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Rules and Regulations

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DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1463

RIN 0560–AH30

Tobacco Transition Payment Program; Tobacco Transition Assessments

AGENCY: Commodity Credit Corporation, USDA.

ACTION: Final rule; technical amendment.

SUMMARY: The Commodity Credit Corporation (CCC) is modifying the regulations for the Tobacco Transition Payment Program (TTPP) to clarify, consistent with current practice and as required by the Fair and Equitable Tobacco Reform Act of 2004 (FETRA), that the allocation of tobacco manufacturer and importer assessments among the six classes of tobacco products will be determined using constant tax rates so as to assure that adjustments continue to be based solely on changes in the gross domestic volume of each class. This means that CCC will continue to determine tobacco class allocations using the Federal excise tax rates that applied in fiscal year 2005. These are the same tax rates used when TTPP was implemented and must be used to ensure, consistent with FETRA, that changes in the relative class assessments are made only on the basis of changes in volume, not changes in tax rates. This technical amendment does not change how the TTPP is implemented by CCC, but rather clarifies the wording of the regulation to directly address this point.

DATES: *Effective Date:* December 10, 2010.

FOR FURTHER INFORMATION CONTACT: Jane Reed, Economic and Policy Analysis Staff, Farm Service Agency (FSA); phone: (202) 720–6782, e-mail: *jane.reed@wdc.usda.gov.* Persons with disabilities or who require alternative means for communication (Braille, large print, audio tape, etc.) should contact the U.S. Department of Agriculture (USDA) Target Center at (202) 720–2600 (voice and TDD).

SUPPLEMENTARY INFORMATION: FETRA (7 U.S.C. 518–519a), which was contained in the American Jobs Creation Act of 2004 (Pub. L. 108–357) authorizes TTPP, sometimes called the "tobacco buyout" program. Under TTPP, eligible former tobacco quota holders and tobacco producers receive payments in 10 annual installments in fiscal years 2005 through 2014. To fund TTPP, CCC collects quarterly assessments from domestic manufacturers and importers of tobacco products. FETRA specifies the methodology for determining quarterly assessments.

As specified in FETRA and the TTPP regulations, the assessments are allocated among six statutorily-specified classes of tobacco products: Cigarettes, cigars, snuff, roll-your-own, chewing, and pipe. FETRA specifies further the initial relative percentages that each class will pay of the total assessment levied each year of the program. Analysis by USDA determined that the initial allocation in FETRA was calculated using tax data and volumes published by the Treasury Department's Alcohol and Tobacco Tax and Trade Bureau (TTB). Specifically, it appeared that Congress used calendar year 2003 relevant tobacco class volume amounts (volume measured by using number of sticks for cigarettes and cigars, pounds for the other classes) from the published TTB data and multiplied those numbers by the then-applicable maximum excise tax rate. In this way, each class' volume was converted from differing bases (sticks and pounds) to a tax dollar figure. The tax figures were added together for a six-class total. Each class' allocation was then its percentage contribution to the six-class total of excise taxes and that percentage was then specified in section 625 of Pub. L. 108–357 (7 U.S.C. 518d) as each class' initial percentage of the overall allocation for TTPP.

The allocation of the total annual assessment needed to fund TTPP among the six classes is commonly referred to as Step A of the assessment process; Step B is the division of assessments within each class of that class' share among the manufacturers or importers of products in that particular class. This technical amendment only addresses Step A.

The initial percentage assigned to cigarette tobacco in FETRA was 96.331 percent, as specified in 7 U.S.C. 518d(c)(1). That allocation, and the allocation to the other five classes, was not intended to be permanent. Rather, as specified in 7 U.S.C. 518d(c)(2), it was provided in FETRA that for subsequent fiscal years, the Secretary would periodically adjust the percentage of the total amount required under subsection (b) to be assessed against, and paid by, the manufacturers and importers of each class of tobacco product specified in paragraph (1) to reflect changes in the share of gross domestic volume held by that class of tobacco product.

Thus, FETRA provides a specified restriction for adjustments to the Step A allocations to reflect changes in the share of gross domestic volume only, not changes in tax rates.

The current regulation in 7 CFR 1463.5(a) specifies that "the national assessment will be divided by CCC among each class of tobacco based upon CCC's determination of each class's share of the excise taxes paid. The value of the excise taxes paid for each class of tobacco will be based upon the reports filed by domestic manufacturers and importers of tobacco products with the Department of the Treasury and the Department of Homeland Security * * *"

Excise taxes paid are based on the volume of tobacco calculated from those reports, consistent with FETRA's intent to base any changes in the Step A allocations on changes in gross domestic volume. To assure the correctness of the result, a constant tax rate must be used, but the regulation is silent on which rates will be used. Until 2009, the point was moot in any event because the excise rates were, until then, unchanged. However, on April 1, 2009, Congress changed tobacco excise tax rates with the passage of the Children's Health Insurance Program Reauthorization Act of 2009 (Pub. L. 111–3) and a question has been raised subsequently about which rates would be used for the calculation. The regulation is being clarified accordingly to address that question specifically. As specified in this technical amendment, CCC will continue to use the "old" rates

(the rates that were in effect when the program was established) for the Step A adjustments because otherwise the adjustments would be for changes in the tax rates instead of changes in volume.

Changing the Step A allocations based on changes in excise tax rates would not be consistent with FETRA. If, for example, there were only two classes of products and for some reason the tax rate of one doubled but the volumes of the two classes remained exactly the same, then the Step A shares of the two classes would change dramatically if the new tax rates were used even though there had been no change in the volumes. That would not be consistent with FETRA because there would be an adjustment that was not based on a change in volume. The new tax rates, adopted in 2009, were proportionately raised more for cigars and roll-your-own tobacco than for the other classes, and if the new tax rates were used, the assessment for cigars and for roll-your-own tobacco would be adjusted to a percentage that would be much higher than if the adjustments are based only on changes in volume. In the meantime, those for cigarettes and some other classes would be much lower, independent of any changes in volume, and contrary to FETRA. In the case of cigars, the assessment would be nearly triple.

The continued use of the old rates has been reflected in calculations for Step A adjustments published on the FSA website both in the fall of 2009 and this year. CCC will, however, continue to make adjustments based on changes in volume and, in fact, because of those adjustments the cigarette share of the assessments has declined from the original 96.3 percent to 91.57 percent for the upcoming year. As the published calculations show, a class' individual percentage volume decline or increase is not necessarily equal to the decline or increase in its proportion of the total among classes. The following hypothetical example is intended to demonstrate why this occurs: Assume there were just two categories of products and one had a volume of 100 and the other had a volume of 1, so that the larger category's proportion of the total volume, 100/101, would be over 99 percent. Assume next that the first category had a 50 percent decline in volume down to 50 units while the other stayed constant at 1. The new total volume would be 51 for the two categories. The larger category's proportion of the total volume (50 of 51) would still be over 98 percent despite the 50 percent decline in its volume. Again, this is a hypothetical example and the actual numbers used in the actual agency calculations are set out in the published calculations.

This amendment ensures that the regulation is clear and remains consistent with FETRA. Because this is a clarification only, and because this action is exempt from notice and comment rulemaking as specified in 7 U.S.C. 519a, this action is taken without prior public comment, although there have been public inquiries about this issue.

This amendment also corrects the authority for part 1463 to refer to the United States Code citation for FETRA, rather than the public law citation.

Executive Order 12866

This technical amendment did not require Office of Management and Budget (OMB) designation under Executive Order 12866, "Regulatory Planning and Review," and therefore OMB has not reviewed this rule.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601–612), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to the notice and comment rulemaking requirements under the Administrative Procedure Act (5 U.S.C. 553). This rule is not subject to the Regulatory Flexibility Act since CCC is not required to publish a notice of proposed rulemaking for this rule. This action is exempt from notice and comment rulemaking (7 U.S.C. 519a).

Environmental Review

The environmental impacts of this rule have been considered in a manner consistent with the provisions of the National Environmental Policy Act (NEPA, 42 U.S.C. 4321–4347), the regulations of the Council on Environmental Quality (40 CFR parts 1500–1508), and FSA regulations for compliance with NEPA (7 CFR part 799). The rule change is a technical amendment and is solely administrative in nature. Therefore, FSA has determined that NEPA does not apply to this Final Rule and no environmental assessment or environmental impact statement will be prepared.

Executive Order 12372

Executive Order 12372, "Intergovernmental Review of Federal Programs," requires consultation with State and local officials. The objectives of the Executive Order are to foster an intergovernmental partnership and a strengthened Federalism, by relying on State and local processes for State and local government coordination and review of proposed Federal Financial assistance and direct Federal development. This rule neither provides Federal financial assistance or direct Federal development; it does not provide either grants or cooperative agreements. Therefore this program is not subject to Executive Order 12372.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, "Civil Justice Reform." This rule would not preempt State and or local laws, and regulations, or policies unless they present an irreconcilable conflict with this rule. Before any judicial action may be brought concerning the provisions of this rule, appeal provisions of 7 CFR parts 11 and 780 would need to be exhausted. This rule would not preempt a State or tribal government law, including any State or tribal government liability law.

Executive Order 13132

This rule has been reviewed under Executive Order 13132, "Federalism." The policies contained in this rule do not have any substantial direct effect on States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. Nor does this rule impose substantial direct compliance costs on State and local governments. Therefore, consultation with the States is not required.

Executive Order 13175

This rule has been reviewed for compliance with Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments." The policies contained in this rule do not have tribal implications that preempt tribal law. FSA continues to consult with Tribal officials to have a meaningful consultation and collaboration on the development and strengthening of CCC regulations.

Unfunded Mandates

Title II of the Unfunded Mandate Reform Act of 1995 (UMRA, Pub. L. 104–4) requires Federal agencies to assess the effects of their regulatory actions on State, local, or tribal governments or the private sector. Agencies generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with Federal mandates that may result in expenditures of $100 million or more in any 1 year for State, local, or tribal governments, in the aggregate, or to the private sector. UMRA generally

requires agencies to consider alternatives and adopt the more cost effective or least burdensome alternative that achieves the objectives of the rule. This rule contains no Federal mandates as defined by Title II of UMRA for State, local, or tribal governments or for the private sector. Therefore, this rule is not subject to the requirements of sections 202 and 205 of UMRA.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule under the Small Business Regulatory Enforcement Fairness Act of 1996, (Pub. L. 104–121, SBREFA). Therefore, CCC is not required to delay the effective date for 60 days from the date of publication to allow for Congressional review and this rule is effective on the date of publication in the **Federal Register**.

Federal Assistance Programs

The title and number of the Federal assistance program as found in the Catalog of Federal Domestic Assistance, to which this rule applies, is:

Tobacco Transition Payment Program—10.085.

Paperwork Reduction Act

These regulations are exempt from the requirements of the Paperwork Reduction Act (44 U.S.C. Chapter 35), as specified in section 642 of Pub. L. 108–357 (7 U.S.C. 519a), which provides that these regulations, which are necessary to implement TTPP, be promulgated and administered without regard to the Paperwork Reduction Act.

E-Government Act Compliance

CCC is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

List of Subjects in 7 CFR Part 1463

Agriculture, Agricultural commodities, Acreage allotments, Marketing quotas, Price support programs, Tobacco, Tobacco transition payments.

■ For the reasons discussed in the preamble, this rule amends 7 CFR part 1463 as follows:

PART 1463—2005–2014 TOBACCO TRANSITION PAYMENT PROGRAM

■ 1. The authority citation for part 1463 is revised to read as follows:

Authority: 7 U.S.C. 518–519a, 714b, and 714c.

§ 1463.5 [Amended]

■ 2. Amend paragraph (a), first sentence, by adding the words "using for all years the tax rates that applied in fiscal year 2005" at the end.

Signed in Washington, DC, on December 7, 2010.

Jonathan W. Coppess,

Executive Vice President, Commodity Credit Corporation.

[FR Doc. 2010–31061 Filed 12–9–10; 8:45 am]

BILLING CODE 3410–05–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

RIN 3150–AI37

[NRC–2009–0014]

Domestic Licensing of Production and Utilization Facilities; Updates to Incorporation by Reference of Regulatory Guides; Correction

AGENCY: Nuclear Regulatory Commission.

ACTION: Correcting amendment.

SUMMARY: This document corrects a final rule that was published in the **Federal Register** on October 5, 2010 (75 FR 61321). The final rule amends the U.S. Nuclear Regulatory Commission's (NRC) regulations to incorporate by reference the latest revisions of two previously incorporated regulatory guides. This document is necessary to add a line of regulatory text that was inadvertently omitted from the final rule.

DATES: The correction is effective on December 10, 2010, and is applicable beginning November 4, 2010, the date the original rule became effective.

FOR FURTHER INFORMATION CONTACT: Cindy Bladey, Chief, Rules, Announcements, and Directives Branch, Office of Administration, Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–492–3667, e-mail: *Cindy.Bladey@nrc.gov.*

SUPPLEMENTARY INFORMATION: This document is the second set of corrections to the final rule that was published on October 5, 2010. The previous correction was published on October 21, 2010 (75 FR 64949). This document adds a line of text to the regulations at 10 CFR 50.55a(g)(3)(ii) that was inadvertently omitted from the final rule.

List of Subjects in 10 CFR Part 50

Antitrust, Classified information, Criminal penalties, Fire protection, Intergovernmental relations, Nuclear power plants and reactors, Radiation protection, Reactor siting criteria, Reporting and recordkeeping requirements.

■ For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 552 and 553, the NRC is adopting the following amendments to 10 CFR part 50.

PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

■ 1. The authority citation for part 50 continues to read as follows:

Authority: Secs. 102, 103, 104, 105, 161, 182, 183, 186, 189, 68 Stat. 936, 937, 938, 948, 953, 954, 955, 956, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2201, 2232, 2233, 2236, 2239, 2282); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); Energy Policy Act of 2005, Pub. L. 109–58, 119 Stat. 194 (2005). Section 50.7 also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102–486, sec. 2902, 106 Stat. 3123 (42 U.S.C. 5841). Section 50.10 also issued under secs. 101, 185, 68 Stat. 955, as amended (42 U.S.C. 2131, 2235); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.13, 50.54(dd), and 50.103 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138).

Sections 50.23, 50.35, 50.55, and 50.56 also issued under sec. 185, 68 Stat. 955 (42 U.S.C. 2235). Sections 50.33a, 50.55a and Appendix Q also issued under sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.34 and 50.54 also issued under sec. 204, 88 Stat. 1245 (42 U.S.C. 5844). Sections 50.58, 50.91, and 50.92 also issued under Pub. L. 97–415, 96 Stat. 2073 (42 U.S.C. 2239). Section 50.78 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Sections 50.80—50.81 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Appendix F also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

■ 2. In § 50.55a, revise paragraph (g)(3)(ii) to read as follows:

§ 50.55a Codes and standards.

* * * * *

(g) * * *

(3) * * *

(ii) Components which are classified as ASME Code Class 2 and Class 3 and supports for components which are classified as ASME Code Class 1, Class 2, and Class 3 must be designed and be provided with access to enable the performance of inservice examination of these components and must meet the preservice examination requirements set forth in the editions and addenda of

Section XI of the ASME Boiler Pressure Vessel Code incorporated by reference in paragraph (b) of this section (or the optional ASME Code Cases listed in the NRC Regulatory Guide 1.147, Revision 16, that are incorporated by reference in paragraph (b) of this section) applied to the construction of the particular component.

* * * * *

Dated at Rockville, Maryland, this 6th day of December 2010.

For the Nuclear Regulatory Commission.

Cindy Bladey,

Chief, Rules, Announcements, and Directives Branch, Division of Administrative Services, Office of Administration.

[FR Doc. 2010–31084 Filed 12–9–10; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2010–0784; Airspace Docket No. 10–AWP–5]

Modification of Class D and E Airspace, and Revocation of Class E Airspace; Flagstaff, AZ

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action will modify Class D and E airspace at Flagstaff, AZ, to accommodate aircraft departing and arriving under Instrument Flight Rules (IFR) at Flagstaff Pulliam Airport. This action also removes Class E airspace designated as an extension to a Class D or E surface area at Flagstaff Pulliam Airport. This action, initiated by the biennial review of the Flagstaff airspace area, will enhance the safety and management of aircraft operations at the airport. This action also makes minor adjustments to the legal description of the airspace.

DATES: Effective 0901 UTC, March 10, 2011. The Director of the Federal Register approves this incorporation by reference action under 1 CFR Part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Richard Roberts, Federal Aviation Administration, Operations Support Group, Western Service Center, 1601 Lind Avenue, SW., Renton, WA 98057; telephone (425) 203–4517.

SUPPLEMENTARY INFORMATION:

History

On October 6, 2010, the FAA published in the **Federal Register** a notice of proposed rulemaking to remove Class E airspace designated as an extension to a Class D or E surface area at Flagstaff, AZ and to modify the Class D and E controlled airspace at Flagstaff Pulliam Airport (75 FR 61660). Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Class D and E airspace designations are published in paragraph 5000, 6004, and 6005, respectively, of FAA Order 7400.9U, dated August 18, 2010, and effective September 15, 2010, which is incorporated by reference in 14 CFR part 71.1. The Class D and E airspace designations listed in this document will be published subsequently in that Order.

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) Part 71 by modifying the Class D airspace and Class E airspace extending upward from 700 feet above the surface to meet current standards for IFR departures and arrivals at Flagstaff Pulliam Airport, Flagstaff, AZ. This action, initiated by a biennial review of the airspace, is necessary for the safety and management of IFR operations at the airport. This action also makes a minor correction to the legal description for Class E airspace extending upward from 700 feet above the surface to coincide with the FAA's National Aeronautical Navigation Services, and changes the description to not exclude the Sedona, AZ, Class E airspace area from this description.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation: (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); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106 discusses the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes additional controlled airspace at Flagstaff Pulliam Airport, Flagstaff AZ.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR Part 71 as follows:

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

■ 1. The authority citation for 14 CFR Part 71 continues to read as follows:

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR Part 71.1 of the Federal Aviation Administration Order 7400.9U, Airspace Designations and Reporting Points, dated August 18, 2010, and effective September 15, 2010 is amended as follows:

Paragraph 5000 Class D airspace.

* * * * *

AWP AZ D Flagstaff, AZ [Modified]

Flagstaff Pulliam Airport, AZ
(Lat. 35°08′25″ N., long. 111°40′09″ W.)

That airspace extending upward from the surface to and including 9,500 feet MSL within a 5-mile radius of Flagstaff Pulliam Airport beginning at lat. 35°13′08″ N., long. 111°38′07″ W., clockwise to lat. 35°07′21″ N., long. 111°46′07″ W., thence to the point of beginning; and that airspace 1.5 miles each side of the Flagstaff Pulliam Airport 127° bearing extending to 7 miles southeast of the Flagstaff Pulliam Airport. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.

Paragraph 6004 Class E airspace areas designated as an extension to Class D or Class E surface area.

* * * * *

AWP AZ E4 Flagstaff, AZ [Removed]

Paragraph 6005 Class E airspace areas extending upward from 700 feet above the surface.

* * * * *

AWP AZ E5 Flagstaff, AZ [Modified]

Flagstaff Pulliam Airport, AZ
(Lat. 35°08′25″ N., long. 111°40′09″ W.)

That airspace extending upward from 700 feet above the surface beginning southwest of the Flagstaff Pulliam Airport at lat. 35°07′59″ N., long. 111°50′30″ W., clockwise along an 8.5 mile arc to lat. 35°16′14″ N., long. 111°36′2″ W., thence to lat. 35°08′25″ N., long. 111°14′50″ W., thence to lat. 35°08′25″ N., long. 111°14′50″ W., to lat. 34°54′20″ N., long. 111°26′11″ W., to lat. 34°58′47″ N., long. 111°37′17″ W., to lat. 34°43′58″ N., long. 111°50′21″ W., to lat. 34°45′01″ N., long. 112°01′17″ W., to lat. 34°54′24″ N., long. 112°05′16″ W., to lat. 35°08′10″ N., long. 111°51′59″ W., thence to the point of beginning. That airspace extending upward from 1,200 feet above the surface bounded by a line beginning at lat. 35°05′04″ N., long. 112°27′43″ W., to lat. 35°11′22″ N., long. 110°52′43″ W., thence clockwise along the 39 mile arc to the point of beginning.

Issued in Seattle, Washington, on December 1, 2010.

John Warner,

Manager, Operations Support Group, Western Service Center.

[FR Doc. 2010–30980 Filed 12–9–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 0908191244–91427–02]

RIN 0648–XA070

Fisheries of the Northeastern United States; Summer Flounder Fishery; Quota Transfer

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

ACTION: Temporary rule.

SUMMARY: NMFS announces that the State of North Carolina is transferring a portion of its 2010 commercial summer flounder quota to the Commonwealth of Virginia. By this action, NMFS adjusts the quotas and announces the revised commercial quota for each state involved.

DATES: Effective December 7, 2010 through December 31, 2010.

FOR FURTHER INFORMATION CONTACT: Sarah Heil, Fishery Management Specialist, 978–281–9257.

SUPPLEMENTARY INFORMATION: Regulations governing the summer flounder fishery are found at 50 CFR part 648. The regulations require annual specification of a commercial quota that is apportioned among the coastal states from North Carolina through Maine. The process to set the annual commercial quota and the percent allocated to each state are described in § 648.100.

The final rule implementing Amendment 5 to the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan, which was published on December 17, 1993 (58 FR 65936), provided a mechanism for summer flounder quota to be transferred from one state to another. Two or more states, under mutual agreement and with the concurrence of the Administrator, Northeast Region, NMFS (Regional Administrator), can transfer or combine summer flounder commercial quota under § 648.100(d). The Regional Administrator is required to consider the criteria set forth in § 648.100(d)(3) in the evaluation of requests for quota transfers or combinations.

North Carolina has agreed to transfer 1,481 lb (643 kg) of its 2010 commercial quota to Virginia. This transfer was prompted by summer flounder landings of a North Carolina vessel that was towed into Cape Charles, VA, due to mechanical problems on November 12, 2010. The Regional Administrator has determined that the criteria set forth in § 648.100(d)(3) have been met. The revised summer flounder quotas for calendar year 2010 are: North Carolina, 3,370,046 lb (1,528,627 kg); and Virginia, 2,910,411 lb (1,320,140 kg).

Classification

This action is taken under 50 CFR part 648 and is exempt from review under Executive Order 12866.

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

Dated: December 6, 2010.

Brian W. Parker,

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

[FR Doc. 2010–31121 Filed 12–7–10; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 75, No. 237
Friday, December 10, 2010

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–1197; Directorate Identifier 2010–NM–044–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A300 B4–600, B4–600R, and F4–600R Series Airplanes, and Model C4–605R Variant F Airplanes (Collectively Called A300–600 Series Airplanes); and Model A310 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

An operator of an A300–600 aeroplane reported finding a cracked pylon fuel drain pipe on engine #1. * * *

* * * The pipe drains the double wall of the wing-to-pylon junction in the event of fuel leakage.

After investigation, it was concluded that the damage of the pylon fuel drain pipe had been caused by chafing of the pipe against over-length screws that had been installed in accordance with the Illustrated Parts Catalogue (IPC) during a maintenance phase of the Lower Aft Pylon Fairing (LAPF).

This condition, if not detected and corrected, could, in combination with fuel leakage in the pylon, lead to an accumulation of fuel in the lowest point of the LAPF. As high temperatures are present within the LAPF, and without ventilation, this could result in fuel (vapour) ignition and consequent fire.

* * * * *

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by January 24, 2011.

ADDRESSES: You may send comments 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 W12–40, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Airbus SAS—EAW (Airworthiness Office), 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; *e-mail: account.airworth-eas@airbus.com;* Internet *http://www.airbus.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2125; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2010–1197; Directorate Identifier 2010–NM–044–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on 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 proposed AD.

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2010–0085, dated May 3, 2010 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

An operator of an A300–600 aeroplane reported finding a cracked pylon fuel drain pipe on engine #1.The pipe, Part Number (P/N) A71715020, had separated and the end was found 5.5 inches from the pylon aft bulkhead. A similar case was also reported on an A300F4–608ST aeroplane.

The affected pylon fuel drain pipe runs from the top of the pylon primary structure to the aft part of the pylon rear secondary structure and is partly attached under the pylon lower spar. The pipe drains the double wall of the wing-to-pylon junction in the event of fuel leakage.

After investigation, it was concluded that the damage of the pylon fuel drain pipe had been caused by chafing of the pipe against over-length screws that had been installed in accordance with the Illustrated Parts Catalogue (IPC) during a maintenance phase of the Lower Aft Pylon Fairing (LAPF).

This condition, if not detected and corrected, could, in combination with fuel leakage in the pylon, lead to an accumulation of fuel in the lowest point of the LAPF. As high temperatures are present within the LAPF, and without ventilation, this could result in fuel (vapour) ignition and consequent fire.

To address and correct this unsafe condition, EASA * * * required an inspection [for missing pipes, or distortions

or holes] of the pylon fuel drain pipe and the attachment screws and, depending on findings, the necessary corrective actions. In case over-length screws are found to be installed, depending on location and aeroplane configuration, these must be replaced.

* * * * *

Required actions also include visually inspecting to determine the length and part number of the drain pipe attachment screws on the LAPF on the left- and right-hand pylons. Corrective actions include replacing or repairing the pipe, or replacing screws with incorrect part numbers with new screws. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Airbus has issued Mandatory Service Bulletin A300–54A6039, Revision 01, including Appendices 01, 02, and 03, dated March 11, 2010; and Mandatory Service Bulletin A310–54A2040, Revision 02, including Appendices 01, 02, and 03, dated June 10, 2010. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a NOTE within the proposed AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 168 products of U.S. registry. We also estimate that it would take about 4 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $57,120, or $340 per product.

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.

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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); and

3. 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 a regulatory evaluation of the estimated costs to comply with this proposed 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.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 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 AD:

Airbus: Docket No. FAA–2010–1197; Directorate Identifier 2010–NM–044–AD.

Comments Due Date

(a) We must receive comments by January 24, 2011.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Airbus Model A300 B4–601, B4–603, B4–620, and B4–622 airplanes; Model A300 B4–605R and B4–622R airplanes; Model A300 F4–605R and F4–622R airplanes; Model A300 C4–605R Variant F airplanes; and Model A310–203, –204, –221, –222, –304, –322, –324, and –325 airplanes; certificated in any category; all serial numbers.

Subject

(d) Air Transport Association (ATA) of America Code 54: Nacelles/pylons.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

An operator of an A300–600 aeroplane reported finding a cracked pylon fuel drain pipe on engine #1. * * *

* * * The pipe drains the double wall of the wing-to-pylon junction in the event of fuel leakage.

After investigation, it was concluded that the damage of the pylon fuel drain pipe had been caused by chafing of the pipe against over-length screws that had been installed in accordance with the Illustrated Parts Catalogue (IPC) during a maintenance phase of the Lower Aft Pylon Fairing (LAPF).

This condition, if not detected and corrected, could, in combination with fuel leakage in the pylon, lead to an accumulation of fuel in the lowest point of the LAPF. As high temperatures are present within the LAPF, and without ventilation, this could result in fuel (vapour) ignition and consequent fire.

* * * * *

Compliance

(f) You are responsible for having the actions required by this AD performed within

the compliance times specified, unless the actions have already been done.

Inspection and Corrective Actions

(g) Within 30 days after the effective date of this AD, do a general visual inspection for missing pipes, or distortions or holes, of the fuel drain pipes of the LAPF, and if no missing pipes, distortions, and holes are found, do a general visual inspection to determine the length and part number of the drain pipe attachment screws on the LAPF on the left-hand and right-hand pylons, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–54A6039, Revision 01, dated March 11, 2010 (for Model A300–600 series airplanes); or A310–54A2040, Revision 02, dated June 10, 2010 (for Model A310 series airplanes).

(1) If missing pipes, distortions, or holes of the fuel drain pipes are detected during any inspection required by paragraph (g) of this AD, before further flight, replace the drain pipe, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–54A6039, Revision 01, dated March 11, 2010 (for Model A300–600 series airplanes); or A310–54A2040, Revision 02, dated June 10, 2010 (for Model A310 series airplanes); or contact Airbus for repair instructions and do the repair.

(2) If screw length is outside the measurement specified in the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–54A6039, Revision 01, dated March 11, 2010 (for Model A300–600 series airplanes); or A310–54A2040, Revision 02, dated June 10, 2010 (for Model A310 series airplanes); or screws having incorrect part numbers are found during any inspection required by paragraph (g) of this AD, before further flight, replace the screws with screws having part number (P/N) NAS1102E3–10, NAS1102E3–12, or NAS560HK3–2, as applicable to location and airplane (engine) configuration, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–54A6039, Revision 01, dated March 11, 2010 (for Model A300–600 series airplanes); or A310–54A2040, Revision 02, dated June 10, 2010 (for Model A310 series airplanes).

(h) As of the effective date of this AD, do not install screws on the LAPF, other than screws having P/N NAS1102E3–10, NAS1102E3–12, or NAS560HK3–2, as applicable to location and airplane (engine) configuration, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–54A6039, Revision 01, dated March 11, 2010 (for Model A300–600 series airplanes); or A310–54A2040, Revision 02, dated June 10, 2010 (for Model A310 series airplanes).

Credit for Actions Accomplished in Accordance with Previous Service Information

(i) Actions accomplished before the effective date of this AD in accordance with the service bulletins identified in Table 1 of this AD are considered acceptable for compliance with the corresponding actions specified in this AD.

TABLE 1—CREDIT SERVICE BULLETINS

For Model—	Airbus mandatory service bulletin—	Revision—	Dated—
A300–600 series airplanes	A300–54A6039	Original	January 19, 2010.
A310 series airplanes	A310–54A2040	Original	January 19, 2010.
A310 series airplanes	A310–54A2040	01	March 11, 2010.

No Reporting

(j) Although Airbus Mandatory Service Bulletins A300–54A6039, Revision 01, dated March 11, 2010; and A310–54A2040, Revision 02, dated June 10, 2010; specify to submit certain information to the manufacturer, this AD does not include that requirement.

FAA AD Differences

Note 1: This AD differs from the MCAI and/or service information as follows: Although the MCAI or service information tells you to submit information to the manufacturer, paragraph (j) of this AD does not require that information.

Other FAA AD Provisions

(k) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to *ATTN:* Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–2125; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

Related Information

(l) Refer to MCAI European Aviation Safety Agency Airworthiness Directive 2010–0085, dated May 3, 2010; Airbus Mandatory Service Bulletin A300–54A6039, Revision 01, dated March 11, 2010; and Airbus Mandatory Service Bulletin A310–54A2040, Revision 02, dated June 10, 2010; for related information.

Issued in Renton, Washington, on December 2, 2010.

Jeffrey E. Duven,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–31040 Filed 12–9–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 139

[Docket No. FAA–2010–0997; Notice No. 10–14]

RIN 2120–AJ38

Safety Management System for Certificated Airports; Extension of Comment Period

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM); extension of comment period.

SUMMARY: This action extends the comment period for an NPRM that was published on October 7, 2010. In that document, the FAA proposed to require each certificate holder to establish a safety management system (SMS) for its entire airfield environment (including movement and non-movement areas) to improve safety at airports hosting air carrier operations. Several associations representing airports and other aviation industry segments have requested that the FAA extend the comment period closing date to allow time to adequately analyze the NPRM and prepare comments.

DATES: The comment period for the NPRM published on October 7, 2010, closing on January 5, 2011, is extended until March 7, 2011.

ADDRESSES: You may send comments identified by docket number FAA–2010–0997 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation (DOT), 1200 New Jersey Avenue, SE., Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at (202) 493–2251.

Privacy: The FAA will post all comments it receives, without change, to *http://www.regulations.gov*, including any personal information the commenter provides. Using the search function of the docket Web site, anyone can find and read the electronic form of all comments received into any FAA dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, *etc.*). DOT's complete Privacy Act Statement can be found in the **Federal Register** published on April 11, 2000 (65 FR 19477–19478), as well as at *http://DocketsInfo.dot.gov*.

Docket: Background documents or comments received may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Sean Denniston, ARM–200, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591, telephone (202) 267–3380; facsimile (202) 267–5075, e-mail *sean.denniston@faa.gov*.

SUPPLEMENTARY INFORMATION: *See* the **Additional Information** section for information on how to comment on this proposal and how the FAA will handle comments received. The "Additional Information" section also contains related information about the docket, privacy, and the handling of proprietary or confidential business information. In addition, there is information on obtaining copies of related rulemaking documents.

Background

On October 7, 2010, the FAA published Notice No. 10–14, entitled "Safety Management System for Certificated Airports" (75 FR 62008). Comments to that document were to be received on or before January 5, 2011.

By a comment posted to the docket on October 13, 2010, the Experimental Aircraft Association (EAA) requested that the comment period be extended by the same number of days in which it takes the FAA to post a full list of part 139 certificated airports to the Safety Management System for Certificated Airports docket. The Airport Certification Status List was posted to the docket on October 27, 2010. Subsequently, in letters dated November 19, 2010, the Airports Council International, North America (ACI–NA) and the American Association of Airport Executives (AAAE) requested that the FAA extend the comment period for Notice No. 10–14 for 90 days. On December 2, 2010, the Clark County, Nevada Department of Aviation also requested an extension of the comment period for 90 days. All petitioners requested the extension to allow time to adequately assess the impact of the NPRM and prepare comments.

While the FAA concurs with the petitioners' requests for an extension of the comment period on Notice No. 10–14, it does not support a 90-day extension. The FAA finds that providing an additional 60 days is sufficient for commenters to analyze the NPRM and provide meaningful comment to Notice No. 10–14.

Absent unusual circumstances, the FAA does not anticipate any further extension of the comment period for this rulemaking.

Extension of Comment Period

In accordance with § 11.47(c) of title 14, Code of Federal Regulations, the FAA has reviewed the petitions made by the Experimental Aircraft Association (EAA), Airports Council International, North America (ACI–NA), the American Association of Airport Executives (AAAE), and the Clark County, Nevada Department of Aviation for extension of the comment period to Notice No. 10–14. These petitioners have shown a substantive interest in the proposed rule and good cause for the extension. The FAA has determined that extension of the comment period is consistent with the public interest, and that good cause exists for taking this action.

Accordingly, the comment period for Notice No. 10–14 is extended until March 7, 2011.

Additional Information

A. Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. The agency also invites comments relating to the economic, environmental, energy, or federalism impacts that might result from adopting the proposals in this document. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should send only one copy of written comments, or if comments are filed electronically, commenters should submit only one time.

The FAA will file in the docket all comments it receives, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, the FAA will consider all comments it receives on or before the closing date for comments. The FAA will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. The agency may change this proposal in light of the comments it receives.

Proprietary or Confidential Business Information: Do not file proprietary or confidential business information in the docket. Such information must be sent or delivered directly to the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this document, and marked as proprietary or confidential. If submitting information on a disk or CD ROM, mark the outside of the disk or CD ROM, and identify electronically within the disk or CD ROM the specific information that is proprietary or confidential.

Under 14 CFR 11.35(b), when the FAA is aware of proprietary information filed with a comment, the agency does not place it in the docket. It is held in a separate file to which the public does not have access, and the FAA places a note in the docket that it has received it. If the FAA receives a request to examine or copy this information, it treats it as any other request under the Freedom of Information Act (5 U.S.C. 552). The FAA processes such a request under Department of Transportation procedures found in 49 CFR part 7.

B. Availability of Rulemaking Documents

An electronic copy of rulemaking documents may be obtained from the Internet by—

1. Searching the Federal eRulemaking Portal (*http://www.regulations.gov*);

2. Visiting the FAA's Regulations and Policies Web page at *http://www.faa.gov/regulations_policies* or

3. Accessing the Government Printing Office's Web page at *http://www.gpoaccess.gov/fr/index.html*.

Copies may also be obtained by sending a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–9680. Commenters must identify the docket or notice number of this rulemaking.

All documents the FAA considered in developing this proposed rule, including economic analyses and technical reports, may be accessed from the Internet through the Federal eRulemaking Portal referenced in item (1) above.

Issued in Washington, DC, on December 7, 2010.

Pamela Hamilton-Powell,

Director, Office of Rulemaking.

[FR Doc. 2010–31094 Filed 12–9–10; 8:45 am]

BILLING CODE 4910–13–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 43

RIN 3038–AD08

Real-Time Public Reporting of Swap Transaction Data

Correction

In proposed rule document 2010–29994 beginning on page 76140 in the issue of Tuesday, December 7, 2010, make the following correction:

Appendix A to Part 43 [Corrected]

On pages 76181 and 76182, in Appendix A to Part 43, in Table A2, the table heading should read "Table A2—Additional Real-Time Public Reporting Data Fields for Options, Swaptions and Swaps with Embedded Options."

[FR Doc. C1–2010–29994 Filed 12–9–10; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF STATE

22 CFR Part 121

[Public Notice: 7256]

RIN 1400–AC77

Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category VII

AGENCY: Department of State.

ACTION: Proposed rule.

SUMMARY: As part of the President's Export Control Reform effort, the Department of State proposes to amend the International Traffic in Arms Regulations (ITAR) to revise Category VII of the U.S. Munitions List. The proposed rule would revise Category VII (tanks and military vehicles) to describe more precisely the defense articles described therein.

DATE: *Effective Date:* The Department of State will accept comments on this proposed rule until February 8, 2011.

ADDRESSES: Interested parties may submit comments within 60 days of the date of the publication by any of the following methods:

- *E-mail: DDTCResponseTeam@state.gov* with the subject line, "Category VII Revision."
- *Mail:* PM/DDTC, SA–1, 12th Floor, Directorate of Defense Trade Controls, Office of Defense Trade Controls Policy, ATTN: Category VII Revision, Bureau of Political Military Affairs, U.S. Department of State, Washington, DC 20522–0112.
- Persons with access to the Internet may also view this notice by searching for its RIN on the U.S. Government regulations Web site at *http://regulations.gov/index.cfm.*

SUPPLEMENTARY INFORMATION: The Directorate of Defense Trade Controls (DDTC), U.S. Department of State, administers the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120–130). The items subject to the jurisdiction of the ITAR, *i.e.,* "defense articles," are identified on the ITAR's U.S. Munitions List (USML) (22 CFR 121.1). With few exceptions, items that are not subject to the export control jurisdiction of the ITAR are subject to the jurisdiction of the Export Administration Regulations (EAR) (15 CFR parts 730 through 774). The Bureau of Industry and Security (BIS), U.S. Department of Commerce, administers the EAR, which include the Commerce Control List (CCL) (15 CFR part 774). The descriptions in many USML categories are general and include design intent as an element of causing an item to be controlled. The descriptions in most CCL categories are specific and generally include technical parameters as an element for causing an item to be controlled.

Export Control Reform

Both the ITAR and the EAR impose license requirements on exports and re-exports. Items not subject to the ITAR or to the exclusive licensing jurisdiction of any other set of regulations are subject to the EAR. A key part of the Administration's Export Control Reform effort is to review and revise these two lists of controlled items to enhance national security so that they: (1) Are "tiered" consistent with the criteria the U.S. Government is establishing to distinguish the types of items that should be controlled at different levels for different types of destinations, end-uses, and end-users ("Criteria"); (2) create a "bright line" between the two lists to clarify jurisdictional determinations and reduce government and industry uncertainty about whether particular items are subject to the jurisdiction of the ITAR or the EAR; and (3) are structurally "aligned" so that they later can be combined into a single list of controlled items. The Department will seek public comment on the "bright line" methodology by means of a separate **Federal Register** notice. In the process of revising the USML, articles will be screened to determine which items that are currently USML-controlled defense articles should remain on the USML, which items that are currently USML controlled defense articles could be controlled under the CCL, and which items should be subject to the EAR without a specific Export Control Classification Number (ECCN) on the CCL. This proposed rule addresses both the need for "tiering" Category VII and the need for establishing a "bright line" between the USML and the CCL so that, after application of this process to the remaining categories of the USML and meeting the statutory and other requirements of Export Control Reform, the two lists can be combined into a single list of controlled items. Prior to the completion of a single U.S. Government control list, DDTC plans to publish in the existing ITAR a final rule amending Category VII after it has reviewed and considered all comments received on this proposed rule, received interagency input and approval, and satisfied its obligations under section 38(f) of the Arms Export Control Act. The final rule to be published amending Category VII will also take in to account and adjust for internal cross-references to other USML categories that have not yet been reviewed or revised. DDTC will

follow the same process described in this Notice with respect to the remaining USML Categories on a category-by-category basis.

The Department of State has revised Category VII to assign all controlled defense articles under this category one of the three control Criteria, that is Tier 1 (T1), Tier 2 (T2), or Tier 3 (T3). These tier designations were made upon a government-wide assessment of the appropriate level of export control for each item based upon different types of destinations, end-uses, and end-users. As other USML categories are reviewed and revised, the same "tiering" structure is planned to be applied to the remaining USML categories. The scope of the three tiers is as follows:

1. A Tier 1 control shall apply to:

a. A weapon of mass destruction (WMD);

b. A WMD-capable unmanned delivery system;

c. A plant, facility or item specially designed for producing, processing, or using:

(i) WMDs;

(ii) Special nuclear materials; or

(iii) WMD-capable unmanned delivery systems; or

d. An item almost exclusively available from the United States that provides a critical military or intelligence advantage.

2. A Tier 2 control shall apply to an item that is not in Tier 1, is almost exclusively available from Regime Partners or Adherents and:

a. Provides a substantial military or intelligence advantage; or

b. Makes a substantial contribution to the indigenous development, production, use, or enhancement of a Tier 1 or Tier 2 item.

3. A Tier 3 control shall apply to an item not in Tiers 1 or 2 that:

a. Provides a significant military or intelligence advantage;

b. Makes a significant contribution to the indigenous development, production, use, or enhancement of a Tier 1, 2, or 3 item; or

c. Other items controlled for national security, foreign policy, or human rights reasons.

Tier 1 defense articles are those that are almost exclusively available from the United States and that provide a critical military or intelligence advantage.

Tier 2 defense articles are those that are almost exclusively available from countries that are members of the multilateral export control regimes that control such items and (i) provide a substantial military or intelligence advantage, or (ii) make a substantial contribution to the indigenous development, production, use, or enhancement of a Tier 1 or Tier 2 item.

Tier 3 defense articles are those that provide a significant military or intelligence advantage, or make a significant contribution to the indigenous development, production, use, or enhancement of a Tier 1, 2, or 3 item.

Additional details on the bright line methodology and the tiering will be published by a separate Department of State advance notice of proposed rulemaking which should be used to assist the public in reviewing the proposed Category VII in this notice.

Regulatory Analysis and Notices

Administrative Procedure Act

This proposed amendment involves a foreign affairs function of the United States and, therefore, is not subject to the procedures contained in 5 U.S.C. 553 and 554.

Regulatory Flexibility Act

Since this proposed amendment is not subject to 5 U.S.C. 553, it does not require analysis under the Regulatory Flexibility Act.

Unfunded Mandates Reform Act of 1995

This proposed amendment does not involve a mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This proposed amendment has been found not to be a major rule within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996.

Executive Orders 12372 and 13132

This proposed amendment will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this proposed amendment does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this proposed amendment.

Executive Order 12866

This proposed amendment is exempt from review under Executive Order 12866, but has been reviewed internally by the Department of State to ensure consistency with the purposes thereof.

Executive Order 12988

The Department of State has reviewed the proposed amendment in light of sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Executive Order 13175

The Department of State has determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not pre-empt tribal law. Accordingly, the requirement of Section 5 of Executive Order 13175 does not apply to this rulemaking.

Paperwork Reduction Act

This proposed amendment does not impose any new reporting or recordkeeping requirements subject to the Paperwork Reduction Act, 44 U.S.C. chapter 35.

List of Subjects in 22 CFR Part 121

Arms and munitions, Exports.

Accordingly, for the reasons set forth above, title 22, chapter I, subchapter M, part 121 is proposed to be amended as follows:

PART 121—THE UNITED STATES MUNITIONS LIST

1. The authority citation for part 121 will continue to read as follows:

Authority: Secs. 2, 38, and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); E.O. 11958, 42 FR 4311; 3 CFR, 1977 Comp. p. 79; 22 U.S.C. 2651a; Pub. L. 105–261, 112 Stat. 1920.

2. Section 121.1 is amended by revising U.S. Munitions List Category VII to read as follows:

§ 121.1 General. The United States Munitions List.

* * * * *

Category VII—Tanks and Other Military Vehicles

(a) End items, systems, accessories, attachments, equipment, parts, and components.

(1) Armed, armored, or specialized vehicles, and other military equipment as follows:

* (i) (Tier 1) Vehicles "specially designed" for deploying "weapons of mass destruction."

* (ii) (Tier 1) Vehicles "specially designed" to mount or contain any system designated as Tier 1 from any other Category.

* (iii) Tanks

(A) (Tier 2) Tanks manufactured after 1955 with any of the following:

(*1*) 120 mm or larger gun;

(*2*) A weapon designated as a Tier 2 defense article;

(*3*) A fire control system or sensors designated as a Tier 2 defense article;

(*4*) Armored components or materials designated as Tier 2 defense articles;

(*5*) An autoloader or similar assisted loading/round selection;

(*6*) A hybrid electric propulsion drive system; or

(*7*) Countermeasures (*e.g.,* radar jamming, infrared tailored smoke, electromagnetic pulse generator) designated as Tier 2 defense articles.

(B) (Tier 3) Tanks not specified in VII(a)(1)(iii)(A) and built after 1955.

* (iv) Armored combat vehicles, manufactured after 1955, not specified in VII(a)(1)(i) through (iii), capable of off-road or amphibious use, mounting a weapon controlled in Categories II, IV or XVIII, and that:

(A) (Tier 2) Have any of the following:

(*1*) A weapon designated as Tier 2;

(*2*) A fire control system or sensors designated as Tier 2;

(*3*) Armored components or materials designated as Tier 2 defense articles; or

(*4*) A hybrid electric propulsion drive system.

(B) (Tier 3) Is an armored combat vehicle mounting a Category II, IV, or XVIII weapon, not controlled in VII(a)(1)(iv)(A).

* (v) Armored combat support vehicles (*e.g.*, personnel carriers, resupply vehicles, recovery vehicles, combat engineer vehicles, reconnaissance vehicles, bridge launching vehicles, ambulances, and command and control vehicles), manufactured after 1955, not specified in VII(a)(1)(i) through (iv), and capable of off-road or amphibious use as follows:

(A) (Tier 2) Have any of the following:

(*1*) Sensors or mission equipment designated as Tier 2;

(*2*) Armored components or materials designated as Tier 2 defense articles; or

(*3*) The same chassis/hull as the vehicles specified in VII(a)(1)(iii)(A) or (iv)(A).

(B) (Tier 3) Combat support vehicles not elsewhere specified in this Category with armor meeting NIJ Level III or better.

(vi) (Tier 2) Trucks, trailers, or containers with installed defense articles designated as Tier 2 for command, or communications, or control, intelligence, or sensor or radar operations, or unmanned air or ground vehicle control, except for vehicles controlled elsewhere in this Category or in other Categories.

Note to paragraph (a)(1)(vi): trucks, trailers, or containers that do not contain defense articles are controlled on the Commerce Control List.

(vii) Unmanned ground vehicles, except those controlled in VII(a)(1)(i) through (v), or in other Categories, that:

(A) (Tier 2) Have mission systems, data links, sensors, or other defense articles designated as Tier 2;

(B) (Tier 2) Mount firearms or other weapons not designated as Tier 1;

(C) (Tier 2) Are capable of off-road or amphibious operation; or

(D) (Tier 3) Is a vehicle otherwise export controlled as a military vehicle that has been modified for unmanned operation.

Technical Note 1 to paragraph (a)(1)(vii): As used in this paragraph, unmanned vehicles include vehicles which are fitted with controls for either manned or unmanned operation.

Technical Note 2 to paragraph (a)(1)(vii): Vehicles in VII(a)(1)(vii)(D) that provide operation beyond visual control range are designated for Tier 2 control.

(2) Components, parts, assemblies, and associated equipment for the end-item vehicles controlled by this Category as follows:

(i) (Tier 2) Control modules/circuits "specially designed" for the electric hybrid propulsion drives for the vehicles specified in VII(a) of this Category.

(ii) Hulls, turrets or turret rings for armored vehicles as follows:

(A) (Tier 2) Hulls or turrets incorporating armor controlled in VII(c)(1), (c)(2), (c)(3)(i), (c)(7), or (c)(8); and turret rings "specially designed" for these hulls or turrets.

(B) (Tier 3) Hulls or turrets not controlled in VII(a)(2)(ii)(A) and associated turret rings.

(iii) Armor systems, components, or parts (*e.g.,* active protection systems, plates, appliqués, tiles) as follows:

(A) (Tier 1) Developmental armor components or parts.

(B) (Tier 2) Transparent armor components or parts produced from armor materials controlled in VII(c)(3) as follows:

(*1*) (Tier 2) Having E_m greater than or equal to 1.3; or

(*2*) Having E_m less than 1.3 and meeting NIJ Level III standards with areal density as follows:

(*i*) (Tier 2) Less than or equal to 30 pounds per square foot; or

(*ii*) (Tier 3) Between 30 and 40 pounds per square foot.

(C) (Tier 2) Active protection systems.

(D) (Tier 2) Composite armor components or parts with $E_m > 1.4$, not controlled in VII(a)(2)(v)(B).

(E) (Tier 2) Spaced armor components or parts, including slat armor components or parts.

(F) (Tier 2) Reactive armor components or parts.

(G) (Tier 2) Electromagnetic armor components or parts, including pulsed power components or parts "specially designed" for electromagnetic armor.

Technical Note 1 to paragraph (a)(2)(iii): See Notes to paragraph (c) for related armor descriptions and definitions.

Technical Note 2 to paragraph (a)(2)(iii): VII(a)(2)(iii) also includes B kits (add-on armor).

(iv) (Tier 3) Deep water fording kits for the vehicles controlled in this Category.

(v) (Tier 2) Gun mount, stabilization, elevating systems or the vehicles controlled in this Category.

(vi) Self-launching bridge components for deployment by the vehicles designated as Tier 2 in VII(a)(1)(v) as follows:

(A) (Tier 2) Self-launching bridges that are rated above class 60 (as determined IAW SSTANAG2021/QSTAG 180 or equivalent); or

(B) (Tier 3) Self-launching bridges that are rated at or below class 60.

(vii) (Tier 3) Built-in test equipment (BITE) "specially designed" to evaluate the condition of weapon or other mission systems for the vehicles designated as Tier 2 or above in this Category. **Note:** This control does not apply to BITE that provides diagnostics solely for a subsystem or component not specifically controlled in this Category.

(viii) (Tier 2) Suspension components as follows:

(A) Rotary shock absorbers specially designed for vehicles greater than 30 tons.

(B) Torsion bars "specially designed" for vehicles controlled in VII(a)(1)(iii)(A) having a mass of greater than 50 tons.

(ix) (Tier 2) Kits to convert a vehicle specified in this Category into either an unmanned or a driver optional vehicle. At minimum, such a kit includes equipment for remote or autonomous steering, acceleration and braking and a control system.

(x) (Tier 2) Signature management components or parts "specially designed" to modify the thermal, acoustic, radar or other electromagnetic signatures of the vehicles in this category. This does not include

components or parts commonly used with commercial vehicles (*e.g.,* mufflers, resonators, electrical filters/capacitors, acoustic or thermal insulation).

* (xi) (Tier 2) Gas turbine engines "specially designed" for ground vehicles.

(xii) (Tier 2) Hot section parts or components "specially designed" for the gas turbine engines in VII(a)(2)(xi).

Note 1 to paragraph (a): For controls related to major systems or subsystems of the vehicles controlled above, see USML Categories I, II, III, IV, XI, XII, XIII, XIV, XV and XVIII.

Note 2 to paragraph (a): Parts or components are controlled in this Category only to the extent listed in VII(a)(2). It does not include any "part" as defined in § 121.8(d) of this subchapter that is not specifically listed. For the purposes of export or reexport, a parts "kit" that contains the unassembled elements of a component is considered a component.

Note 3 to paragraph (a): Developmental vehicles are controlled at the highest tier associated with the functions proposed to be accomplished by that vehicle, and are controlled once the vehicle is placed in full scale production.

Note 4 to paragraph (a): Vehicles are considered manufactured after 1955 if, at any time after 1955, any of the following changes occur:

1. Propulsion upgrade to a formerly gasoline powered armored vehicle with either diesel or multi-fuel capability.
2. Armor upgrade to employ reactive armor.
3. Fire control upgrade with a digital control system.
4. Addition of laser designator or laser rangefinder.
5. Addition of autoloader or similar assisted loading/round selection.
6. Increase of gun bore to larger than 90 mm.
7. Conversion to unmanned operation.

Note 5 to paragraph (a): Vehicles manufactured in 1955 or prior that retain a functional weapon are controlled based on the Category that controls the weapon.

(b) Test, inspection, and production equipment.

(1) (Tier 2) Production equipment, tooling, and test equipment "specially designed" for armored vehicles designated as Tier 2 in this Category.

(2) (Tier 3) Test or calibration equipment "specially designed" for the articles controlled in this Category.

Note 1 to paragraph (b): For production of major systems or subsystems, see the controls specific to those items in Categories II, III, IV, *etc.,* or in the EAR (*e.g.,* Armor plate machining equipment and tank turret bearing grinding machines are "subject to the EAR" and controlled in ECCN 2B018).

Note 2 to paragraph (b): This control does not apply to test, inspection and production equipment "specially designed" for a subsystem or component not specifically controlled in this Category.

(c) Materials.

(1) (Tier 1) Developmental armor for the vehicles controlled in this Category.

(2) (Tier 2) Spaced armor.

(3) Transparent armor containing a transparent crystalline laminate such as spinel, aluminum oxynitride, or sapphire as follows:

(i) (T2) Having E_m greater than or equal to 1.3; or

(ii) Having E_m less than 1.3 and meeting NIJ Level III standards with areal density as follows:

(A) (Tier 2) Less than or equal to 30 pounds per square foot; or

(B) (Tier 3) Between 30 and 40 pounds per square foot.

(4) (Tier 2) Transparent ceramic plate greater than or equal to ½″ thick and larger than 8″ x 8″, excluding glass, for transparent armor.

(5) (Tier 3) Transparent ceramic plate greater than ¼″ thick but less than ½″ thick and larger than 8″ x 8″, excluding glass, for transparent armor.

(6) (Tier 3) Non-transparent ceramic plate or blanks greater than ¼″ thick and larger than 8″ x 8″ for transparent armor. This includes spinel and aluminum oxynitride (ALON).

(7) (Tier 2) Composite armor with E_m > 1.4 and meeting NIJ Level III or better.

(8) (Tier 3) Metal Laminate Armor with E_m > 1.4 and meeting NIJ Level III or better.

Note 1 to paragraph (c): Composite armor is defined for this Category as:

1. More than one layer of different materials, or
2. A matrix composite.

Note 2 to paragraph (c): Spaced Armors are metallic or non-metallic armors that incorporate an air space and/or obliquity or discontinuous material path effects as part of the defeat mechanism.

Note 3 to paragraph (c): Reactive armor employs explosives, propellants, or other materials between plates for the purpose of enhancing plate motion during a ballistic event or otherwise defeating the penetrator.

Note 4 to paragraph (c): Electromagnetic armor (EMA) employs electricity to defeat threats such as shaped charges.

Note 5 to paragraph (c): Materials used in composite armor could include layers of metals, plastics, elastomers, fibers, glass, ceramics, etc. and ceramic-glass reinforced plastic laminates, encapsulated ceramics in a metallic or non-metallic matrix, functionally gradient ceramic-metal materials, ceramic balls in a cast metal matrix.

Note 6 to paragraph (c): For this Category, a material is considered transparent if it allows 75% or greater transmission of light in the visible spectrum through a 1 mm thick nominal sample.

Note 7 to paragraph (c): The material controlled in VII(c)(6) has not been treated to reach the 75% transmission level referenced in Note 6.

Note 8 to paragraph (c): Metal laminate armors are two or more layers of metallic materials which are mechanically or adhesively bonded together to form an armor system. E_m is the line-of-sight target mass effectiveness and provides a ratio of the tested armors performance to that of rolled homogenous armor.

Note 9 to paragraph (c): E_m is the line-of-sight target mass effectiveness ratio and provides a measure of the tested armor's performance to that of rolled homogenous armor, where E_m is defined as follows:

$$Em = \frac{\rho_{RHA}\left(Po - \mathrm{Pr}\right)}{AD_{T\,\mathrm{arg}\,et}}$$

Where:

ρ_{RHA}= density of RHA (7.85 g/cm^2)
Po = Baseline Penetration of RHA (mm)
Pr = Residual Line of Sight Penetration, either positive or negative (mm RHA equivalent)
AD_{TARGET} = Line-of-Sight Areal Density of Target (kg/m^2).

(d) Software.

(1) (Tier 2) Software "specially designed" for the integration or control of vehicle combat systems or subsystems, both offensive and defensive, that is not controlled in other Categories. This includes software that is "specially designed" to stabilize weapon motion for shooting on the move.

* (2) (Tier 2) Software, algorithms, and modules "specially designed" for the design of ballistic armor protection for vehicles controlled in VII(a)(1)(iii) through (v).

(3) (Tier 2) Software "specially designed" for controlling the gas turbine engines controlled in this Category.

(4) (Tier 2) Software containing the control laws or algorithms for unmanned ground vehicles controlled in this Category.

(5) (Tier 2) Built-in test and diagnostic software "specially designed" for built-in test equipment controlled in VII(a)(2)(vii).

(6) (Tier 2) Software "specially designed" for autonomic logistics for the vehicles controlled in this Category that are designated as Tier 2.

* (7) (Tier 1) Software "specially designed" for the design, production, or use of articles controlled in this Category that are designated as Tier 1.

* (8) (Tier 2) Software "specially designed" for the design, production, or

use of articles specified in this Category that are designated as Tier 2.

(9) (Tier 2) Software "specially designed" for the electric hybrid propulsion drive control modules/circuits specified in VII(a)(2)(i) of this Category.

Note paragraph (d): This Category does not control software for major systems, subsystems, parts or components controlled in other Categories or that are incorporated into an end item. For controls of major systems or subsystems of the vehicles controlled under paragraph (a) of this Category, see USML Categories I, II, III, IV, VIII, XI, XII, XIII, XIV, XV, and XVIII. See also controls on related simulation and training items in Category IX.

(e) Technology.

* (1) Design or manufacturing technology "required" for the articles controlled in this Category as follows:

(i) (Tier 1) Design or manufacturing technology "required" for articles controlled in this Category designated as Tier 1.

(ii) (Tier 1) Design or manufacturing technology "required" for armor materials specified in VII(c) and armor systems, components, or parts specified in VII(a)(2)(iii) of this Category.

(iii) (Tier 1) Design or manufacturing technology "required" for rotary shock absorbers or torsion bars for vehicles specified in VII(a)(1)(iii)(A) having a mass greater than 50 tons. This includes design technology "required" for the complete suspensions incorporating the shock absorbers and torsion bars.

(iv) (Tier 1) Design or manufacturing technology "required" for armored vehicle hulls for vehicles designated as Tier 2 or better controlled in this Category.

(v) (Tier 2) Design or manufacturing technology "required" for articles controlled in this Category and not elsewhere specified.

* (2) Test technology as follows:

(i) (Tier 1) Test technology directly related to defense articles designated as Tier 1 and controlled in this Category.

(ii) (Tier 1) Test technology directly related to armor materials specified in VII.C and armor systems, components, or parts specified in VII(a)(2)(v) of this Category.

(iii) (Tier 1) Test technology directly related to armored vehicle hull design for vehicles designated as Tier 2 or better controlled in this Category.

(iv) (Tier 2) Test technology directly related to developmental vehicles controlled in this Category or to other vehicles designated as Tier 2 that are controlled in this Category.

(v) (Tier 3) Test technology, not elsewhere specified, directly related to defense articles controlled in this Category.

(3) Technology "required" for the operation, maintenance, and repair of the vehicles controlled in this Category as follows:

(i) (Tier 1) Technology "required" for maintenance or operation on any defense article designated as Tier 1 and controlled in this Category.

(ii) (Tier 2) Technology "required" for intermediate or depot level maintenance of any defense article designated as Tier 2 or 3 and controlled in this Category.

(iii) (Tier 3) Operator or organizational level maintenance or repair technology "required" for any defense article controlled in this Category.

(iv) (Tier 3) Operation manuals for any defense article controlled in this Category.

Note to paragraph (e): This Category does not control technology for major systems or subsystems or subsystems controlled in other Categories or incorporated into the end item. For controls of major systems or subsystems of the vehicles specified in (a) of this Category, see USML Categories I, II, III, IV, VIII, XI, XII, XIII, XIV, XV, and XVIII. See also controls on related simulation and training items in Category IX.

(f) Defense services.

* (1) (Tier 1) Providing assistance in the design, development, production or depot level maintenance on any defense article designated as Tier 1 in this Category.

* (2) (Tier 2) Providing assistance in the design, development, production or intermediate or depot level maintenance on any defense article designated as Tier 2 in this Category.

(3) (Tier 2) Providing training or advice in the tactical employment of the vehicles designated as Tier 1 or Tier 2 and controlled in this Category.

(g) Manufacturing or production.

(1) (Tier 1) Granting a right or license to manufacture any defense article designated as Tier 1 in this Category.

(2) (Tier 1) Granting a right or license to manufacture any defense article designated as Tier 2 in this Category.

(3) (T2) Granting a right or license to manufacture any defense article designated as Tier 3, enumerated in VII(a)(1)(iii) through VII(a)(2)(v) and VII(a)(2)(vii).

(4) (T2) Granting a right or license to manufacture any other defense article designated as Tier 3 in (a) in this Category.

(h) Defined terms.

(1) Certain terms used in the category:

(i) Specially designed. The term "specially designed" means that the end-item, equipment, accessory, attachment, system, component, or part (*see* ITAR § 121.8); or "software"; has properties that:

(A) Distinguish it for certain predetermined purposes,

(B) Are directly related to the functioning of a defense article, and

(C) Are used exclusively or predominantly in or with a defense article identified on the USML.

(ii) Required. As applied to technology, refers to only that portion of technology which is peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics or functions. Such "required" technology may be shared by different products.

(iii) Weapon of mass destruction. Any destructive device or weapon that is designed or intended to cause death or serious bodily injury through the release, dissemination, or impact of toxic or poisonous chemicals, or their precursors, any weapon involving a biological agent, toxin, or vector, or any weapon that is designed to release radiation or radioactivity at a level dangerous to human life. This includes, but is not limited to:

(A) Nuclear explosive devices and their major sub-systems;

(B) Chemicals covered by Schedule I of the Chemical Weapons Convention; and

(C) Biological agents and biologically derived substances specifically developed, configured, adapted, or modified for the purpose of increasing their capability to produce casualties in humans or livestock, degrade equipment, or damage crops.

(2) Certain terms defined in the Export Administration Regulations (contained in 15 CFR chapter VII, subchapter C) that may be related to Category VII:

"Software." (Cat: all)—A collection of one or more "programs" or "microprograms" fixed in any tangible medium of expression.

"Program." (Cat 2, 4, and 6)—A sequence of instructions to carry out a process in, or convertible into, a form executable by an electronic computer.

"Microprogram." (Cat 4 and 5)—A sequence of elementary instructions, maintained in a special storage, the execution of which is initiated by the introduction of its reference instruction into an instruction register.

"Technology." (General Technology Note)—Specific information necessary for the "development," "production," or "use" of a product. The information takes the form of "technical data" or "technical assistance." Controlled "technology" is defined in the Commerce Control List (Supplement No. 1 to 15 CFR part 774).

Note: Technical assistance—May take forms such as instruction, skills training,

working knowledge, consulting services. "Technical assistance" may involve transfer of "technical data."

"Technical data."—May take forms such as blueprints, plans, diagrams, models, formulae, tables, engineering designs and specifications, manuals and instructions written or recorded on other media or devices such as disk, tape, read-only memories.

Dated: December 1, 2010.

Ellen O. Tauscher,

Under Secretary, Arms Control and International Security, Department of State.

[FR Doc. 2010–31158 Filed 12–8–10; 4:15 pm]

BILLING CODE 4710–25–P

DEPARTMENT OF STATE

22 CFR Part 121

RIN 1400–AC78

[Public Notice: 7257]

Revisions to the United States Munitions List

AGENCY: Department of State.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: As part of the President's export control reform initiative, the Directorate of Defense Trade Controls (DDTC) seeks public comment on revisions to the United States Munitions List (USML) that would make it a "positive list" of controlled defense articles, requests that the public "tier" defense articles based on the Administration's three-tier control criteria, and identify those current defense articles that the public believes do not fall within the scope of any of the criteria's tiers. A "positive list" is a list that describes controlled items using objective criteria rather than broad, open-ended, subjective, or design intent-based criteria. DDTC is not seeking with this advance notice of proposed rulemaking (ANPRM) input on whether particular defense articles should or should not be controlled on the USML or whether any defense articles should be controlled differently. Rather, it is only seeking with this ANPRM input on how the USML can be revised so that it clearly describes what is subject to the jurisdiction of the International Traffic in Arms Regulations (ITAR), how defense articles are identified by tier, and what current defense articles do not fall within the scope of any of the tiers. Guidelines for revision of the USML toward this end are provided in this ANPRM. Please see the proposed rule published elsewhere in this issue of the **Federal Register** for an example of a USML Category that has been revised in this manner.

DATES: Comments must be received by February 8, 2011.

ADDRESSES: Interested parties may submit comments within 60 days of the date of the publication by any of the following methods:

- *E-mail: DDTCResponseTeam@state.gov* with the subject line, "USML—Positive List."
- *Mail:* PM/DDTC, SA–1, 12th Floor, Directorate of Defense Trade Controls, Office of Defense Trade Controls Policy, ATTN: USML—Positive List, Bureau of Political Military Affairs, U.S. Department of State, Washington, DC 20522–0112.
- Persons with access to the Internet may also view this ANPRM by searching for its RIN on the U.S. Government regulations Web site at *http://regulations.gov/index.cfm.*

FOR FURTHER INFORMATION CONTACT: Director Charles B. Shotwell, Office of Defense Trade Controls Policy, Department of State, Telephone (202) 663–2792 or Fax (202) 261–8199; E-mail *DDTCResponseTeam@state.gov*, ATTN: USML—Positive List.

SUPPLEMENTARY INFORMATION:

Existing Controls

The Directorate of Defense Trade Controls (DDTC), U.S. Department of State, administers the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120–130). The items subject to the jurisdiction of the ITAR, *i.e.,* "defense articles," including related technical data, and "defense services," are identified on the ITAR's U.S. Munitions List (USML) (22 CFR 121.1). With few exceptions, items that are not subject to the export control jurisdiction of the ITAR are subject to the jurisdiction of the Export Administration Regulations (EAR), 15 CFR Parts 730–774. The Bureau of Industry and Security (BIS), U.S. Department of Commerce, administers the EAR, which include the Commerce Control List (CCL) (15 CFR part 774). The descriptions in many USML categories are general and include design intent as a reason for an item to be controlled. The descriptions in most CCL categories are specific and generally include technical parameters for an item to be controlled.

Export Control Reform

A key part of the Administration's Export Control Reform effort is to review and revise both the ITAR and the CCL to enhance national security so that they: (1) Are "tiered" consistent with the criteria the U.S. Government has established to distinguish the types of items that should be controlled at different levels for different types of destinations, end-uses, and end-users; (2) create a "bright line" between the two lists to clarify jurisdictional determinations and reduce government and industry uncertainty about whether a particular item is subject to the jurisdiction of the ITAR or the EAR; and (3) are structurally "aligned" so that they can eventually be combined into a single control list.

The Administration has determined that these changes are necessary to better focus its resources on protecting those items that need to be protected, to end jurisdictional confusion between the ITAR and EAR, and to provide clarity to make it easier for exporters to comply with the regulations and for the U.S. Government to administer and enforce them.

In order to accomplish the three above-referenced tasks simultaneously, the USML and, to a lesser degree, the CCL must be revised so that they are aligned into "positive lists." A "positive list" is one that describes controlled items using objective criteria such as horsepower, microns, wavelength, speed, accuracy, hertz or other precise descriptions rather than broad, open-ended, subjective, or design intent-based criteria.

The U.S. Government has developed a methodology to transition the current control lists to this new structure. This methodology includes guidance on how to articulate the parameters for the items controlled and criteria to be used to screen these items to determine their tier of control. The full draft methodology that was developed for internal use by the U.S. Government was provided to the Department of State's Defense Trade Advisory Group (DTAG) as well as to the Department of Commerce's Technical Advisory Committees as it was being finalized. The full text is not included in this notice, as aspects are beyond the scope of the request for public comment; however, the full text is available for public review on the DDTC Web page at *http://www.pmddtc.state.gov/DTAG/index.html.*

This notice provides a summary of the full methodology and the full text of its guidance for building a "positive" list to order to request input from the public on this key feature of the control list reform.

Request for Comments

As the U.S. Government continues its work on preparing proposed revisions to the USML, it seeks public input on how best to describe the USML in a positive

manner. U.S. companies, trade associations, and individuals that produce, market, or export USML-controlled defense articles are generally well positioned to describe their articles positively and to provide comments on what are and are not clear descriptions of controls over the articles. Public comment at this stage of the USML review process also ensures that affected industry sectors have the opportunity to contribute and comment on a key element of Export Control Reform.

The U.S. Government is not, at this time, seeking public comment on whether an item should or should not be controlled on the USML; however, the public is requested to identify those defense articles that it believes do not fall within the scope of any of the criteria's tiers. The U.S. Government is also not seeking public comment at this time on whether an item should be controlled differently for export to different countries. General comments on the overall reform process or the other aspects of current export controls are outside the scope of this inquiry. In order to contribute directly to export control reform, all comments are strongly encouraged to abide by the detailed guidelines provided in this notice.

BIS will publish a separate request for public comments on (1) how to describe items controlled on CCL more clearly and in a more "positive" "tiered" manner and (2) the availability of certain items outside of certain destinations.

The following is a summary of the specific requests for public comment described in this notice:

- Public comments should be provided on a category-by-category basis.
- Within each category, public input should be further identified by groups A thru E as further described below.
- Public input should describe defense articles in a "positive" way:

1. Use objective criteria or thresholds, such as precise descriptions or technical parameters, that do not lend themselves to multiple interpretations by reasonable people.

2. Descriptions should not contain any (a) controls that use generic labels for "parts," "components," "accessories," "attachments," or "end-items" or (b) other types of controls for specific types of defense articles because, for example, they were "specifically designed or modified" for a defense article, but should contain identification of those "parts," "components," "accessories," "attachments," or "end-items" that do warrant enumerated control on the USML. Separately, the use of "specially designed" as a control criterion for the other "parts," "components," "accessories," "attachments," or "end-items" should only be applied when required by multilateral obligations or when no other reasonable option exists.

3. Items are not to be listed on both the CCL and the USML unless there are specific technical or other objective criteria—regardless of the reason why any particular item was designed or modified—that distinguish between when an item is USML-controlled or when it is CCL-controlled.

4. In cases where technical characteristics are classified and need to be protected, the objective descriptions of the products controlled should be set at an unclassified level below the classified level.

5. Public input should include the recommended tier of control for the defense articles described using the tiering criteria in Part IV, Step 4 of the Guidelines in this notice.

6. The public is also requested to identify any current defense articles that do not fall within the scope of any of the criteria's tiers, and provide an explanation why they believe that such items are not within the scope of the criteria.

The U.S. Government's Work on the USML

The U.S. Government has already begun reviewing and revising the USML. The State Department published as a proposed rule elsewhere in this issue of the **Federal Register** a proposed revision to USML Category VII, which pertains to tanks and military vehicles. As members of the public prepare their comments on how to revise other USML categories into positive lists, they should use this revised Category VII as a guide for the level and type of detail the U.S. Government is seeking to develop in the remaining USML categories other than Category XVII (Classified Articles, Technical Data and Defense Services Not Otherwise Enumerated) and Category XXI (Miscellaneous Articles).

Guidelines

I. Introduction

This notice describes the background to and the process by which the U.S. Government is reviewing and, as appropriate, revising the two primary lists of items it controls—the USML and the CCL. The review and revision are part of Phase II of the broad, three-phased Export Control Reform effort. A summary of the control list work and the three phase reform effort is available at the White House Web page at *http://www.whitehouse.gov/the-press-office/2010/08/30/president-obama-lays-foundation-a-new-export-control-system-strengthen-n*. "Items," for purposes of this notice, are (a) physical things such as goods, products, materials, commodities, end-items, parts, components, and defense articles; (b) technology and technical data; and (c) software. The types of services and other transactions, licensing policies, and the lists of destinations, end-uses, and end-users that are subject to export controls, and the efforts to review and revise them, will be described in separate documents.

II. Goals of the Phase II Control List Review and Revision Effort

The purpose of the control list review effort is to enhance national security by reviewing and revising the USML and the CCL so that they:

1. Are "tiered" consistent with the criteria the U.S. Government has established to distinguish the types of items that should be controlled at different levels for different types of destinations, end-uses, and end-users ("Criteria," detailed below);

2. Create a "bright line" between the two lists to clarify jurisdictional determinations and reduce government and industry uncertainty about whether particular items are subject to the jurisdiction of the International Traffic in Arms Regulations (ITAR) or the Export Administration Regulations (EAR); and

3. Are structurally "aligned" so that they later can eventually be combined into a single control list.

In order to accomplish these tasks simultaneously, the USML and, to a lesser degree, the CCL must be revised so that they are aligned into "positive lists." A "positive list" is a list that describes controlled items using objective criteria such as horsepower, microns, wavelength, speed, accuracy, hertz or other precise descriptions rather than broad, open-ended, subjective, catch-all, or design intent-based criteria.

III. Background to the Control List Review and Revision Effort

A key element of Export Control Reform is that all items on the USML and the CCL must be screened against the Criteria the U.S. Government has developed to determine new control levels consistent with contemporary national security threats and other issues.

The basic premise of the effort is that if an item type falls within the scope of one of the Criteria's three tiers, the item should be controlled for export, reexport, and in-country transfer at the

level set forth in the licensing policy the U.S. Government is developing for that tier. The licensing policies to be assigned to each tier are still under development but, generally, the highest tier of control will carry the most comprehensive license and compliance requirements.

If an item is determined not to be within the scope of any of the three tiers, it should not be on a control list. (Items that do not meet one of the primary elements of the tiered criteria, such as being significant for maintaining a military or intelligence advantage, which must nonetheless be controlled for a separate foreign policy, statutory, or multilateral obligation, will be identified as Tier 3 items.)

The U.S. Government has also determined that, during Phase II, the USML and the CCL should be revised and aligned so that there is a clear jurisdictional "bright line" between the items subject to the control of the ITAR and the control of the EAR.

The U.S. Government is committed to creating a clear jurisdictional "bright line" so that exporters and foreign parties can more easily and consistently determine whether many types of commodities, technologies, and software—and directly related services—are subject to the ITAR or the EAR.

The creation of a "bright line" is also a vital interim step in the U.S. Government's plan to have, by the end of Phase III, a single list of controlled items that is divided into three tiers and administered by a single licensing agency under a single set of export control regulations. The interim "bright line" is necessary because the structures of the USML and the CCL are significantly different. Many of the ITAR's USML controls are based on subjective or design-intent criteria. That is, regardless of an item's capability, sophistication, age, funding, lethality, end-use, or origins, it is, with some exceptions, USML-controlled if it was originally "specifically designed, modified, or adapted" for a military or space application, purpose, or use. In particular, most USML categories contain a non-specific catch-all control over every "part" or "component" that was "specifically designed or modified" for any of the defense articles listed in that category. This means, for example, that a bolt specifically modified for a military vehicle, and all technical data and services directly related to the bolt, are controlled for almost worldwide export in a similar manner to the military vehicle itself (and all the technical data and services directly related to the military vehicle).

Most of the EAR's CCL controls are based on the technical capabilities and specifications of items regardless of their intended end-use or the reasons for which they were designed. The CCL's controls are also more flexible in that different types of items are controlled differently to different groups of destinations and end-users depending on the significance of the item. In other words, the CCL is a more "positive" list with more flexible controls than the USML. The EAR do nonetheless have a significant number of export control classification numbers (ECCNs) with controls on items that are "specially designed" for some purpose or end-item. The issues involving the definition of this term—a term that must remain in many ECCNs, at least for now, to remain consistent with multilateral obligations—are addressed below.

Because the USML contains many broad, general descriptions of the types of articles controlled, each USML category will need to be "opened" in order to further assess whether each defense article within its scope still warrants control under the USML based on national security concerns and to screen them against the U.S. Government's Criteria to create a tiered "positive list." "Screening" articles means determining which items that are currently USML-controlled defense articles should remain on the USML, which items that are currently USML controlled defense articles could be controlled under the CCL, and which items no longer require any control beyond EAR99 controls because they do not meet the criteria of any of the three tiers. "Opening" USML categories means identifying and then creating specific, positive lists of the specific types of articles the U.S. Government wants to control rather than relying on broad, general descriptions of or subjective criteria for determining when something is controlled.

IV. Steps for and Guidelines Controlling List Review and Revision Effort

The following are the steps and the guidelines that the U.S. Government has developed to prepare proposed amendments to the USML and the CCL so that they are, with rare exceptions, aligned "positive lists" that do not overlap and are consistent with the tiered criteria. The guidelines are set out in ordered steps.

Step 1—Review Each USML Category and Related ECCNs Separately

The USML and the CCL are too big and complex to be reviewed in their entirety all at once. In order to make the project more manageable, USML categories (and related ECCNs) are being reviewed separately, albeit with an awareness to the reviews or planned reviews in any other USML category or ECCN that could affect the effort. Public comments should be provided on a category-by-category basis, as further described below.

Step 2 —Provide Input Following the New Proposed Structure of the USML

The U.S. Government is proposing to revise the structure of the USML so that it tracks the A, B, C, D, E structure of the CCL (which also tracks the Wassenaar Arrangement dual-use list structure) and also has an additional F and G "Group" to address ITAR-specific defense service and manufacturing controls. That is, each revised USML category is being divided into seven "Groups":

"A," for "Equipment, Assemblies, and Components";
"B," for "Test, Inspection, and Production Equipment";
"C," for "Materials";
"D," for Software";
"E," for "Technology";
"F," for "Defense Services"; and
"G," for "Manufacturing and Production Authorizations."

For purposes of the list review and revision effort, the public is requested to provide input in sections A thru E. Sections F and G at this stage do not require input for building the positive list. To facilitate public comment, these heading terms are defined as follows:

A. "Equipment, Assemblies, and Components" means any tangible item that falls within the scope of any one of the defined terms in ITAR § 121.8—*i.e.,* "end-item," "accessory," "attachment," "associated equipment," "component," or "part"—or "commodity," as defined in EAR § 772.1, and is not "test, inspection, or production equipment," as defined for Group B, or "materials," as defined for Group C.

B. "Test, Inspection, and Production Equipment" means any tangible item that is "specially designed" to test, inspect, produce, or develop any of the types of items defined in ITAR § 121.8 or a "commodity," as defined in EAR § 772.1. Examples include machine tools, measuring equipment, lithography equipment, tape lay-up machines, templates, jigs, mandrels, moulds, dies, fixtures, and alignment mechanisms.

C. "Material" means any crude or processed matter that is not clearly identifiable as any of the types of items defined in ITAR § 121.8 or a "commodity" that is more broadly defined in EAR § 772.1. Examples

include the alloys, ceramics, prepregs, and raw material out of which parts, components, accessories, attachments, associated equipment, and end-items are made. Examples also include chemicals, toxins, and biological organisms.

D. "Software" means a collection of one or more programs or microprograms fixed in any tangible medium of expression. It includes object code, source code, system functional design logic flows, algorithms, application programs, operating systems, and other programs to design, implement, test, operate, diagnose, or repair other software or items. A "program" is a sequence of instructions to carry out a process in, or convertible into, a form executable by an electronic computer. A "microprogram" is a sequence of elementary instructions, maintained in a special storage, the execution of which is initiated by the introduction of its reference instruction into an instruction register.

E. "Technology" means, when reviewing items that are or should be on the USML, "technical data" as defined in ITAR § 120.10(a)(1). "Technology" means, when reviewing items that are or should be on the CCL, "technology" as defined in EAR § 772.1. "Technology" does not include any information that falls within the scope of "public domain," as defined in ITAR § 120.11, or is outside the scope of the EAR or "publicly available," as referenced in EAR §§ 734.3(b)(2) and (b)(3), respectively.

These definitions are not intended to narrow or materially alter any term in the ITAR or the EAR. Rather, they are combinations of similar terms that are used now in the EAR and the ITAR to give structure to the tiered, aligned, positive list revision effort. The U.S. Government is currently preparing proposed harmonized terms to be used in the ITAR, EAR, and the sanctions regulations. This separate task should not, however, affect the public's review and input. The scope and meaning of and controls over defense services and manufacturing and production authorizations will be addressed separately.

Step 3—Describe Defense Articles in a "Positive" Way

The Department of State requests public input on how defense articles should be described, to the maximum extent possible, in a "positive" way. When providing input describing defense articles within the A, B, C, D, and E Group structure, the Department offers the following guidelines to aid the public in providing comments that make the revised USML a "positive list":

1. *Positive List Guideline #1:* The public should, to the extent possible, use objective criteria or thresholds, such as precise descriptions or technical parameters, that do not lend themselves to multiple interpretations by reasonable people.

Controls on items using technical descriptions will be the most effective means for all parties involved in the export process to clearly and easily determine jurisdiction and control requirements. For example, USML Categories V and XIV are subject to few jurisdictional questions because the controls are, in the main, based on specifically identified chemical compounds.

Category V also illustrates the value of using a technical parameter to create clear controls. Both the USML and the CCL control spherical aluminum powder. The controls on the USML are limited, however, to a specific technical parameter: Spherical aluminum powder "in particle sizes of 60 micrometers or less."

By using this guideline for revisions to the USML, reliance on subjective or discretionary terms such as "design-intent" or "ultimate end-use" of an item will be eliminated. Such terms have historically been difficult for industry and government to apply and consistently agree upon.

2. *Positive List Guideline #2:* When providing suggestions for revised USML categories, descriptions should avoid any (i) controls that use generic labels for "parts," "components," "accessories," "attachments," or "end-items"; or (ii) other types of controls for specific types of defense articles because, for example, they were "specifically designed or modified" for a defense article.

This guideline includes a recommended prohibition against using as standards for in the USML generic phrases such as the following:

- Are "capable for use with" a defense article;
- Are "equivalent to" a defense article;
- Have "significant military or intelligence applicability";
- Have a "military purpose";
- Have "military application"; or
- Are "predominately used" in military applications or end items.

This instruction does not prohibit the control on the USML of items that have, by whatever definition, any of these characteristics. To the contrary, the instruction requests the public describe and identify such items *without* using the generic phrases, which are at the root of many of the difficulties encountered in the current export control lists.

This instruction also does not mean that specific models or part numbers of components need to be identified. Rather, *types* of items should be listed. For example, the parts and components controlled under a revised USML Category I could be limited to "barrels, receiver, frames, slides, bolts, and bolt carriers that fit and function in any of the above-listed firearms." All other parts and components that fit or function in such firearms, even if specifically or specially designed or modified for them in terms of their size, shape or configuration, could be controlled in a separate entry that could become subject to the EAR.

The guidelines governing how items moved to the jurisdiction of the EAR would be controlled will be addressed in a separate future Department of Commerce notice. The Department of State is seeking with this notice comments on current defense articles that the public does not view meet any of the criteria as explained in Step 4 below.

This guideline is a critical tool for achieving one of the essential goals of the list reform effort, which is to "de-conflict" the USML and the CCL. At the end of the process, the lists should be written so that exporters easily and consistently can determine the jurisdictional status of an article, technical data, or software—and reasonable parties would reach the same conclusion about the nature of the item at issue if presented with the same facts.

This drafting prohibition exists because it is necessary to stop using terms that do not readily lend themselves to objective determinations. These terms have been at the core of most jurisdictional disputes over the decades and have thus been a distraction from the larger mission of precisely and clearly controlling items for national security and foreign policy purposes.

Guideline #2 does *not* apply to the miscellaneous USML Categories XVII or XXI. The guidelines, the limitations on and requirements for use, and its prospective-only characteristics, will be described in more detail in a separate notice.

3. *Positive List Guideline # 3:* Items are not to be listed on both the CCL and the USML unless there are specific technical or other objective criteria—regardless of the reason why any particular item was designed or modified—that distinguish between when an item is USML-controlled and when it is CCL-controlled.

An implication of this guideline is that if an item is listed on the CCL, an exporter is entitled to conclude that it is EAR-controlled unless there is a specific cross reference in the ECCN to the USML stating that such items that exceed the technical characteristics described in that USML category are ITAR-controlled—even if the item was specifically designed, modified, or intended for use in civil applications. If a cross-reference does not exist, one will be added to recommend consulting both the USML and the CCL for potential controls, particularly in situations where an item exceeds specific technical parameters that could cause it to be USML-controlled.

For example, an integrated circuit that falls within the technical description of ECCN 3A001 is CCL-controlled regardless of whether it was specifically designed or modified, in terms of its form or fit, to function exclusively in a military end-item unless it exceeds the radiation tolerances described in USML subcategory XV(d). An integrated circuit that exceeds such tolerances would be USML controlled regardless of why it was so designed. This example does not preclude the possibility that subcategory XV(d) may need to be amended to increase the radiation-tolerant thresholds.

An implication of this guideline is that all controls in the amended USML and CCL on parts and components must be at the item-type level, with technical characteristics determining whether or how the part or component is controlled for export, and not at the model or part number level by virtue of an item having been modified to fit into a particular end-item. This approach de-emphasizes the significance of "form" or "fit" in determining whether an item is USML-controlled and focuses more on its function, capability, performance, or characteristics.

4. *Positive List Guideline #4:* In cases where technical characteristics are classified and need to be protected, the objective descriptions of the products controlled should be set at an unclassified level below the classified level.

As a reminder, both the USML and CCL list review efforts pertain only to unclassified information (*e.g.,* not Confidential, Secret, or Top Secret). This means that USML Category XVII (Classified Articles, Technical Data and Defense Services Not Otherwise Enumerated) does not need to be reviewed or revised.

5. *Positive List Guideline #5:* Use "Specially Designed" as a control criterion only when required by multilateral obligations or when no other reasonable option exists.

There are specific, identified types of end-items and generic "components" that are controlled on the Wassenaar Munitions List because they are "specially designed" for another item or some purpose. The Wassenaar Arrangement does not define the term "specially designed." Controls for such items should nonetheless carry forward to the revised USML or revised CCL with as precise of a description as possible of what is controlled. Thus, for example, the revised USML subcategory VII(g) generic, catch-all controls over components would read "Military Vehicle components *as follows:*". The subcategory would then list the types of components controlled by that subcategory in that tier using the objective criteria set forth above.

For articles that are not within the scope of the Wassenaar Munitions List or other multilateral regime, but should nonetheless be listed on the USML, the term "specially designed" should rarely be used as a control parameter. Where a revised USML subcategory must use "specially designed" to remain consistent with the Wassenaar Arrangement or other multilateral regime obligation or when no other reasonable option exists to describe the control without using the term, the public is asked to use the following *draft* definition of the term:

"For the purposes of this Subchapter, the term "specially designed" means that the end-item, equipment, accessory, attachment, system, component, or part (*see* ITAR § 121.8) has properties that (i) distinguish it for certain predetermined purposes, (ii) are directly related to the functioning of a defense article, and (iii) are used exclusively or predominantly in or with a defense article identified on the USML."

The Departments of State and Commerce will be seeking public comment on this draft definition in a later notice.

Step 4: Provide Recommended Tier of Control for the Defense Articles Identified in Step 3

The Department of State requests public input on screening those items the public identifies in a more "positive" way in Step 3 against the three tier control criteria listed in Section III above and described further below, and identify the tier of control for items within each category and group (A, B, C, D, and E). The U.S. Government will make the final decisions on what types of defense articles are within the scope of any of the three tiers and, thus, may or may not accept suggestions regarding how items should be tiered. Nonetheless, the Department of State is interested in the public's views on the issue of how defense articles on a positive list can be described so that they are distinguished with tiered, objective criteria.

Although the U.S. Government retains full discretion in deciding how any particular type of defense article is tiered, or divided by objective criteria among different tiers, the public is asked to provide input regarding how defense articles, or types of defense articles with different capabilities, should be described within different tiers.

The Criteria and the scope of its three tiers are as follows:

1. A Tier 1 control shall apply to:

a. A weapon of mass destruction (WMD);

b. A WMD-capable unmanned delivery system;

c. A plant, facility or item specially designed for producing, processing, or using:

(i) WMDs;

(ii) Special nuclear materials; or

(iii) WMD-capable unmanned delivery systems; or

d. An item almost exclusively available from the United States that provides a critical military or intelligence advantage.

2. A Tier 2 control shall apply to an item that is not in Tier 1, is almost exclusively available from Regime Partners or Adherents and:

a. Provides a substantial military or intelligence advantage; or

b. Makes a substantial contribution to the indigenous development, production, use, or enhancement of a Tier 1 or Tier 2 item.

3. A Tier 3 control shall apply to an item not in Tiers 1 or 2 that:

a. Provides a significant military or intelligence advantage;

b. Makes a significant contribution to the indigenous development, production, use, or enhancement of a Tier 1, 2, or 3 item; or

c. Is controlled for national security, foreign policy, or human rights reasons.

Tier 1 defense articles are those that are almost exclusively available from the United States and that provide a critical military or intelligence advantage.

Tier 2 defense articles are those that are almost exclusively available from countries that are members of the multilateral export control regimes that control such items and (i) provide a substantial military or intelligence advantage, or (ii) make a substantial contribution to the indigenous development, production, use, or enhancement of a Tier 1 or Tier 2 item.

Tier 3 defense articles are those that provide a significant military or intelligence advantage, or make a significant contribution to the indigenous development, production, use, or enhancement of a Tier 1, 2, or 3 item.

For defense articles currently controlled on the USML, the public is asked to identify the items they believe do not fall within the scope of any of the criteria's tiers and explain why they believe such items are not within the scope of the criteria. These items may be candidates to be moved to the CCL.

Items controlled pursuant to multilateral agreement, *i.e.,* the Wassenaar Arrangement, the Missile Technology Control Regime, the Australia Group, the Chemical Weapons Convention, and the Nuclear Suppliers Group, that do not meet the availability or "military or intelligence advantage" control criteria in Tiers 1, 2 or 3 will be identified by the U.S. Government as Tier 3 items until and unless their control status is adjusted consistent with the procedures of the applicable multilateral agreement.

The following are definitions of several of the key terms and phrases used in the tiered criteria set forth above. The term "almost exclusively available" means that the item is only available from a very small number of other countries that have in place effective export controls on the item. The term "critical" means providing a capability with respect to which the United States cannot afford to fall to parity and that would pose a grave threat to national security if not controlled (*i.e.,* a "crown jewel"). Examples of "grave threat to national security" include: Armed hostilities against the United States or its allies; disruption of foreign relations vitally affecting the national security; the compromise of vital national defense plans or complex crypto-logic and communications intelligence systems; the revelation of sensitive intelligence operations; the disclosure of scientific or technological developments vital to national security; or critical assistance to foreign development and/or acquisition of WMD.

The term "substantial" means providing a capability with respect to which the United States must maintain parity and that would pose a serious threat to national security if not controlled. Examples of a "serious threat to the national security" include: Disruption of foreign relations significantly affecting the national security; significant impairment of a program or policy directly related to the national security; revelation of significant military plans or intelligence operations; compromise of scientific or technological developments relating to national security; or substantial assistance to foreign development or acquisition of a WMD.

The term "significant" means providing a capability that could be reasonably expected to cause damage to national security if not controlled.

Dated: November 30, 2010.

Ellen O. Tauscher,

Under Secretary, Arms Control and International Security, Department of State.

[FR Doc. 2010–30994 Filed 12–8–10; 4:15 pm]

BILLING CODE 4710–25–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 301

[REG–100194–10]

RIN 1545–BJ52

Specified Tax Return Preparers Required To File Individual Income Tax Returns Using Magnetic Media; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains a correction to a notice of proposed rulemaking (REG–100194–10) that was published in the **Federal Register** on Friday, December 3, 2010 (75 FR 75439). The proposed regulations provide further guidance relating to the requirement for "specified tax return prepares,".

FOR FURTHER INFORMATION CONTACT: Keith L. Brau at (202) 622–4940 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The notice of proposed rulemaking that is the subject of this document is under section 6011 of the Internal Revenue Code.

Need for Correction

As published, the notice of proposed rulemaking (REG–100194–10) contains an error that is misleading and is in need of clarification.

Correction to Publication

Accordingly, the notice of proposed rulemaking which was the subject of FR Doc. 2010–30500 is corrected as follows:

On page 75442, in the preamble, column 2, under the heading "Comments and Public Hearing", line 17 from the bottom of the page, the language "for Tuesday, January 7, 2011 at 10 a.m." is corrected to read "for Friday, January 7, 2011 at 10 a.m."

Guy Traynor,

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

[FR Doc. 2010–31028 Filed 12–9–10; 8:45 am]

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 300

[REG–124018–10]

RIN 1545–BJ65

User Fees Relating to Enrolled Agents and Enrolled Retirement Plan Agents

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed amendments to the regulations relating to the imposition of user fees for enrolled agents and enrolled retirement plan agents. The proposed regulations separate the enrolled retirement plan agent user fees from the enrolled agent user fees and lower the initial enrollment and renewal of enrollment fees for enrolled agents and enrolled retirement plan agents. The proposed regulations affect individuals who are or apply to become enrolled agents or enrolled retirement plan agents. The charging of user fees is authorized by the Independent Offices Appropriations Act of 1952.

DATES: Written or electronic comments must be received by January 10, 2011. Outlines of topics to be discussed at the public hearing scheduled for January 14, 2011, at 10 a.m. must be received by January 5, 2011.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–124018–10), room 5205, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–124018–10), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC or sent electronically via the Federal eRulemaking Portal at *http://*

www.regulations.gov (IRS REG–124018–10). The public hearing will be held in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Emily M. Lesniak at (202) 622–4570; concerning cost methodology, Eva J. Williams at (202) 435–5514; concerning submission of comments, the public hearing, or to be placed on the building access list to attend the public hearing, Richard A. Hurst at *Richard.A.Hurst@irscounsel.treas.gov* or (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

Section 330 of title 31 of the United States Code authorizes the Secretary of the Treasury to regulate the practice of representatives before the Treasury Department. Pursuant to section 330 of title 31, the Secretary has published regulations governing practice before the IRS in 31 CFR part 10 and reprinted the regulations as Treasury Department Circular No. 230 (Circular 230). Circular 230 is administered by the IRS Office of Professional Responsibility (OPR).

Section 10.4(a) of Circular 230 authorizes the Director of OPR to grant status as an enrolled agent to applicants who demonstrate special competence in tax matters by passing a written examination administered by, or administered under the oversight of, the Director of OPR and who have not engaged in any conduct that would justify suspension or disbarment under Circular 230. Every year OPR develops and administers a Special Enrollment Examination (SEE) that individuals must pass to become an enrolled agent through examination.

Section 10.4(b) of Circular 230 authorizes the Director of OPR to grant status as an enrolled retirement plan agent to applicants who demonstrate special competence in qualified retirement plan matters by passing a written examination administered by, or under the oversight of, the Director of OPR and who have not engaged in any conduct that would justify suspension or disbarment under Circular 230. Every year OPR develops and administers an Enrolled Retirement Plan Agent Special Enrollment Examination (ERPA–SEE) that individuals must pass to become an enrolled retirement plan agent through examination.

Section 10.4(b) also authorizes the Director of OPR to grant full or limited enrollment as an enrolled agent or full enrollment as an enrolled retirement plan agent to a former IRS employee if the former employee has not engaged in any conduct that would justify the suspension or disbarment of any practitioner under the provisions of Circular 230 and the employee meets certain other requirements. These requirements include minimum length of employment with the IRS and substantive tax expertise. Application for enrollment based on former employment with the IRS must be made within three years from the date of separation from such employment and the applicant is not required to pass the SEE or the ERPA–SEE, unless a former employee who previously was granted limited enrollment status wants to qualify for full enrollment.

Once eligible for enrollment as an enrolled agent or enrolled retirement plan agent, whether by examination or former employment with the IRS, an individual must file an application for enrollment with the Director of OPR. An individual granted status as an enrolled agent or enrolled retirement plan agent as provided in § 10.6(d) must renew enrollment every three years to maintain active enrollment and be able to practice before the IRS. In order to qualify for renewal, an applicant must certify the completion of the continuing education requirements set forth in § 10.6(e) of Circular 230 and compliance with certain ethical standards in Circular 230 and State regulatory agencies.

As part of the application to become an enrolled agent or enrolled retirement plan agent, an individual must currently pay a nonrefundable user fee of $125. This user fee is authorized under § 300.5. An individual also must pay a $125 nonrefundable user fee to renew enrollment, which is authorized under § 300.6. An individual must renew enrollment every three years. In addition, a user fee of $11 per part is currently imposed to take the SEE or the ERPA–SEE. The user fee to take the SEE and ERPA–SEE is currently authorized under § 300.4.

The proposed regulations coordinate the user fees imposed on enrolled agents and enrolled retirement plan agents with the new user fee to apply for or renew a preparer tax identification number (PTIN). The Treasury Department and the IRS are implementing recommendations in Publication 4832, "Return Preparer Review," which was published on January 4, 2010. Based on these recommendations, the Treasury Department and the IRS recently published final regulations under section 6109 (TD 9501, 75 FR 60309, September 30, 2010) that require tax return preparers who prepare all or substantially all of a tax return or claim for refund for compensation to obtain a PTIN. Individuals applying for or renewing a PTIN are required to pay a $50 IRS user fee and a $14.25 vendor fee. The final regulations establishing the IRS user fee to apply for or renew a PTIN were published on September 30, 2010 (TD 9503).

The process for reviewing an enrolled agent or an enrolled retirement plan agent initial enrollment or renewal of enrollment application is, in some ways, duplicative of the new process for reviewing a PTIN application. For example, the tax compliance checks and suitability checks conducted as part of a PTIN application are the same tax compliance checks and suitability checks currently performed as part of the process for becoming an enrolled agent or enrolled retirement plan agent. To avoid any potential duplication and unnecessary expense for individuals applying to become an enrolled agent or an enrolled retirement plan agent, the Treasury Department and the IRS intend to require all enrolled agents and enrolled retirement plan agents to obtain a PTIN. The Treasury Department and the IRS further intend to eliminate the tax compliance checks and suitability checks from the initial enrollment and renewal of enrollment process for enrolled agents and enrolled retirement plan agents because these checks will be performed as part of the requirement to obtain a PTIN. Thus, the Treasury Department and the IRS are eliminating the portion of the initial enrollment and renewal of enrollment user fees that recover the costs to perform the tax compliance checks and suitability checks (and any other review conducted as part of the PTIN application process).

Accordingly, the proposed regulations separate the initial enrollment and renewal of enrollment user fees imposed on enrolled agents from the initial enrollment and renewal of enrollment user fees imposed on enrolled retirement plan agents, which are all currently imposed in §§ 300.5 and 300.6. (The proposed regulations also separate the user fee to take the ERPA–SEE to become an enrolled retirement plan agent from the user fee to take the SEE to become an enrolled agent, which are both currently imposed in § 300.4.)

The proposed regulations also reduce both the enrolled agent and enrolled retirement plan agent initial enrollment and renewal of enrollment user fees to reflect that the review procedures (including tax compliance checks and suitability checks), previously conducted as part of the enrolled agent and enrolled retirement plan agent

initial enrollment and renewal of enrollment processes, will now be conducted as part of the PTIN application and renewal process. In particular, the proposed regulations amend § 300.5 to reduce the enrolled agent initial enrollment user fee to $30 and § 300.6 to reduce the enrolled agent renewal of enrollment user fee to $30. The enrolled retirement plan agent initial enrollment user fee is found in proposed § 300.10 and is $30. The enrolled retirement plan agent renewal of enrollment user fee is found in proposed § 300.11 and also is $30.

The initial enrollment and renewal of enrollment user fees imposed on enrolled agents and enrolled retirement plan agents in the proposed regulations reflect only the costs of the review processes that are not conducted as part of the PTIN application or renewal processes. The costs include processing the enrolled agent and enrolled retirement plan agent initial enrollment and renewal of enrollment applications, processing the accompanying user fees, and conducting a search for any violations of professional rules and standards of conduct.

Authority

The Independent Offices Appropriations Act (IOAA) of 1952, which is codified at 31 U.S.C. 9701, authorizes agencies to prescribe regulations that establish charges for services provided by the agency, which includes charging user fees. The charges must be fair and must be based on the costs to the government, the value of the service to the recipient, the public policy or interest served, and other relevant facts. The IOAA provides that regulations implementing user fees are subject to policies prescribed by the President; these policies are currently set forth in the Office of Management and Budget Circular A–25, 58 FR 38142 (July 15, 1993) (the OMB Circular).

The OMB Circular encourages user fees for government-provided services that confer benefits on identifiable recipients over and above those benefits received by the general public. Under the OMB Circular, an agency that seeks to impose a user fee for government-provided services must calculate the full cost of providing those services. In general, a user fee should be set at an amount that allows the agency to recover the full cost of providing the special service, unless the Office of Management and Budget grants an exception.

Pursuant to the guidelines in the OMB Circular, the IRS has calculated its cost of providing services under the enrolled agent and enrolled retirement plan agent program and PTIN application process. The full cost of administering these programs will be charged and the proposed user fees will be implemented under the authority of the IOAA and the OMB Circular.

Proposed Effective/Applicability Date

The Administrative Procedure Act provides that substantive rules will not be effective until thirty days after the final regulations are published in the **Federal Register** (5 U.S.C. 553(d)). Final regulations may be effective prior to thirty days after publication if the publishing agency finds that there is good cause for an earlier effective date.

The Treasury Department and the IRS recently finalized regulations that require all tax return preparers who prepare all or substantially all of a tax return or claim for refund for compensation to use a PTIN as their identifying number (TD 9501). The Treasury Department and the IRS also finalized regulations that require tax return preparers to pay a $64.25 user fee to apply for or renew a PTIN (TD 9503, 75 FR 60316, September 30, 2010). Tax return preparers who prepare all or substantially all of a tax return or claim for refund must obtain or renew their PTIN for the 2011 tax season.

Circular 230 requires that, to maintain active enrollment to practice before the IRS, enrolled agents must renew enrollment every third year after initial enrollment is granted. The renewal schedules are staggered with approximately one third of enrolled agents renewing every year. Enrolled agents with social security numbers or tax identification numbers ending in 4, 5, or 6 are currently scheduled to renew their enrollment beginning on November 1, 2010 and ending on January 31, 2011. To enable these enrolled agents to renew their enrollment at the reduced fee, the IRS issued Announcement 2010–81 on October 14, 2010, which delayed the renewal period for enrolled agents with social security numbers or tax identification numbers ending in 4, 5, or 6. The renewal process cannot be reinstated until this regulation is finalized; otherwise, these enrolled agents will pay twice for the IRS to perform the compliance and suitability checks. To minimize the disruption to the enrolled agent program caused by the delay of renewal, the renewal process must be reinstated as quickly as possible. Thus, the Treasury Department and the IRS find that there is good cause for these regulations to be effective upon the publication of a Treasury decision adopting these rules as final regulations in the **Federal Register**.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. It is hereby certified that this regulation will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required. This certification is based upon the information that follows. The proposed regulation does not place an additional filing requirement on enrolled agents or enrolled retirement plan agents and decreases the enrollment costs already in effect. Thus, this regulation should reduce the economic impact imposed by the current enrolled agent and enrolled retirement plan agent user fees.

Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The Treasury Department and the IRS request comments on the clarity of the proposed regulations and how they can be made easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for January 14, 2011, beginning at 10 a.m. in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. All visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, *see* the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written or electronic comments and an outline of the topics to be discussed and the time to be devoted to each topic by January 5, 2011. A period of 10 minutes will be allocated to each person for making comments.

An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these regulations is Emily M. Lesniak, Office of the Associate Chief Counsel (Procedure and Administration).

List of Subjects in 26 CFR Part 300

Reporting and recordkeeping requirements, User fees.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 300 is proposed to be amended as follows:

PART 300—USER FEES

Paragraph 1. The authority citation for part 300 continues to read in part as follows:

Authority: 31 U.S.C. 9701.

Par. 2. Section 300.0 is amended by:

1. Redesignating paragraph (b)(9) as paragraph (b)(12).
2. Adding new paragraph (b)(9).
3. Adding paragraphs (b)(10) and (b)(11).

The additions and revisions read as follows.

§ 300.0 User fees; in general.

* * * * *

(b) * * *

(9) Taking the special enrollment examination to become an enrolled retirement plan agent.

(10) Enrolling an enrolled retirement plan agent.

(11) Renewing the enrollment of an enrolled retirement plan agent.

* * * * *

Par. 3. Section 300.4 is amended by revising the heading to read as follows:

§ 300.4 Enrolled agent special enrollment examination fee.

* * * * *

Par. 4. Section 300.5 is amended by revising paragraphs (b) and (d) to read as follows:

§ 300.5 Enrollment of enrolled agent fee.

* * * * *

(b) *Fee.* The fee for initially enrolling as an enrolled agent with the IRS Office of Professional Responsibility is $30.

* * * * *

(d) *Effective/applicability date.* This section is applicable the date that final regulations are published in the **Federal Register**.

Par. 5. Section 300.6 is amended by revising paragraphs (b) and (d) to read as follows:

§ 300.6 Renewal of enrollment of enrolled agent fee.

* * * * *

(b) *Fee.* The fee for renewal of enrollment as an enrolled agent with the IRS Office of Professional Responsibility is $30.

* * * * *

(d) *Effective/applicability date.* This section is applicable the date that final regulations are published in the **Federal Register**.

§ 300.9 [Redesignated as § 300.12]

Par. 6. Redesignate § 300.9 as § 300.12.

Par. 7 Add new § 300.9 to read as follows:

§ 300.9 Enrolled retirement plan agent special enrollment examination fee.

(a) *Applicability.* This section applies to the special enrollment examination to become an enrolled retirement plan agent pursuant to 31 CFR 10.4(b).

(b) *Fee.* The fee for taking the enrolled retirement plan agent special enrollment examination is $11 per part, which is the cost to the government for overseeing the examination and does not include any fees charged by the administrator of the examination.

(c) *Person liable for the fee.* The person liable for the enrolled retirement plan agent special enrollment examination fee is the applicant taking the examination.

(d) *Effective/applicability date.* This section is applicable the date that final regulations are published in the **Federal Register**.

Par. 7. Section 300.10 is added to read as follows:

§ 300.10 Enrollment of enrolled retirement plan agent fee.

(a) *Applicability.* This section applies to the initial enrollment of enrolled retirement plan agents with the IRS Office of Professional Responsibility pursuant to 31 CFR 10.5(b).

(b) *Fee.* The fee for initially enrolling as an enrolled retirement plan agent with the IRS Office of Professional Responsibility is $30.

(c) *Person liable for the fee.* The person liable for the enrollment fee is the applicant filing for enrollment as an enrolled retirement plan agent with the IRS Office of Professional Responsibility.

(d) *Effective/applicability date.* This section is applicable the date that final regulations are published in the **Federal Register**.

Par. 8. Section 300.11 is added to read as follows:

§ 300.11 Renewal of enrollment of enrolled retirement plan agent fee.

(a) *Applicability.* This section applies to the renewal of enrollment of enrolled retirement plan agents with the IRS Office of Professional Responsibility pursuant to 31 CFR 10.5(b).

(b) *Fee.* The fee for renewal of enrollment as an enrolled retirement plan agent with the IRS Office of Professional Responsibility is $30.

(c) *Person liable for the fee.* The person liable for the renewal of enrollment fee is the person renewing enrollment as an enrolled retirement plan agent with the IRS Office of Professional Responsibility.

(d) *Effective/applicability date.* This section is applicable the date that final regulations are published in the **Federal Register**.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2010–31033 Filed 12–7–10; 4:15 pm]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2010–0794]

RIN 1625–AA11

Regulated Navigation Area; Hudson River South of the Troy Locks, NY

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish a Regulated Navigation Area (RNA) on the navigable waters of the Hudson River in New York, south of the Troy Locks. This action is necessary to promote navigational safety, provide for the safety of life and property, and facilitate the reasonable demands of commerce. This action would impose restrictions on vessels operating within the waters of the Hudson River south of the Troy Locks when ice is a threat to navigation.

DATES: Comments and related material must be received by the Coast Guard on or before January 10, 2011. Requests for public meetings must be received by the Coast Guard on or before December 27, 2010.

ADDRESSES: You may submit comments identified by docket number USCG–2010–0794 using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *Fax:* 202–493–2251.

(3) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these four methods. See the "Public Participation and Request for Comments" portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call or e-mail Chief Warrant Officer Kary Moss, Coast Guard Sector New York Waterways Management Division; telephone 718–354–4117, e-mail *Kary.L.Moss@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided.

Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2010–0794), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online (via *http://www.regulations.gov*) or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online via *http://www.regulations.gov,* it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an e-mail address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* click on the "submit a comment" box, which will then become highlighted in blue. In the "Document Type" drop down menu select "Proposed Rule" and insert "USCG–2010–0794" in the "Keyword" box. Click "Search" then click on the balloon shape in the "Actions" column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the rule based on your comments.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* click on the "read comments" box, which will then become highlighted in blue. In the "Keyword" box insert "USCG–2010–0794" and click "Search." Click the "Open Docket Folder" in the "Actions" column. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one on or before December 27, 2010 using one of the four methods specified under **ADDRESSES**. Please explain why you believe a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Basis and Purpose

Historically ice has been an impediment to navigation during certain times of the year on the navigable waters of the Hudson River south of the Troy Locks. West Point, Crum Elbow, Esopus Meadows, Stuyvesant Anchorage, Hudson Anchorage, Silver Point, and Hyde Park are all natural choke points on the Hudson River where ice buildup has the potential to severely restrict vessel traffic.

There are several situations faced by vessels during severe winter conditions that can place the vessels, passengers, and crew in great danger including being beset in the ice and ice accretion, where ice forms on the superstructure and decks of transiting vessels thereby affecting the vessel's stability. Ice may also cause significant damage to propellers, rudders, and hull plating.

The formation of ice on the Hudson River is subject to many variables and is not consistent from year to year. During a moderate or severe winter, the frozen waterways may impede a vessel's ability to maneuver. Once ice build-up begins it can affect the transit of vessels on the navigable waterways. In addition a vessel's watertight integrity may also be compromised by ice abrasion and ice pressure on the vessel's hull.

Ice floes on the navigable waterways may also cause visual aids to navigation to become submerged, destroyed, or moved off station. Ice conditions on the navigable waterways may create hazardous conditions in which the operations of certain vessels become unsafe.

Previous ice seasons have shown that vessels with less than 3000 horsepower, while engaged in towing operations, have significant difficulty transiting the Hudson River in locations where ice thickness is on average eight inches or greater. This difficulty in transiting the Hudson River during ice buildup poses a safety threat to the environment and a potential hazard to navigation.

It sometimes becomes necessary to impose operating restrictions to ensure the safe navigation of vessels. During the 2009–2010 ice navigation season the Coast Guard promulgated a Temporary Final Rule that established an RNA for that period. That rule established restrictions similar to those that the Coast Guard proposes in this rule. This proposed rule allows the Coast Guard to restrict and manage vessel movement when hazardous ice conditions exist within a specified area of the Hudson River.

Discussion of Proposed Rule

The Coast Guard proposes to establish a Regulated Navigation Area on the navigable waters of the Hudson River south of the Troy Locks. The Regulated Navigation Area is intended to restrict vessels with less than 3000 horsepower (HP) engaged in towing operations from operating on the Hudson River south of the Troy Locks when ice thickness is on average eight inches or greater, unless authorized by the Captain of the Port (COTP) New York or a designated representative.

The COTP New York will notify mariners of the location and thickness of the ice as well as any restrictions via marine broadcast, Local Notices to Mariners, and VTS New York. For the purpose of this rule, the definition of horsepower in 46 CFR 10.107 applies.

When the ice thickness reaches an average of eight inches or greater on the Hudson River along reported routes, vessels of less than 3,000 HP engaged in towing operations would not be authorized to transit unless in conjunction with scheduled Coast Guard icebreaking operations in the area, or operating with an assist tug or as part of a convoy, or specifically authorized by the COTP New York.

Operators of vessels that do not meet the criteria of the operating restrictions, but who believe that they have the capability to operate in ice safely, may seek a waiver from the COTP New York to continue operating. Waivers may be requested by calling telephone number (718) 354–4356 or on VHF channel 13 or 16.

Regulatory Analyses

We developed this proposed rule after considering numerous statutes and executive orders related to rulemaking. Below, we summarize our analyses based on 13 of these statutes or executive orders.

Regulatory Planning and Review

This proposed rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

The Coast Guard's implementation of the proposed Regulated Navigation Area will only be enforced at the location on the navigable waters of the Hudson River south of the Troy Locks where ice conditions on average are eight inches or greater, and only restrict vessels that are less than 3,000 horsepower while engaged in towing operations.

Before the effective period, the Coast Guard will issue maritime advisories widely available to users of the navigable waters of the Hudson River. Furthermore, vessels affected by this restriction may be authorized to transit the zone with permission of the Captain of the Port New York. Requests to transit may be made by calling telephone number (718) 354–4356 or on VHF channel 13 or 16.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed rule would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. This proposed rule will affect the following entities, some of which may be small entities: The owners and operators of tugs with engines below 3,000 total horsepower attempting to transit the Hudson River in cold weather months when ice thickness is on average eight inches or greater.

This RNA would not have a significant economic impact on a substantial number of small entities for the following reasons: Tugs with less than 3,000 total horsepower have historically been unable to transit the Hudson River when ice thickness is on average eight inches or greater. Operators have generally taken these vessels out of service or use vessels that are capable of operating in such conditions. Before the effective period, the Coast Guard will issue maritime advisories widely available to users of the river.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (*see* **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub.L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, contact CWO Kary Moss at 718–354–4117. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

Collection of Information

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

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this proposed rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

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

Taking of Private Property

This proposed rule would not cause a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically

significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

Indian Tribal Governments

This proposed rule does not have Tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

Energy Effects

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. A preliminary environmental analysis checklist supporting this determination is available in the docket where indicated under **ADDRESSES**. This proposed rule involves establishing a Regulated Navigation Area restricting tugs with less than 3,000 total horsepower from transiting the Hudson River when ice thickness is on average eight inches or greater. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects in 33 CFR Part 165

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

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

2. Add § 165.165 to read as follows:

§ 165.165 Regulated Navigation Area; Hudson River south of the Troy Locks, New York.

(a) *Regulated navigation area.* All navigable waters of the Hudson River south of the Troy Locks.

(b) *Definitions.* The following definitions apply to this section:

(1) Designated representative means any Coast Guard commissioned, warrant, or petty officer, or a Federal, State, or local law enforcement officer designated by or assisting the Captain of the Port (COTP) New York.

(2) Horsepower (HP) means the total maximum continuous shaft horsepower of all the vessel's main propulsion machinery.

(c) *Applicability.* This section applies to tugs with less than 3,000 horsepower when engaged in towing operations.

(d) *Regulations.* (1) Except as provided in paragraph (c)(3) of this section, vessels less than 3,000 horsepower while engaged in towing operations are not authorized to transit that portion of the Hudson River south of the Troy Locks when ice thickness on average is eight inches or greater.

(2) All Coast Guard assets enforcing this Regulated Navigation Area can be contacted on VHF marine band radio, channel 13 or 16. The COTP can be contacted at (718) 354–4356, and the public may contact the COTP to suggest changes or improvements in the terms of this Regulated Navigation Area.

(3) All persons desiring to transit through a portion of the regulated area that has operating restrictions in effect must contact the COTP at telephone number (718) 354–4356 or on VHF channel 13 or 16 to seek permission prior to transiting the affected regulated area.

(4) The COTP will notify the public of any changes in the status of this Regulated Navigation Area by Marine Safety Information Broadcast on VHF–FM marine band radio, channel 22A (157.1 MHZ).

Dated: November 29, 2010.

Daniel A. Neptun,

Rear Admiral, U.S. Coast Guard, Commander, First Coast Guard District.

[FR Doc. 2010–31118 Filed 12–9–10; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

49 CFR Parts 1030–1039

[Docket No. EP 707]

Demurrage Liability

AGENCY: Surface Transportation Board (Board or STB).

ACTION: Advance Notice of Proposed Rulemaking.

SUMMARY: Through this Advance Notice of Proposed Rulemaking (ANPR), the Board is instituting a proceeding regarding demurrage, *i.e.,* charges for holding rail cars. The agency's intent is to adopt a rule or policy statement addressing when parties should be responsible for demurrage in light of current commercial practices followed by rail carriers, shippers, and receivers.

DATES: Comments are due by January 24, 2011. Reply comments are due by February 23, 2011.

ADDRESSES: Comments and replies may be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the E–FILING link on the Board's Web site, at *http://www.stb.dot.gov.* Any person submitting a filing in the traditional paper format should send an original and 10 copies to: Surface Transportation

Board, Attn: STB Ex Parte No. 707, 395 E Street, SW., Washington, DC 20423–0001. Copies of written comments and replies will be available for viewing and self-copying at the Board's Public Docket Room, Room 131, and will be posted to the Board's Web site.

FOR FURTHER INFORMATION CONTACT: Craig Keats at 202–245–0260. (Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.)

SUPPLEMENTARY INFORMATION: Demurrage—the assessment of charges for holding railroad-owned rail freight cars for loading or unloading beyond a specified amount of time—has compensatory and penalty functions. It compensates car owners for the use of their equipment, and by penalizing those who hold cars too long, it encourages prompt return of rail cars into the transportation network. Because of these dual roles, demurrage is statutorily recognized as an important tool in ensuring the smooth functioning of the rail system.

Since the earliest days of railroad regulation, there have been disputes about who should be responsible for paying demurrage. Certain principles for allocating liability for holding carrier equipment became well established over time and were reflected in agency and court decisions.[1] Regulatory and technological changes over the years, however—such as the elimination of required tariff-filing and the advances in electronic commerce—suggest a need to revisit the matter to consider whether the Board's policies should be revised to account for current statutory provisions and commercial practices.

The Board has long been involved in resolving demurrage disputes, both as an original matter and on referral from courts hearing railroad complaints seeking recovery of charges.[2] Our attention became focused on the possible need to examine our policies, however, when some tension developed in the Federal courts of appeals regarding the liability of warehousemen and similar third-party car receivers for railroad demurrage.[3] As we reviewed the two lines of analysis, we began to consider the possibility that neither court's approach produces an optimal outcome given the current statutory and commercial environment. We therefore are instituting this proceeding in an effort to update our policies regarding responsibility for demurrage liability and to promote uniformity in the area.

The Interstate Commerce Act (IC Act), as amended by the ICC Termination Act of 1995 (ICCTA), provides that demurrage is subject to Board regulation under 49 U.S.C. 10702, which requires railroads to establish reasonable rates and transportation-related rules and practices, and under 49 U.S.C. 10746, which requires railroads to compute demurrage and to establish demurrage-related rules "in a way that fulfills the national needs related to" freight car use and distribution and that will promote an adequate car supply. In the simplest case, demurrage is assessed on the "consignor" (the shipper of the goods) for delays at origin and on the "consignee" (the receiver of the goods) for delays at destination.

An important issue has always been who is liable for demurrage when goods are shipped to warehousemen, transloaders, or other "intermediate" stops in the transportation chain before reaching their ultimate destination. Notwithstanding the usual common-law liability (for both freight charges and demurrage) of a consignee that accepted delivery,[4] the issue was more complicated for warehousemen, who typically are not "owners" of the property being shipped. The law became well accepted that, for a warehouseman to be subject to demurrage or detention charges, there had to be some other basis for liability outside the mere fact of handling the goods shipped.[5] And what became the most important "other basis" was whether the warehouseman was shown as the consignee on the bill of lading.[6] Thus, our predecessor, the Interstate Commerce Commission (ICC), held that a tariff[7] may not lawfully assess such charges on a warehouseman who is not the beneficial owner of the freight, who is not named as a consignor or consignee in the bill of lading, and who is not otherwise party to the contract of transportation, "e.g., a warehouseman who receives the freight pursuant to an 'in care of' designation."[8]

The absence of any litigation over the matter suggests that the accepted rule described above provided some degree of certainty for several decades. In recent years, however, a new issue has arisen: what is the law when a warehouseman who accepts rail cars and holds them too long *is* named as consignee in the bill of lading, but asserts either that it did not know of its consignee status or that it affirmatively asked the shipper not to name it consignee? On that issue, the Eleventh Circuit in *Groves* looked to contract principles and found that a party shown as a consignee in the bill of lading is not in fact a consignee unless it expressly agreed to the terms of the bill describing it as a consignee.[9] On virtually identical facts, the Third Circuit in *Novolog* held that "recipients of freight who are named as consignees on bills of lading are subject to liability for demurrage charges arising after they accept delivery unless they act as agents of another [party] and comply with the

[1] *See Responsibility for Payment of Detention Charges, Eastern Cent. States,* 335 I.C.C. 537, 541 (1969) (*Eastern Central*) (involving liability of intermediaries for detention, the motor carrier equivalent of demurrage), *aff'd, Middle Atl. Conference* v. *United States,* 353 F.Supp. 1109, 1114–15 (D.D.C. 1972) (3-judge court sitting under the then-effective provisions of 28 U.S.C. 2321 et seq.) (*Middle Atlantic*).

[2] *E.g., Eastern Central; Springfield Terminal Ry.–Petition for Declaratory Order,* NOR 42108 (STB served June 16, 2010); *Capitol Materials Inc.–Petition for Declaratory Order–Certain Rates and Practices of Norfolk S. Ry.,* NOR 42068 (STB served Apr. 12, 2004); *R. Franklin Unger, Trustee of the Indiana Hi-Rail Corp., Debtor–Petition for Declaratory Order–Assessment and Collection of Demurrage and Switching Charges,* NOR 42030 (STB served June 14, 2000); *South-Tec Dev. Warehouse, Inc., and R.R. Donnelley & Sons Company–Petition for Declaratory Order–Illinois Cent. R.R.,* NOR 42050 (STB served Nov. 15, 2000); *Ametek, Inc.–Petition for Declaratory Order,* NOR 40663, *et al.* (ICC served Jan. 29, 1993), *aff'd, Union Pac. R.R.* v. *Ametek, Inc.,* 104 F.3d 558 (3d Cir. 1997).

[3] *Compare Norfolk S. Ry. v. Groves,* 586 F.3d 1273 (11th Cir. 2009) (*Groves*), *pet. for cert. pending,* No. 08–15418 (filed Apr. 6, 2010), *with CSX Transp. Co.* v. *Novolog Bucks Cnty.,* 502 F.3d 247 (3d Cir. 2007) (*Novolog*).

[4] *Pittsburgh, Cincinnati, Chicago & St. Louis Ry.* v. *Fink,* 250 U.S. 577, 581 (1919); *Groves,* 586 F.3d at 1278.

[5] *See, e.g., Smokeless Fuel Co.* v. *Norfolk & W. Ry.,* 85 I.C.C. 395, 401 (1923).

[6] A bill of lading is the basic transportation contract between the shipper and the carrier; its terms and conditions bind the shipper, the originating carrier, and all connecting carriers.

[7] Historically, carriers gave public notice of their rates and general service terms in tariffs that were publicly filed with the ICC and that had the force of law under the so-called "filed rate doctrine." *See Maislin Indus., Inc.* v. *Primary Steel, Inc.,* 497 U.S. 116, 127 (1990). The requirement that rail carriers file rate tariffs at the agency was repealed in ICCTA.

[8] *Eastern Central,* 335 I.C.C. at 541. The "in care of" designation refers to the principle of agency law under which a consignee—although presumed to be an owner generally liable for freight charges upon acceptance of goods—could be relieved of such liability if the carrier were made aware that the receiver of the goods was accepting the goods only as an agent for the actual owner. The *Novolog* court, 502 F.3d at 255, found that agency principles such as these became incorporated into the IC Act in the 1920s in what is now 49 U.S.C. 10743(a). *See Novolog,* 502 F.3d at 255. That statutory provision states that a consignee that informs the railroad in writing that it is only an agent is not liable for "additional rates that may be found due after delivery."

[9] Relying in part on *Illinois Cent. R.R.* v. *South Tec Dev. Warehouse, Inc.,* 337 F.3d 813 (7th Cir. 2003) (*South Tec*), which did not directly decide the issue but that indicated a predilection toward such a result, *Groves* found the warehouseman not to be a consignee and thus not liable for demurrage even though the warehouse accepted the freight cars as part of its business and held them beyond the period of free time.

notification procedures in [the] consignee-agent liability provision [of] 49 U.S.C. 10743(a)(1)."[10] That provision relieves certain receivers of property from liability for certain rates if it notifies the carrier in writing that it is not the owner of the property, but rather is only an agent for the owner.

Discussion

We believe that broad public input would assist us in addressing the liability of a warehouseman who accepts rail cars and holds them too long, but who asserts either that it did not know that it had been designated the consignee on the bill of lading or that it affirmatively asked the shipper not to name it consignee. Indeed, even with the extensive discussions in *Novolog* and *Groves,* the best answer in this matter is not readily apparent. *Novolog* relies on a broad reading of section 10743(a)(1) (one that the ICC appeared to share), along with policy reasons why a rule requiring that a warehouseman explicitly accept potential demurrage liability would not be a good idea. *Groves* relies on contract law principles to support its view that a receiver of goods must explicitly agree before it can be a consignee subject to liability. But neither approach seems clearly superior, and indeed there are shortcomings with each.

Novolog, for example, cites valid transportation reasons for putting liability on the party best able to release the rail cars (the warehouseman) or to decline the cars if it knows that its facility is already overcrowded. Yet *Novolog* places dispositive weight on the designation given to the warehouseman in the bill of lading, which historically was a paper document that was consciously agreed upon by the carrier and the shipper (although it did not require any action by the consignee). Today, however, transactional paperwork such as the bill of lading is largely handled electronically, and the role of the railroad, the shipper, and the listed consignee in making the designation is evolving. In *Groves,* for example, it is unexplained why some of the bills named the warehouseman as the consignee while others did not.

Groves, for its part, is unsatisfying in various ways. First, it overlooks the fact that, because the warehouseman is in the best position to deal with returning the equipment or rejecting cars if its facility is overcrowded, finding the warehouseman to be responsible for demurrage would best advance the intent of 49 U.S.C. 10746 (efficient use of freight cars). Moreover, although we share the concern that a party might be made liable for charges without its knowledge,[11] as the decision in *Novolog* points out, it is also true that the warehouseman is the one who has the relationship with the shipper, and it should not be the carrier's responsibility to investigate whether the relationship described in the bill of lading accurately reflects the *de facto* status of the parties.

Finally, notwithstanding the ICC's finding in *Eastern Central* in 1969, we are not certain that the provisions of 49 U.S.C. 10743 should be interpreted to apply to demurrage. The language of section 10743 ("[l]iability for rates for transportation") can be read to focus on the shipping charges themselves, and not on accessorial charges such as demurrage. As explained in *Hub City* and *Hall,*[12] the statutory provision, which was first enacted in the Transportation Act of 1920 as an antidiscrimination provision, was modified in 1927 to address the liability of a sales agent for freight charges that turned out to be higher than those originally paid. It was further modified in 1940 to address the liability of an agent *vis a vis* a beneficial owner for additional freight charges resulting when shipments were reconsigned and refused at destination. Neither event speaks to application of the provision to demurrage. Moreover, because section 10743(b) does not apply to a shipment that is prepaid, applying section 10743 to demurrage as well as line-haul charges could have the curious effect of making the consignee liable for demurrage if the shipment is not prepaid, but not liable for the same conduct—holding the cars too long—if it is prepaid. That would be in some tension with the historic (and statutory, *see* 49 U.S.C. 10746) purposes of demurrage: to compensate the equipment owner and to facilitate prompt return of cars.

For all of these reasons, we are instituting this proceeding to explore whether we should look to a new way of determining the liability of warehousemen for demurrage.

One possible rule would place liability for demurrage on the receiver of the rail cars, regardless of the designations in the bill of lading, if the carrier has provided the receiver with adequate notice of liability. (If the receiver were an agent of another party, we assume that the usual principal-agent rules would govern, although we request comments on this point.) What constitutes "adequate notice" could be decided on a case-by-case basis either by the Board or the Federal courts in collection actions, or it could be established by rule. Given the potential industry-wide implications of such rules, broad public input is warranted.

Accordingly, we seek comment on these matters. In their comments, parties may address any relevant matters, but we specifically seek comment on the following, which we believe will assist us in developing an appropriate way of allocating liability that advances the purposes of demurrage and also is consistent with the IC Act, contract law, agency law, and principles of notice/fairness:

- Describe the circumstances under which intermediaries ought to be found liable for demurrage in light of the dual purposes of demurrage. Notwithstanding the ICC's decision in *Eastern Central,* is there a reason why we should not presume that a party that accepts freight cars ought to be the one that is liable regardless of its designation on the bill of lading, so long as it has notice of its liability before it accepts cars?
- Explain how the paperwork attending a shipment of property by rail is processed and how it gives (or does not give) all affected parties (rail carriers, shippers, consignee-owners, warehousemen etc.) notice of the status they are assigned in the bill of lading. For purposes of assessing demurrage, should it be a requirement that electronic bills of lading accurately reflect the *de facto* status of each party in relation to other parties involved with the transaction? If so, and if electronic bills of lading do not accurately reflect the *de facto* status of each party in relation to other parties involved with the transaction, please suggest changes that will ensure that they do.
- With the repeal of the requirement that carriers file publicly available tariffs, how can a warehouseman or

[10] 502 F.3d at 254. *Novolog* cited *Middle Atlantic,* the Uniform Commercial Code, and the Federal Bills of Lading Act to find (502 F.3d at 258) that a warehouseman (or, in that case, a transloader) could be a "legal consignee" even if it was not the "ultimate consignee." The court found that a contrary result, such as the one suggested in *South Tec,* would frustrate what it viewed as the plain intent of § 10743: "to facilitate the effective assessment of charges by establishing clear rules for liability" by permitting railroads to rely on bills of lading and "avoid wasteful attempts to recover [charges] from the wrong parties." 502 F.3d at 258–59. The court found warehouseman liability equitable because the warehouseman—which otherwise has no incentive to agree to liability—can avoid liability under § 10743(a) simply by identifying itself as an agent, whereas the rail carrier has no option but to deliver to the named consignee. *Id.* at 259.

[11] *See West Point Relocation, Inc. & Eli Cohen–Petition for Declaratory Order,* FD 35290 (STB served Oct. 29, 2010).

[12] *Blanchette* v. *Hub City Terminals, Inc.,* 683 F.2d 1008 (7th Cir. 1981); *Union Pac. R.R.* v. *Hall Lumber Sales, Inc.,* 419 F.2d 1009 (7th Cir. 1969).

similar non-owner receiver best be made aware of its status vis a vis demurrage liability? Does actual placement of a freight car on the track of the shipper or receiver constitute adequate notification to a shipper, consignee or agent that a demurrage liability is being incurred? What about constructive placement (placement at an alternative point when the designated placement point is not available)?

• Describe how agency principles ought to apply to demurrage. Are warehousemen generally agents or non-agents, or are their circumstances too varied to permit generalizations? How can a rail carrier know whether a warehouseman or similar non-owner receiver of freight is acting as an agent or in some other capacity?

• Given the discussions in *Hub City* and *Hall,* should section 10743 be read as applicable to demurrage charges at all? The ICC said it was in *Eastern Central,* but it did so with little discussion. Would general agency principles apply to demurrage liability even if section 10743 were found inapplicable?

• If section 10743 is applicable, would the *Groves* analysis (finding that liability does not attach unless the receiver agrees to accept liability) apply to the underlying shipping rate as well as demurrage charges? If it did, how would such a ruling affect industry practice?

• Because the warehouseman or other receiver can reap financial gain by taking on as many cars as possible (and sometimes holding them too long), or by serving as a storage facility when the ultimate receiver is not ready to accept a car, should liability be based on an unjust enrichment theory? The court rejected such an approach in *Middle Atlantic,* 353 F. Supp. at 1124, principally because it found no benefit to the warehouseman from holding rail cars. Is that finding valid?

The requirements of section 603 of the Regulatory Flexibility Act of 1980, 5 U.S.C. 601, et seq., (RFA) do not apply to this action because, at this stage, it is an ANPR and not a "rule" as defined in section 601 of the RFA. Under the RFA, however, the Board must consider whether a proposed rule would have a significant economic impact on a substantial number of small entities. "Small entities" include small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations under 50,000. If adoption of any rule likely to result from this ANPR could have a significant economic impact on a small entity within the meaning of the RFA, commenters should submit as part of their comments an explanation of how the business or organization falls within the definition of a small entity, and how and to what extent the commenter's business or organization could be affected. Following review of the comments received in response to this ANPR, if the Board promulgates a notice of proposed rulemaking regarding this matter, it will conduct the requisite analysis under the RFA.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Initial comments are due on January 24, 2011.

2. Reply comments are due on February 23, 2011.

3. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Nottingham.

Andrea Pope-Matheson,

Clearance Clerk.

[FR Doc. 2010–30967 Filed 12–9–10; 8:45 am]

BILLING CODE 4915–01–P

Notices

Federal Register
Vol. 75, No. 237
Friday, December 10, 2010

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

December 6, 2010.

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 regarding (a) 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; (b) the accuracy of the agency's estimate of burden 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 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 should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

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.

Risk Management Agency

Title: Standard Reinsurance Agreement Plan of Operations.

OMB Control Number: 0563–0069.

Summary of Collection: The Federal Crop Insurance Act, Title 7 U.S.C. Chapter 36 Sec. 1508(k), authorizes the Federal Crop Insurance Corporation (FCIC) to provide reinsurance to approved insurance providers that insure producers of any agricultural commodity under one or more plans acceptable to FCIC. The Standard Reinsurance Agreement is a financial agreement between FCIC and the company to provide subsidy and reinsurance on eligible crop insurance. The Plan of Operation provides the information the insurer is required to file for the initial and each subsequent reinsurance year.

Need and Use of the Information: FCIC uses the information as a basis for the approval of the insurer's financial and operational capability of delivering the crop insurance program and for evaluating the insurer's performance regarding implementation of procedures for training and quality control. If the information were not collected, FCIC would not be able to reinsure the crop business.

Description of Respondents: Business or other for-profit; Farms.

Number of Respondents: 21,016.

Frequency of Responses: Reporting: Annually.

Total Burden Hours: 175,684.

Charlene Parker,

Departmental Information Clearance Officer.

[FR Doc. 2010–31030 Filed 12–9–10; 8:45 am]

BILLING CODE 3410–08–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: South Pacific Tuna Act.

OMB Control Number: 0648–0218.

Form Number(s): NA.

Type of Request: Regular submission (extension of a currently approved collection).

Number of Respondents: 42.

Average Hours per Response: Expressions of interest, 2 hours for initial and 15 minutes for renewal; license applications and catch reports, 1 hour each; vessel registration, 45 minutes; unloading logsheets, 30 minutes.

Burden Hours: 389.

Needs and Uses: This request is for review of an extension of a currently approved collection. The National Oceanic and Atmospheric Administration (NOAA) collects vessel license, vessel registration, catch, and unloading information from operators of United States (U.S.) purse seine vessels fishing within a large region of the central and western Pacific Ocean governed by the Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America. The collection of information is required to meet U.S. obligations under the Treaty.

The Treaty authorizes U.S. tuna vessels to fish within fishing zones of a large region of the Pacific Ocean. The South Pacific Tuna Act of 1988 (16 U.S.C. 973–973r) and U.S. implementing regulations (50 CFR part 300, subpart D) authorize the collection of information from participants in the Treaty fishery. Vessel operators who wish to participate in the Treaty Fishery may submit expressions of interest in order to determine eligibility for the fishery, and must submit annual vessel license and registration (including registration of vessel monitoring system (VMS) units) applications and periodic written reports of catch and unloading of fish from licensed vessels. They are also required to ensure the continued operation of VMS units on board licensed vessels, which is expected to require periodic maintenance of the units. The license and registration application information is used to determine the operational capability and financial responsibility of vessel operators. Information obtained from vessel catch and unloading reports is used to assess fishing effort and fishery resources in the region and to track the

amount of fish caught within each Pacific island state's exclusive economic zone for fair disbursement of Treaty monies. The maintenance of VMS units is needed to ensure the continuous operation of the units, used as an enforcement tool.

Affected Public: Business or other for-profit organizations.

Frequency: Annually and on occasion.

Respondent's Obligation: Mandatory.

OMB Desk Officer: *OIRA_Submission@omb.eop.gov.*

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov.*

Dated: December 6, 2010.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2010–31068 Filed 12–9–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: An Observer Program for Vessels in the Pacific Coast Groundfish Fishery.

OMB Control Number: 0648–0500.

Form Number(s): NA.

Type of Request: Regular submission (extension of a currently approved information collection).

Number of Respondents: 5.

Average Hours per Response: Projected observer assignments and observer contracts, 5 minutes each; training/briefing and debriefing registration, 7 minutes; weekly deployment reports and reports of harassment/refusal to board, safety or performance concerns, 15 minutes each; observer provider change in ownership, 20 minutes.

Burden Hours: 135.

Needs and Uses: This is a request for a renewal of a currently approved information collection.

NMFS At-Sea Hake and West Coast Groundfish Observer Programs define observer duties, train and brief/debrief observers, and manage observer data and its release. The observers, deployed aboard vessels participating in the U.S. West Coast groundfish fishery, are hired by observer providers who contract with the vessels to provide the required observer coverage (50 CFR part 660). This data collection relates to the response time for observer providers to register observers for training, briefing and debriefing and to provide projected assignments and weekly reports to NMFS, as well as copies of contracts with observers or vessels, change in ownership information, and reports of harassment of and other concerns related to vessels and observers.

Affected Public: Business or other for-profit organizations.

Frequency: Weekly and on occasion.

Respondent's Obligation: Mandatory.

OMB Desk Officer: OIRA_Submission@omb.eop.gov.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov.*

Dated: December 6, 2010.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2010–31069 Filed 12–9–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Foreign Fishing Reporting Requirements.

OMB Control Number: 0648–0075.

Form Number(s): NA.

Type of Request: Regular submission (renewal of a current information collection).

Number of Respondents: 1.

Average Hours per Response: Reports, 6 minutes; logbook reports, 30 minutes.

Burden Hours: 56.

Needs and Uses: This request is for renewal of a current information collection.

Foreign fishing activities are authorized under the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*). The collection of information from permitted foreign vessels is necessary to monitor their activities and whereabouts in U.S. waters. Reports are also necessary to monitor the amount of fish, if any, such vessels receive from U.S. vessels in joint venture operations, wherein U.S. vessels catch and transfer at-sea to permitted foreign vessels certain species for which U.S. demand is low relative to the abundance of the species.

Affected Public: Business or other for-profit organizations.

Frequency: Daily and weekly.

Respondent's Obligation: Mandatory.

OMB Desk Officer: OIRA_Submission@omb.eop.gov.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov.*

Dated: December 6, 2010.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2010–31070 Filed 12–9–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 68–2010]

Foreign-Trade Zone 86—Tacoma, WA Application for Reorganization Under Alternative Site Framework

An application has been submitted to the Foreign-Trade Zones (FTZ) Board (the Board) by the Port of Tacoma,

grantee of FTZ 86, requesting authority to reorganize the zone under the alternative site framework (ASF) adopted by the Board (74 FR 1170, 1/12/09 (correction 74 FR 3987, 1/22/09); 75 FR 71069–71070, 11/22/10). The ASF is an option for grantees for the establishment or reorganization of general-purpose zones and can permit significantly greater flexibility in the designation of new "usage-driven" FTZ sites for operators/users located within a grantee's "service area" in the context of the Board's standard 2,000-acre activation limit for a general-purpose zone project. The application was submitted pursuant to the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally filed on December 3, 2010.

FTZ 86 was approved by the Board on July 20, 1983 (Board Order 216, 48 FR 34794, 08/01/83) and expanded on April 3, 1985 (Board Order 292, 50 FR 15206, 04/17/85), on November 3, 1989 (Board Order 446, 54 FR 47247, 11/13/89) and on November 21, 2000 (Board Order 1131, 65 FR 76218, 12/06/00).

The current zone project includes the following sites: *Site 1* (621 acres)—Port of Tacoma Complex, Tacoma; *Site 2* (137 acres)—Valley South Corporate Park, 142nd Avenue East, Sumner; *Site 3* (226 acres)—four port-owned parcels located at 19315 38th Avenue East (30 acres), 4630 192nd Street East (31 acres), the intersection of 192nd Street East and 54th Avenue East (31 acres) and at the intersection of 38th Avenue East and 200th Street East (134 acres), Frederickson; *Site 4* (232 acres)—Fife Business Park, 5003 Pacific Highway East, Fife; *Site 5* (170 acres)—Lakewood Industrial Park, 4700 100th Street Southwest, Lakewood; *Site 6* (76 acres)—Sumner Corporate Park, 1800 140th Avenue East, Sumner; *Site 7* (423 acres)—Cascadia Development Corporation Industrial Park, State Road 410, South Prairie; *Site 10* (123 acres)—Greenwater Corporate Park, East Valley Highway and 8th Street East, Sumner; *Site 11* (185 acres)—Boeing Frederickson parcel, 18001 Canyon Road East, Frederickson; *Site 12* (160 acres)—J.R. & F. Randles parcel, 19209 Canyon Road East, Frederickson; *Site 13* (33 acres)—Rainier Corporate Park East, 70th Avenue East and 20th Street East, Fife; and, *Site 14* (89 acres)—Trans Pacific Industrial Park, 20th Street East and Port of Tacoma Road, Fife.

The grantee's proposed service area under the ASF would be Pierce County, Washington, as described in the application. If approved, the grantee would be able to serve sites throughout the service area based on companies' needs for FTZ designation. The proposed service area is within and adjacent to the Tacoma Washington Customs and Border Protection port of entry.

The applicant is requesting authority to reorganize its existing zone project to include all of the existing sites as "magnet" sites. The ASF allows for the possible exemption of one magnet site from the "sunset" time limits that generally apply to sites under the ASF, and the applicant proposes that Site 1 be so exempted. No usage-driven sites are being requested at this time. As part of the reorganization request, the applicant is also requesting that Site 13 be removed from the zone project due to changed circumstances. Because the ASF only pertains to establishing or reorganizing a general-purpose zone, the application would have no impact on FTZ 86's authorized subzones.

In accordance with the Board's regulations, Christopher Kemp of the FTZ Staff is designated examiner to evaluate and analyze the facts and information presented in the application and case record and to report findings and recommendations to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is February 8, 2011. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to February 23, 2011.

A copy of the application will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Washington, DC 20230–0002, and in the "Reading Room" section of the Board's Web site, which is accessible via *http://www.trade.gov/ftz.* For further information, contact Christopher Kemp at *Christopher.Kemp@trade.gov* or (202) 482–0862.

Dated: December 3, 2010.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2010–31104 Filed 12–9–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1724]

Grant of Authority for Subzone Status; Lam Research Corporation (Wafer Fabrication Equipment) Fremont, Newark, and Livermore, CA

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Foreign-Trade Zones Act provides for "* * * the establishment * * * of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes," and authorizes the Foreign-Trade Zones Board to grant to qualified corporations the privilege of establishing foreign-trade zones in or adjacent to U.S. Customs and Border Protection ports of entry;

Whereas, the Board's regulations (15 CFR Part 400) provide for the establishment of special-purpose subzones when existing zone facilities cannot serve the specific use involved, and when the activity results in a significant public benefit and is in the public interest;

Whereas, the City of San Jose, California, grantee of Foreign-Trade Zone 18, has made application to the Board for authority to establish a special-purpose subzone at the wafer fabrication equipment manufacturing and distribution facilities of Lam Research Corporation, located in Fremont, Newark, and Livermore, California, (FTZ Docket 36–2010, filed 5/18/2010);

Whereas, notice inviting public comment has been given in the **Federal Register** (75 FR 29722–29723, 5/27/2010) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and Board's regulations are satisfied, and that the proposal is in the public interest;

Now, therefore, the Board hereby grants authority for subzone status for activity related to the manufacturing and distribution of wafer fabrication equipment at the facilities of Lam Research Corporation, located in Fremont, Newark, and Livermore, California (Subzone 18F), as described in the application and **Federal Register** notice, subject to the FTZ Act and the

Board's regulations, including Section 400.28.

Signed at Washington, DC, this 26th day of November 2010.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

[FR Doc. 2010–31109 Filed 12–9–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1725]

Reorganization of Foreign-Trade Zone 26 Under Alternative Site Framework, Atlanta, GA

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Board adopted the alternative site framework (ASF) in December 2008 (74 FR 1170, 01/12/09; correction 74 FR 3987, 01/22/09) as an option for the establishment or reorganization of general-purpose zones;

Whereas, the Georgia Foreign-Trade Zone, Inc., grantee of Foreign-Trade Zone 26, submitted an application to the Board (FTZ Docket 22–2010, filed 3/25/2010, amended 9/24/2010) for authority to reorganize under the ASF with a service area that includes the Georgia counties of Haralson, Paulding, Polk, Floyd, Bartow, Chattooga, Gordon, Pickens, Gilmer, Walker, Whitfield, Murray, Forsyth, Dawson, Hall, Banks, Lumpkin, Fulton, DeKalb, Gwinnett, Cobb, Douglas, Clayton, Henry, Fayette, Rockdale, Cherokee, Carroll, Coweta, Heard, Troup, Meriwether, Pike, Spalding, Butts, Lamar, Upson, Jasper, Newton, Morgan, Greene, Walton, Oconee, Clarke, Barrow, Jackson, Bibb, Crawford, Jones, Monroe, Putnam, Richmond, Harris, Talbot and Muscogee in their entirety and portions of White, Franklin, Peach, Houston, and Twiggs Counties, in and adjacent to the Atlanta Customs and Border Protection port of entry with the exception of Walker, Whitfield, and Murray Counties which are adjacent to the Chattanooga Customs and Border Protection port of entry, and Richmond County which is adjacent to the Columbia Customs and Border Protection port of entry, FTZ 26's existing Sites 1 through 18 would be categorized as magnet sites, and existing Site 19 would be categorized as a usage-driven site;

Whereas, notice inviting public comment was given in the **Federal Register** (75 FR 17126–17127, 4/5/2010) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendation of the examiner's report, and finds that the requirements of the FTZ Act and Board's regulations are satisfied, and that the proposal is in the public interest;

Now, Therefore, the Board hereby orders:

The application to reorganize FTZ 26 under the alternative site framework is approved, subject to the FTZ Act and the Board's regulations, including Section 400.28, to the Board's standard 2,000-acre activation limit for the overall general-purpose zone project, to a five-year ASF sunset provision for magnet sites that would terminate authority for Sites 1 through 18 if not activated by November 30, 2015, and to a three-year ASF sunset provision for usage-driven sites that would terminate authority for Site 19 if no foreign-status merchandise is admitted for a *bona fide* customs purpose by November 30, 2013.

Signed at Washington, DC, this 26th day of November 2010.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration Alternate Chairman, Foreign-Trade Zones Board.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2010–31108 Filed 12–9–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

Foreign-Trade Zone 207—Richmond, VA Site Renumbering Notice

Foreign-Trade Zone 207 was approved by the Foreign-Trade Zones Board on March 31, 1995 (Board Order 733) and expanded on September 9, 2005 (Board Order 1413).

FTZ 207 currently consists of 2 "sites" totaling 2,276 acres in the Richmond area. The current update does not alter the physical boundaries that have previously been approved, but instead involves an administrative renumbering that separates certain non-contiguous sites for record-keeping purposes.

Under this revision, the site list for FTZ 207 will be as follows: Site 1 (2044 acres)—within the Richmond International Airport Complex; Site 2 (221 acres)—SouthPoint Business Park, 8100 Quality Drive, Prince George; and, Site 3 (11 acres)—Lewiston Industrial Park, 11293 Central Drive, Ashland.

For further information, contact Maureen Hinman at *maureen.hinman@trade.gov* or (202) 482–0627.

Dated: December 1, 2010.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2010–31098 Filed 12–9–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

Foreign-Trade Zone 238—Dublin, VA Site Renumbering Notice

Foreign-Trade Zone 238 was approved by the Foreign-Trade Zones Board on August 5, 1999 (Board Order 1047).

FTZ 238 currently consists of 1 "site" totaling 50 acres in the Dublin area. The current update does not alter the physical boundaries that have previously been approved, but instead involves an administrative renumbering that separates certain non-contiguous sites for recordkeeping purposes.

Under this revision, the site list for FTZ 238 will be as follows: Site 1 (35 acres)—within the New River Valley Airport on VA Route 100, Dublin; and, Site 2 (15 acres)—located at 4100 Bob White Boulevard, Pulaski.

For further information, contact Maureen Hinman at *maureen.hinman@trade.gov* or (202) 482–0627.

Dated: December 1, 2010.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2010–31103 Filed 12–9–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

Foreign-Trade Zone 214—Lenoir County, North Carolina Site Renumbering Notice

Foreign-Trade Zone 214 was approved by the Foreign-Trade Zones Board on May 7, 1996 (Board Order 815), and expanded on August 14, 2003 (Board Order 1281) and November 2, 2007 (Board Order 1531).

FTZ 214 currently consists of 3 "sites" totaling 1,250 acres in the Lenoir County area. The current update does not alter the physical boundaries that have previously been approved, but instead involves an administrative renumbering that separates certain non-

contiguous sites for record-keeping purposes.

Under this revision, the site list for FTZ 214 will be as follows: Site 1 (1,131 acres)—within the Kinston Regional Jetport complex, Lenoir County; Site 2 (35 acres)—located at 1114 Kingsboro Road, Rocky Mount, Edgecombe County; Site 3 (56 acres)—located at 400 English Road, Rocky Mount, Nash County; and, Site 4 (28 acres)—located at 1201 Thorpe Road, Rocky Mount, Nash County.

For further information, contact Maureen Hinman at *maureen.hinman@trade.gov* or (202) 482–0627.

Dated: December 1, 2010.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2010–31107 Filed 12–9–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–583–837]

Polyethylene Terephthalate Film, Sheet, and Strip From Taiwan: Extension of Time Limit for Final Results of the Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* December 10, 2010.

FOR FURTHER INFORMATION CONTACT: Gene Calvert or Jack Zhao, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, Department of Commerce, Washington, DC 20230; telephone: (202) 482–3586 or (202) 482–1396, respectively.

SUPPLEMENTARY INFORMATION:

Background

On August 16, 2010, the Department of Commerce (the Department) published the preliminary results of this review. *See Polyethylene Terephthalate Film, Sheet, and Strip From Taiwan: Preliminary Results of Antidumping Duty Administrative Review,* 75 FR 49902 (August 16, 2010) (*Preliminary Results*). The review covers the period July 1, 2008 through June 30, 2009. The final results of review are currently due on December 14, 2010.

Extension of Time Limits for Final Results

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act), requires the Department to issue the final results of an administrative review within 120 days after the date on which the preliminary results are published. However, if it is not practicable to complete the review within this time period, section 751(a)(3)(A) of the Act allows the Department to extend the time period up to a maximum of 180 days from the date of publication of the preliminary results of this administrative review.

The Department finds that it is not practicable to complete the final results of this administrative review by the current due date of December 14, 2010. Additional time is needed to review sales and cost data that were gathered after the *Preliminary Results* and to issue a post-preliminary analysis regarding whether to use an alternate cost methodology. Therefore, pursuant to section 751(a)(3)(A) of the Act, we are extending the due date for the completion of the final results of this review from December 14, 2010 to February 12, 2011, 180 days after the date of publication of the *Preliminary Results.*

Because February 12, 2011 falls on a Saturday, it is the Department's long-standing practice to issue a determination the next business day when the statutory deadline falls on a weekend, federal holiday, or any other day when the Department is closed. *See Notice of Clarification: Application of* "*Next Business Day*" *Rule for Administrative Determination Deadlines Pursuant to the Tariff Act of 1930, As Amended,* 70 FR 24533 (May 10, 2005). Accordingly, the deadline for the completion of these final results is now no later than February 14, 2011.

This notice is published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: December 6, 2010.

Gary Taverman,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2010–31112 Filed 12–9–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–905]

Certain Polyester Staple Fiber From the People's Republic of China: Extension of Time Limit for the Final Results of the Second Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce

DATES: *Effective Date:* December 10, 2010.

FOR FURTHER INFORMATION CONTACT: Steven Hampton or Jerry Huang, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; *telephone:* (202) 482–0116 or (202) 482–4047, respectively.

Background

On July 14, 2010, the Department of Commerce ("Department") published in the **Federal Register** the *Preliminary Results* of the second administrative review of certain polyester staple fiber ("PSF") from the People's Republic of China ("PRC"), covering the period June 1, 2008—May 31, 2009. *See Certain Polyester Staple Fiber From the People's Republic of China: Notice of Preliminary Results and Preliminary Rescission, in Part, of the Antidumping Duty Administrative Review,* 75 FR 40777 (July 14, 2010) ("*Preliminary Results*").

The final results of this review are currently due on December 20, 2010. *See Second Antidumping Duty Administrative Review of Certain Polyester Staple Fiber From the People's Republic of China: Extension of Time Limit for the Final Results,* 75 FR 64694 (October 20, 2010).

Extension of Time Limit for the Final Results

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended ("the Act"), requires the Department to issue the final results of an administrative review within 120 days after the date on which the *Preliminary Results* have been published. If it is not practicable to complete the review within the time period, section 751(a)(3)(A) of the Act allows the Department to extend this deadline to a maximum of 180 days. The current deadline for the completion of the final results of this review is December 20, 2010.

The Department has determined that completion of the final results of this

review by the current deadline is not practicable. The Department requires more time to analyze a significant amount of complex information pertaining to the labor wage rate surrogate value. Therefore, given the number and complexity of issues in this case, and in accordance with section 751(a)(3)(A) of the Act, we are extending the time period for issuing the final results of review until January 10, 2011.

This notice is published pursuant to sections 751(1)(3)(A) and 777(i)(1) of the Act and 19 CFR 351.213(h)(2).

Dated: December 6, 2010.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2010–31115 Filed 12–9–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–914]

Light-Walled Rectangular Pipe and Tube From the People's Republic of China: Notice of Rescission of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On September 29, 2010, the U.S. Department of Commerce (the Department) published a notice of initiation of an administrative review of the antidumping duty order on light-walled rectangular pipe and tube from the People's Republic of China (PRC). The review covers Sun Group Co., Ltd. (Sun Group), a producer/exporter of light-walled rectangular pipe and tube from the PRC. We are now rescinding this administrative review in full.

DATES: *Effective Date:* December 10, 2010.

FOR FURTHER INFORMATION CONTACT: Magd Zalok or Howard Smith, AD/CVD Operations, Office 4, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; *telephone:* (202) 482–4162 or (202) 482–5193, respectively.

SUPPLEMENTARY INFORMATION:

Background

On August 2, 2010, the Department published in the **Federal Register** the notice of opportunity to request an administrative review of the antidumping duty order on, *inter alia,* light-walled rectangular pipe and tube from the PRC for the period August 1, 2009, through July 31, 2010. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 75 FR 45094 (August 2, 2010).

On August 16, 2010, the Department received a timely request from Sun Group Co., Ltd., a Chinese exporter/producer of light-walled rectangular pipe and tube, that the Department conduct an administrative review of the antidumping duty order on light-walled rectangular pipe and tube from the PRC. On September 29, 2010, the Department published in the **Federal Register** the notice of initiation of, *inter alia,* the 2009–2010 administrative review of light-walled rectangular pipe and tube from the PRC. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part,* 75 FR 60076 (September 29, 2010) (*Initiation*).

On October 15, 2010, Sun Group filed a letter withdrawing its request for review.

Period of Review

The period of review (POR) is August 1, 2009, through July 31, 2010.

Scope of the Order

The merchandise that is the subject of the order is certain welded carbon-quality light-walled steel pipe and tube, of rectangular (including square) cross section, having a wall thickness of less than 4 mm.

The term carbon-quality steel includes both carbon steel and alloy steel which contains only small amounts of alloying elements. Specifically, the term carbon-quality includes products in which none of the elements listed below exceeds the quantity by weight respectively indicated: 1.80 percent of manganese, or 2.25 percent of silicon, or 1.00 percent of copper, or 0.50 percent of aluminum, or 1.25 percent of chromium, or 0.30 percent of cobalt, or 0.40 percent of lead, or 1.25 percent of nickel, or 0.30 percent of tungsten, or 0.10 percent of molybdenum, or 0.10 percent of niobium, or 0.15 percent vanadium, or 0.15 percent of zirconium. The description of carbon-quality is intended to identify carbon-quality products within the scope. The welded carbon-quality rectangular pipe and tube subject to the order is currently classified under the Harmonized Tariff Schedule of the United States ("HTSUS") subheadings 7306.61.50.00 and 7306.61.70.60. While HTSUS subheadings are provided for convenience and Customs purposes, our written description of the scope of the order is dispositive.

Rescission of Antidumping Duty Administrative Review

Pursuant to 19 CFR 351.213(d)(1), the Secretary will rescind an administrative review under this section, in whole or in part, if a party that requested a review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review, or withdraws at a later date if the Department determines it is reasonable to extend the time limit for withdrawing the request. Sun Group withdrew its review request within the 90-day deadline. As a result, in accordance with 19 CFR 351.213(d)(1), the Department is rescinding the administrative review of Sun Group.

Assessment Instructions

The Department will instruct U.S. Customs and Border Protection ("CBP") to assess antidumping duties on all appropriate entries. For Sun Group, the company for which this review is rescinded, antidumping duties shall be assessed at the rate equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). The Department intends to issue appropriate assessment instructions directly to CBP 15 days after publication of this notice.

Notification to Importers

This notice serves as a reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

Notification Regarding Administrative Protective Orders

This notice serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Tariff Act of 1930, as amended, and 19 CFR 351.213(d)(4).

Dated: December 6, 2010.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2010–31117 Filed 12–9–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–913]

Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Rescission, in Part, of Countervailing Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) is rescinding, in part, the administrative review of the countervailing duty order on certain new pneumatic off-the-road tires (OTR Tires) from the People's Republic of China (PRC) for the period January 1, 2009, through December 31, 2009, with respect to the following seven companies: Shandong Huitong Tyre Co., Ltd.; Qingdao Hengda Tyres Co., Ltd.; Qingdao Sinorient International Ltd.; Qingdao Qizhou Rubber Co., Ltd.; Techking Tires Limited; Qingda Etyre International Trade Co., Ltd.; and Wengdeng Sanfeng Tyre Co, Ltd. This partial rescission is based on the timely withdrawal by these companies of their requests for a review.

DATES: *Effective Date:* December 10, 2010.

FOR FURTHER INFORMATION CONTACT: Emily Halle or Andrew Huston, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; *telephone:* (202) 482–0176 or (202) 482–4261, respectively.

SUPPLEMENTARY INFORMATION:

Background

On September 1, 2010, the Department published a notice of opportunity to request an administrative review of the countervailing duty order on OTR Tires from the PRC. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 75 FR 53635 (September 1, 2010). The above-referenced seven companies timely requested an administrative review of the countervailing duty order on OTR Tires from the PRC for the period January 1, 2009, through December 31, 2009. In addition, the Department received timely requests from two other parties: Tianjin United Tire and Rubber International Co., Ltd. and Guizhou Tyre Co., Ltd., along with its affiliates, Guizhou Advanced Rubber Co., Ltd., and Guizhou Tyre Import and Export Corporation (collectively, Guizhou Tyre). No other party requested a review of these two parties. In accordance with section 751(a)(1) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.221(c)(1)(i), the Department published a notice initiating an administrative review of the countervailing duty order. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 75 FR 66349, 66351 (October 28, 2010). On November 30, 2010, the Department rescinded the review with respect to Guizhou Tyre, pursuant to a timely withdrawal of its request for review. *See Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Partial Rescission of Countervailing Duty Administrative Review,* 75 FR 74003 (November 30, 2010). *Rescission, in Part, of Countervailing Duty Administrative Review.*

The Department's regulations provide that the Department will rescind an administrative review if the party that requested the review withdraws its request for review within 90 days of the date of publication of the notice of initiation. *See* 19 CFR 351.213(d)(1). The above-referenced seven companies timely withdrew their requests within the 90-day deadline. Therefore, as no other party requested a review of these companies, in accordance with 19 CFR 351.213(d)(1), the Department is rescinding this administrative review of the countervailing duty order with respect to these companies.

Assessment

The Department will instruct U.S. Customs and Border Protection (CBP) to assess countervailing duties on all appropriate entries. For the seven companies listed above, countervailing duties shall be assessed at rates equal to the cash deposit or bonding rate of the estimated countervailing duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). The Department intends to issue appropriate assessment instructions directly to CBP 15 days after publication of this notice.

Notification Regarding Administrative Protective Order

This notice serves as a final reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

This notice is issued and published in accordance with 19 CFR 351.213(d)(4).

Dated: December 6, 1020.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2010–31111 Filed 12–9–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA076

Marine Mammals; File No. 15415

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

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that Scott D. Kraus, PhD, New England Aquarium Edgerton Research Laboratory, Central Wharf, Boston, MA 02110, has applied in due form for a permit to conduct research on North Atlantic right whales (*Eubalaena glacialis*).

DATES: Written, telefaxed, or e-mail comments must be received on or before January 10, 2011.

ADDRESSES: The application and related documents are available for review by selecting "Records Open for Public Comment" from the *Features* box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov,* and then selecting File No. 15415 from the list of available applications.

These documents are also available upon written request or by appointment in the following offices:

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 713–2289; fax (301) 713–0376; and

Northeast Region, NMFS, 55 Great Republic Drive, Gloucester, MA 01930; phone (978) 281–9328; fax (978) 281–9394.

Written comments on this application should be submitted to the Chief, Permits, Conservation and Education Division, at the address listed above. Comments may also be submitted by facsimile to (301) 713–0376, or by email to *NMFS.Pr1Comments@noaa.gov.* Please include the File No. in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits, Conservation and Education Division at the address listed above. The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Amy Hapeman or Kristy Beard, (301) 713–2289.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222–226).

Dr. Kraus requests a three-year scientific research permit to study North Atlantic right whales along the U.S. East Coast from New York Harbor to the Maine-Canada border. Dr. Kraus would conduct experimental trials in which a rope mimic consisting of a colored rigid pipe would be placed in the water near the travelling path of a juvenile or adult whale to determine if right whales are responsive to various color and light characteristics. Control trials would also be conducted with no rope mimic placed in an animal's path. The applicant requests to take up to 200 whales annually for the close vessel approach, photo-identification, observation, and monitoring of whales during trials. The proposed research would seek to determine whether the sensory and behavioral capabilities of right whales can be used to avoid entanglements at depth and in conditions of poor visibility.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), a draft environmental assessment (EA) has been prepared to examine whether significant environmental impacts could result from issuance of the proposed scientific research permit. The draft EA is available for review and comment simultaneous with the scientific research permit application.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of the application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: December 6, 2010.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2010–31122 Filed 12–9–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA064

Fisheries of the Exclusive Economic Zone Off Alaska; North Pacific Halibut and Sablefish Individual Fishing Quota Cost Recovery Programs

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

ACTION: Notification of standard prices and fee percentage.

SUMMARY: NMFS publishes individual fishing quota (IFQ) standard prices for the IFQ cost recovery program in the halibut and sablefish fisheries of the North Pacific. This action is intended to provide holders of halibut and sablefish IFQ permits with the 2010 standard prices and fee percentage to calculate the required payment for IFQ cost recovery fees due by January 31, 2011.

DATES: Effective December 10, 2010.

FOR FURTHER INFORMATION CONTACT: Troie Zuniga, Fee Coordinator, 907–586–7231.

SUPPLEMENTARY INFORMATION

Background

NMFS Alaska Region administers the halibut and sablefish individual fishing quota (IFQ) programs in the North Pacific. The IFQ programs are limited access systems authorized by the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and the Northern Pacific Halibut Act of 1982. Fishing under the IFQ programs began in March 1995. Regulations implementing the IFQ program are set forth at 50 CFR part 679.

In 1996, the Magnuson-Stevens Act was amended to, among other things, require the Secretary of Commerce to "collect a fee to recover the actual costs directly related to the management and enforcement of any * * * individual quota program." This requirement was further amended in 2006 to include collection of the actual costs of data collection, and to replace the reference to "individual quota program" with a more general reference to "limited access privilege program" at section 304(d)(2)(A). This section of the Magnuson-Stevens Act also specifies an upper limit on these fees, when the fees must be collected, and where the fees must be deposited.

On March 20, 2000, NMFS published regulations implementing the IFQ cost recovery program (65 FR 14919), which are set forth at § 679.45. Under the regulations, an IFQ permit holder incurs a cost recovery fee liability for every pound of IFQ halibut and IFQ sablefish that is landed on his or her IFQ permit(s). The IFQ permit holder is responsible for self-collecting the fee liability for all IFQ halibut and IFQ sablefish landings on his or her permit(s). The IFQ permit holder is also responsible for submitting a fee liability payment to NMFS on or before the due date of January 31 of the year following the year in which the IFQ landings were made. The dollar amount of the fee due is determined by multiplying the annual IFQ fee percentage (3 percent or less) by the ex-vessel value of all IFQ landings made on a permit and summing the totals of each permit (if more than one).

Standard Prices

The fee liability is based on the sum of all payments made to fishermen for the sale of the fish during the year. This includes any retro-payments (*e.g.,* bonuses, delayed partial payments, post-season payments) made to the IFQ permit holder for previously landed IFQ halibut or sablefish.

For purposes of calculating IFQ cost recovery fees, NMFS distinguishes between two types of ex-vessel value: Actual and standard. Actual ex-vessel value is the amount of all compensation, monetary or non-monetary, that an IFQ permit holder received as payment for his or her IFQ fish sold. Standard ex-vessel value is the default value on which to base fee liability calculations. IFQ permit holders have the option of using actual ex-vessel value if they can satisfactorily document it; otherwise the standard ex-vessel value is used.

Regulations at § 679.45(c)(2)(i) require the Regional Administrator to publish IFQ standard prices during the last quarter of each calendar year. These standard prices are used, along with estimates of IFQ halibut and IFQ sablefish landings, to calculate standard values. The standard prices are described in U.S. dollars per IFQ equivalent pound for IFQ halibut and IFQ sablefish landings made during the year. IFQ equivalent pound(s) is the weight (in pounds) for an IFQ landing, calculated as the round weight for sablefish and headed and gutted net weight for halibut. NMFS calculates the standard prices to closely reflect the variations in the actual ex-vessel values of IFQ halibut and IFQ sablefish landings by month and port or port-group. The standard prices for IFQ halibut and IFQ sablefish are listed in the tables that follow the next section. Data from ports are combined as necessary to protect confidentiality.

Fee Percentage

Section 304(d)(2)(B) of the Magnuson-Stevens Act specifies a maximum fee of 3 percent of the ex-vessel value of fish harvested under an IFQ Program. NMFS annually sets a fee percentage for sablefish and halibut IFQ holders that is based on the actual annual costs associated with certain management and enforcement functions, as well as the standard ex-vessel value of the catch subject to the IFQ fee for the current year. The method used by NMFS to calculate the IFQ fee percentage is described at § 679.45(d)(2)(ii).

Regulations at § 679.45(d)(3)(i) require NMFS to publish the IFQ fee percentage for the halibut and sablefish IFQ fisheries in the **Federal Register** during or before the last quarter of each year. For the 2010 sablefish and halibut IFQ fishing season, an IFQ permit holder is to use a fee liability percentage of 1.4 to calculate his or her fee for landed IFQ in pounds. The IFQ permit holder is responsible for submitting the fee liability payment to NMFS on or before January 31, 2011.

REGISTERED BUYER STANDARD EX-VESSEL PRICES BY LANDING LOCATION FOR 2010 IFQ SEASON

Landing location	Period ending	Halibut standard ex-vessel price $	Sablefish standard ex-vessel price $
CORDOVA	February 28	—	—
	March 31	—	—
	April 30	4.43	—
	May 31	4.48	3.64
	June 30	—	—
	July 31	—	—
	August 31	5.25	—
	September 30	—	—
	October 31	—	—
	November 30	—	—
DUTCH HARBOR	February 28	—	—
	March 31	—	—
	April 30	—	—
	May 31	—	—
	June 30	—	—
	July 31	—	—
	August 31	—	—
	September 30	—	—
	October 31	—	—
	November 30	—	—
HOMER	February 28	—	—
	March 31	4.59	—
	April 30	4.77	—
	May 31	4.64	—
	June 30	5.06	—
	July 31	5.24	—
	August 31	5.51	—
	September 30	5.67	—
	October 31	5.67	—
	November 30	5.67	—
KETCHIKAN	February 28	—	—
	March 31	—	—
	April 30	—	—
	May 31	—	—
	June 30	—	—
	July 31	4.93	—
	August 31	5.34	—
	September 30	—	—
	October 31	—	—
	November 30	—	—
KODIAK	February 28	—	—
	March 31	4.15	4.36
	April 30	4.32	3.78
	May 31	4.31	3.65
	June 30	4.54	3.66
	July 31	4.75	3.76
	August 31	5.06	4.01
	September 30	5.30	4.23
	October 31	5.30	4.23

REGISTERED BUYER STANDARD EX-VESSEL PRICES BY LANDING LOCATION FOR 2010 IFQ SEASON—Continued

Landing location	Period ending	Halibut standard ex-vessel price $	Sablefish standard ex-vessel price $
	November 30	5.30	4.23
PETERSBURG	February 28	—	—
	March 31	4.47	—
	April 30	4.59	—
	May 31	4.75	—
	June 30	5.00	—
	July 31	5.16	—
	August 31	5.38	—
	September 30	5.40	—
	October 31	5.40	—
	November 30	5.40	—
SEWARD	February 28	—	—
	March 31	—	—
	April 30	—	—
	May 31	—	—
	June 30	—	—
	July 31	—	—
	August 31	—	—
	September 30	—	—
	October 31	—	—
	November 30	—	—
SITKA	February 28	—	—
	March 31	—	—
	April 30	4.36	3.54
	May 31	4.61	3.59
	June 30	4.80	3.75
	July 31	—	—
	August 31	—	—
	September 30	—	—
	October 31	—	—
	November 30	—	—
YAKUTAT	February 28	—	—
	March 31	—	—
	April 30	—	—
	May 31	—	—
	June 30	—	—
	July 31	—	—
	August 31	—	—
	September 30	—	—
	October 31	—	—
	November 30	—	—

Port group	Period ending	Halibut standard ex-vessel price $	Sablefish standard ex-vessel price $
BERING SEA [1]	February 28	—	—
	March 31	—	—
	April 30	—	3.07
	May 31	4.09	3.41
	June 30	4.21	3.68
	July 31	4.50	3.80
	August 31	4.66	3.80
	September 30	4.60	3.72
	October 31	4.60	3.72
	November 30	4.60	3.72
CENTRAL GULF [2]	February 28	—	—
	March 31	4.61	4.14
	April 30	4.51	3.72
	May 31	4.39	3.66
	June 30	4.73	3.73
	July 31	4.93	3.72
	August 31	5.22	3.82
	September 30	5.40	3.99
	October 31	5.40	3.99
	November 30	5.40	3.99

REGISTERED BUYER STANDARD EX-VESSEL PRICES BY LANDING LOCATION FOR 2010 IFQ SEASON—CONTINUED

Port group	Period ending	Halibut standard ex-vessel price $	Sablefish standard ex-vessel price $
SOUTHEAST [3]	February 28	—	—
	March 31	4.76	3.72
	April 30	4.54	3.67
	May 31	4.67	3.70
	June 30	4.83	4.01
	July 31	5.04	3.90
	August 31	5.28	4.14
	September 30	5.57	4.35
	October 31	5.57	4.35
	November 30	5.57	4.35
ALL [4]	February 28	—	—
	March 31	4.65	3.75
	April 30	4.49	3.66
	May 31	4.44	3.65
	June 30	4.67	3.80
	July 31	4.82	3.77
	August 31	5.07	3.90
	September 30	5.22	4.09
	October 31	5.22	4.09
	November 30	5.22	4.09

[1] *Landing locations Within Port Group—Bering Sea:* Adak, Akutan, Akutan Bay, Atka, Bristol Bay, Chefornak, Dillingham, Captains Bay, Dutch Harbor, Egegik, Ikatan Bay, Hooper Bay, King Cove, King Salmon, Kipnuk, Mekoryuk, Naknek, Nome, Quinhagak, Savoonga, St. George, St. Lawrence, St. Paul, Togiak, Toksook Bay, Tununak, Beaver Inlet, Ugadaga Bay, Unalaska.

[2] *Landing Locations Within Port Group—Central Gulf of Alaska:* Anchor Point, Anchorage, Alitak, Chignik, Cordova, Eagle River, False Pass, West Anchor Cove, Girdwood, Chinitna Bay, Halibut Cove, Homer, Kasilof, Kenai, Kenai River, Alitak, Kodiak, Port Bailey, Nikiski, Ninilchik, Old Harbor, Palmer, Sand Point, Seldovia, Resurrection Bay, Seward, Valdez, Whittier.

[3] *Landing Locations Within Port Group—Southeast Alaska:* Angoon, Baranof Warm Springs, Craig, Edna Bay, Elfin Cove, Excursion Inlet, Gustavus, Haines, Hollis, Hoonah, Hyder, Auke Bay, Douglas, Tee Harbor, Juneau, Kake, Ketchikan, Klawock, Metlakatla, Pelican, Petersburg, Portage Bay, Port Alexander, Port Graham, Port Protection, Point Baker, Sitka, Skagway, Tenakee Springs, Thorne Bay, Wrangell, Yakutat.

[4] *Landing Locations Within Port Group—All:* For Alaska: All landing locations included in 1, 2, and 3. For California: Eureka, Fort Bragg, Other California. For Oregon: Astoria, Aurora, Lincoln City, Newport, Warrenton, Other Oregon. For Washington: Anacortes, Bellevue, Bellingham, Nagai Island, Edmonds, Everett, Granite Falls, Ilwaco, La Conner, Port Angeles, Port Orchard, Port Townsend, Ranier, Fox Island, Mercer Island, Seattle, Standwood, Other Washington. For Canada: Port Hardy, Port Edward, Prince Rupert, Vancouver, Haines Junction, Other Canada.

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

Dated: December 6, 2010.

Brian Parker,

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

[FR Doc. 2010–31123 Filed 12–9–10; 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 product and service to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: *Effective Date:* 1/3/2011.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

FOR FURTHER INFORMATION CONTACT: Barry S. Lineback, Telephone: (703) 603–7740, Fax: (703) 603–0655, or e-mail *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION:

Additions

On 10/15/2010 (75 FR 63446–63447), the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed additions to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to furnish the product and service and impact of the additions on the current or most recent contractors, the Committee has determined that the product and service listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46–48c 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 furnish the product and service to the Government.

2. The action will result in authorizing small entities to furnish the product and service 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. 46–48c) in connection with the product and service proposed for addition to the Procurement List.

End of Certification

Accordingly, the following product and service are added to the Procurement List:

Product

Yellow Vinyl Panel Marker/NSN: 8345–00–NSH–0015.
NPA: Development Workshop, Inc., Idaho Falls, ID.
Contracting Activity: Bureau of Land Management, FA–National Interagency Fire Center, Boise, ID.

Coverage: C–List for 100% of the requirement of the FA–National Interagency Fire Center as aggregated by the Bureau of Land Management.

Service

Service Type/Location: Custodial Service. FEMA Louisiana Recovery Office, 1500 Main Street, Baton Rouge, LA.
NPA: Goodworks, Inc., Metairie, LA.
Contracting Activity: Dept of Homeland Security, Federal Emergency Management Agency, Baton Rouge, LA.

Deletions

On 10/15/2010 (75 FR 63446–63447), the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed deletions from the Procurement List.

After consideration of the relevant matter presented, the Committee has determined that the products listed below are no longer suitable for procurement by the Federal Government under 41 U.S.C. 46–48c 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 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. 46–48c) in connection with the products deleted from the Procurement List.

End of Certification

Accordingly, the following products are deleted from the Procurement List:

Products

Hanger, Magnetic (Picture)

NSN: 5340–00–916–4207–3x6″.
NSN: 5340–00–916–4208–6x7″.
NSN: 5340–00–916–4209–6x6″.
NPA: Knox County Association for Retarded Citizens, Knoxville, TN.
Contracting Activity: GSA/FAS Southwest Supply Center (QSDAC), Fort Worth, TX.

Blanket, Bed

NSN: 7210–00–177–4986.
NPA: Chautauqua County Chapter, NYSARC, Jamestown, NY.
Contracting Activity: GSA/FAS Southwest Supply Center (QSDAC), Fort Worth, TX.

Toner, Cartridges, New

NSN: 7510–01–417–1222.
NPA: Alabama Industries for the Blind, Talladega, AL.
Contracting Activity: GSA/FSS OFC SUP CTR—Paper Products, New York, NY.

Barry S. Lineback,

Director, Business Operations.

[FR Doc. 2010–31072 Filed 12–9–10; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Additions and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed Additions to and Deletions from the Procurement List.

SUMMARY: The Committee is proposing to add products to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities and to delete services previously provided by such agencies.

Comments Must Be Received on or Before: 1/10/2011.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

For Further Information or to Submit Comments Contact: Barry S. Lineback, Telephone: (703) 603–7740, Fax: (703) 603–0655, or e-mail *CMTEFedReg@AbilityOne.gov*.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C 47(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Additions

If the Committee approves the proposed additions, the entities of the Federal Government identified in this notice will be required to procure the products listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

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. If approved, the action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the products to the Government.

2. If approved, the action will result in authorizing small entities to furnish the products 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. 46–48c) in connection with the products proposed for addition to the Procurement List.

Comments on this certification are invited. Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

End of Certification

The following products are proposed for addition to Procurement List for production by the nonprofit agencies listed:

Products

Strap Webbing

NSN: 5340–01–043–5409.
NSN: 5340–01–043–8475.
NPA: Mississippi Industries for the Blind, Jackson, MS.
Contracting Activity: Defense Logistics Agency Troop Support, Philadelphia, PA.
Coverage: C-List for 100% of the requirement of the Department of Defense, as aggregated by the Defense Logistics Agency Troop Support, Philadelphia, PA.

Wind Jacket—Layer IV, ECWCS Gen III, Universal Camouflage

NSN: 8415–01–546–8657—Size X-Small-Short.
NSN: 8415–01–546–8667—Size X-Small-Regular.
NSN: 8415–01–546–8745—Size Small-Short.
NSN: 8415–01–538–6057—Size Small-Regular.
NSN: 8415–01–546–8758—Size Small-Long.
NSN: 8415–01–538–6067—Size Medium-Regular.
NSN: 8415–01–546–8809—Size Medium-Long.
NSN: 8415–01–538–6074—Size Large-Regular.
NSN: 8415–01–538–6080—Size Large-Long.
NSN: 8415–01–538–6681—Size X-Large-Regular.
NSN: 8415–01–546–8828—Size XX-Large-Regular.
NSN: 8415–01–546–8829—Size XX-Large-Long.
NSN: 8415–01–546–8834—Size XX-Large-XLong.
NPA: Blind Industries & Services of Maryland, Baltimore, MD.
Contracting Activity: Defense Logistics Agency Troop Support, Philadelphia, PA.
Coverage: C-List for 50% of the requirement of the Department of Defense, as aggregated by the Defense Logistics Agency Troop Support, Philadelphia, PA.

Deletions

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. If approved, the action will not result in additional reporting, recordkeeping or other compliance requirements for small entities.

2. If approved, the action may 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. 46–48c) in connection with the services proposed for deletion from the Procurement List.

End of Certification

The following services are proposed for deletion from the Procurement List:

Services

Service Type/Location: Audio/Visual Duplication Service. Federal Emergency Management Agency: National Emergency Training Center, 16825 South Seton Avenue, Emmitsburg, MD.
NPA: ForSight Vision, York, PA
Contracting Activity: Federal Emergency Management Agency, NETC Acquisition Section, Washington, DC.
Service Type/Location: Custodial Service. Mauna Loa Observatory: Hilo Office, 1437 Kilauea Ave., #102, Hilo, HI.
NPA: The ARC of Hilo, Hilo, HI.
Contracting Activity: Department of Commerce, Washington, DC.

Barry S. Lineback,

Director, Business Operations.

[FR Doc. 2010–31073 Filed 12–9–10; 8:45 am]

BILLING CODE 6353–01–P

DEPARTMENT OF ENERGY

[OE Docket No. EA–306–A]

Application To Export Electric Energy; MAG Energy Solutions, Inc.

AGENCY: Office of Electricity Delivery and Energy Reliability, DOE.

ACTION: Notice of Application.

SUMMARY: MAG Energy Solutions, Inc. (MAG E.S.) has applied to renew its authority to transmit electric energy from the United States to Canada pursuant to section 202(e) of the Federal Power Act (FPA).

DATES: Comments, protests, or requests to intervene must be submitted to DOE and received on or before January 10, 2011.

ADDRESSES: Comments, protests, or requests to intervene should be addressed to: Christopher Lawrence, Office of Electricity Delivery and Energy Reliability, Mail Code: OE–20, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585–0350. Because of delays in handling conventional mail, it is recommended that documents be transmitted by overnight mail, by electronic mail to *Christopher.Lawrence@hq.doe.gov,* or by facsimile to 202–586–8008.

FOR FURTHER INFORMATION CONTACT: Christopher Lawrence (Program Office) 202–586–5260.

SUPPLEMENTARY INFORMATION: Exports of electricity from the United States to a foreign country are regulated by the Department of Energy (DOE) pursuant to sections 301(b) and 402(f) of the Department of Energy Organization Act (42 U.S.C. 7151(b), 7172(f)) and require authorization under section 202(e) of the FPA (16 U.S.C. 824a(e)).

On April 6, 2006 the Department of Energy (DOE) issued Order No. EA–306, which authorized MAG E.S. to transmit electric energy from the United States to Canada for a five-year term as a power marketer using existing international transmission facilities. That Order will expire on April 6, 2011. On December 1, 2010, MAG E.S. filed an application with DOE for renewal of the export authority contained in Order No. EA–306 for an additional five-year term.

The electric energy that MAG E.S. proposes to export to Canada would be surplus energy purchased from electric utilities, Federal power marketing agencies, and other entities within the United States. The existing international transmission facilities to be utilized by MAG E.S. have previously been authorized by Presidential permits issued pursuant to Executive Order 10485, as amended, and are appropriate for open access transmission by third parties.

Procedural Matters: Any person desiring to become a party to these proceedings or to be heard by filing comments or protests to this application should file a petition to intervene, comment, or protest at the address provided above in accordance with §§ 385.211 or 385.214 of the Federal Energy Regulatory Commission's Rules of Practice and Procedures (18 CFR 385.211, 385.214). Fifteen copies of each petition and protest should be filed with DOE and must be received on or before the date listed above.

Comments on the MAG E.S. application to export electric energy to Canada should be clearly marked with Docket No. EA–306–A. Additional copies (one each) are to be filed directly with Martin Gauthier, Director, MAG Energy Solutions, Inc., 1010 Sherbrooke Quest, Suite 800, Montreal, Quebec, Canada H3A 2R7; *AND* Carol A. Smoots, Esq., Perkins Coie LLP, 607 14th Street, NW., Suite 800, Washington, DC 20005; *AND* Nidhi J. Thakar, Esq., Perkins Coie LLP, 607 14th Street, NW., Suite 800, Washington, DC 20005. A final decision will be made on this application after the environmental impacts have been evaluated pursuant to DOE's National Environmental Policy Act Implementing Procedures (10 CFR Part 1021) and after a determination is made by DOE that the proposed action will not adversely impact on the reliability of the U.S. electric power supply system.

Copies of this application will be made available, upon request, for public inspection and copying at the address provided above, by accessing the program Web site at *http://www.oe.energy.gov/permits_pending.htm,* or by e-mailing Odessa Hopkins at *Odessa.Hopkins@hq.doe.gov.*

Issued in Washington, DC, on December 6, 2010.

Anthony J. Como,

Director, Permitting and Siting Office of Electricity Delivery and Energy Reliability.

[FR Doc. 2010–31059 Filed 12–9–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

[Case No. RF–017]

Energy Conservation Program for Consumer Products: Publication of the Petition for Waiver and Notice of Granting the Application for Interim Waiver of Electrolux From the Department of Energy Residential Refrigerator and Refrigerator-Freezer Test Procedure

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

ACTION: Notice of Petition for Waiver, Notice of Granting Application for Interim Waiver, and Request for Public Comments.

SUMMARY: This notice announces receipt of and publishes the Electrolux Home Products, Inc. (Electrolux) petition for waiver (hereafter, "petition") from specified portions of the U.S. Department of Energy (DOE) test procedure for determining the energy consumption of electric refrigerators and refrigerator-freezers. The waiver request pertains to Electrolux's product

lines that utilize a control logic that changes the wattage of the anti-sweat heaters based upon the ambient relative humidity conditions to prevent condensation. The existing test procedure does not take humidity or adaptive control technology into account. Therefore, Electrolux has suggested an alternate test procedure that takes adaptive control technology into account when measuring energy consumption. DOE solicits comments, data, and information concerning Electrolux's petition and the suggested alternate test procedure. DOE also publishes notice of the grant of an interim waiver to Electrolux.

DATES: DOE will accept comments, data, and information with respect to the Electrolux Petition until, but no later than January 10, 2011.

ADDRESSES: You may submit comments, identified by case number "RF–017," by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: AS_Waiver_Requests@ee.doe.gov.* Include the case number [Case No. RF–017] in the subject line of the message.
- *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J/1000 Independence Avenue, SW., Washington, DC 20585–0121. *Telephone:* (202) 586–2945. Please submit one signed original paper copy.
- *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza, SW., Suite 600, Washington, DC 20024. Please submit one signed original paper copy.

Docket: For access to the docket to review the background documents relevant to this matter, you may visit the U.S. Department of Energy, 950 L'Enfant Plaza, SW., (Resource Room of the Building Technologies Program), Washington, DC, 20024; (202) 586–2945, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Available documents include the following items: (1) This notice; (2) public comments received; (3) the petition for waiver and application for interim waiver; and (4) prior DOE rulemakings regarding similar refrigerator-freezers. Please call Ms. Brenda Edwards at the above telephone number for additional information regarding visiting the Resource Room.

FOR FURTHER INFORMATION CONTACT: Dr. Michael G. Raymond, U.S. Department of Energy, Building Technologies Program, Mail Stop EE–2J, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585–0121. *Telephone:* (202) 586–9611. *E-mail: Michael.Raymond@ee.doe.gov.*

Ms. Jennifer Tiedeman, U.S. Department of Energy, Office of the General Counsel, Mail Stop GC–71, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585–0103. *Telephone:* (202) 287–6111. *E-mail: Jennifer.Tiedeman@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Background and Authority

Title III, Part B of the Energy Policy and Conservation Act of 1975 ("EPCA"), Public Law 94–163 (42 U.S.C. 6291–6309, as codified), established the Energy Conservation Program for "Consumer Products Other Than Automobiles," a program covering most major household appliances, which includes the refrigerator-freezers that are the focus of this notice.[1] Part B includes definitions, test procedures, labeling provisions, energy conservation standards, and the authority to require information and reports from manufacturers. Further, Part B authorizes the Secretary of Energy to prescribe test procedures that are reasonably designed to produce results which measure energy efficiency, energy use, or estimated operating costs, and that are not unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) The test procedure for residential refrigerators and refrigerator-freezers is contained in 10 CFR part 430, subpart B, appendix A1.

The regulations set forth in 10 CFR 430.27 contain provisions that enable a person to seek a waiver from the test procedure requirements for covered consumer products. A waiver will be granted by the Assistant Secretary for Energy Efficiency and Renewable Energy (the Assistant Secretary) if it is determined that the basic model for which the petition for waiver was submitted contains one or more design characteristics that prevents testing of the basic model according to the prescribed test procedures, or if the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data. 10 CFR part 430.27(l). Petitioners must include in their petition any alternate test procedures known to the petitioner to evaluate the basic model in a manner representative of its energy consumption. 10 CFR 430.27(b)(1)(iii). The Assistant Secretary may grant the waiver subject to conditions, including adherence to alternate test procedures. 10 CFR 430.27(l). Waivers remain in effect pursuant to the provisions of 10 CFR 430.27(m).

The waiver process also allows the Assistant Secretary to grant an interim waiver from test procedure requirements to manufacturers that have petitioned DOE for a waiver of such prescribed test procedures. 10 CFR 430.27(a)(2); 430.27(g). An interim waiver remains in effect for a period of 180 days or until DOE issues its determination on the petition for waiver, whichever is sooner, and may be extended for an additional 180 days, if necessary. 10 CFR 430.27(h).

II. Petition for Waiver of Test Procedure

On September 15, 2010, Electrolux filed a petition for waiver from the test procedure applicable to residential electric refrigerators and refrigerator-freezers set forth in 10 CFR Part 430, Subpart B, Appendix A1. Electrolux is designing new refrigerator-freezers that contain variable anti-sweat heater controls that detect a broad range of temperature and humidity conditions, and respond by activating adaptive heaters, as needed, to evaporate excess moisture. According to the petitioner, Electrolux's technology is similar to that used by General Electric Company (GE) and Whirlpool Corporation (Whirlpool) for refrigerator-freezers which were the subject of petitions for waiver published April 17, 2007 (72 FR 19189) and July 10, 2008 (73 FR 39684), respectively. GE's waiver was granted on February 27, 2008. 73 FR 10425. Whirlpool's waiver was granted on May 5, 2009. 74 FR 20695. Electrolux itself filed a petition for waiver from the test procedure applicable to residential refrigerator-freezers for its similar models in November 2008, which was published in the **Federal Register** on June 4, 2009. 74 FR 26853. DOE granted Electrolux's November 2008 petition for waiver on December 15, 2009. 74 FR 66338. Subsequently, DOE granted similar waivers for additional Electrolux refrigerator-freezers on March 11, 2010 (75 FR 11530) and April 29, 2010 (75 FR 22584). Most recently, DOE granted similar waivers to Samsung on March 18, 2010 (75 FR 13120) and August 3, 2010 (75 FR 45623); to Haier on June 7, 2010 (75 FR 32175); and to LG on August 19, 2010 (75 FR 51264).

In its September 2010 petition, as in its three earlier petitions, Electrolux seeks a waiver from the existing DOE test procedure applicable to refrigerators and refrigerator-freezers under 10 CFR part 430 because the existing test procedure takes neither ambient

[1] For editorial reasons, upon codification in the U.S. Code, Part B was re-designated Part A.

humidity nor adaptive technology into account. Therefore, Electrolux states that the test procedure does not accurately measure the energy consumption of Electrolux's new refrigerator-freezers that feature variable anti-sweat heater controls and adaptive heaters. Consequently, Electrolux has submitted to DOE for approval an alternate test procedure that would allow it to calculate the energy consumption of this new product line correctly. Electrolux's alternate test procedure is the same in all relevant particulars as that prescribed for GE, Whirlpool, Samsung, Haier, LG and Electrolux itself for refrigerator-freezers that are equipped with the same type of technology. The alternate test procedure applicable to these products simulates the energy used by the adaptive heaters in a typical consumer household, as explained, for example, in the Decision and Order that DOE published in the **Federal Register** on February 27, 2008 in response to GE's petition for waiver described above. 73 FR 10425. DOE believes that it is in the public interest to have similar products tested and rated for energy consumption on a comparable basis.

III. Application for Interim Waiver

Electrolux also requests an interim waiver from the existing DOE test procedure. Under 10 CFR 430.27(b)(2), each application for interim waiver "shall demonstrate likely success of the Petition for Waiver and shall address what economic hardship and/or competitive disadvantage is likely to result absent a favorable determination on the Application for Interim Waiver." An interim waiver may be granted if it is determined that the applicant will experience economic hardship if the application for interim waiver is denied; if it appears likely that the petition for waiver will be granted; and/or the Assistant Secretary determines that it would be desirable for public policy reasons to grant immediate relief pending a determination of the petition for waiver. 10 CFR 430.27(g).

DOE has determined that Electrolux's application for interim waiver does not provide sufficient market, equipment price, shipments and other manufacturer impact information to permit DOE to evaluate the economic hardship Electrolux might experience absent a favorable determination on its application for interim waiver. DOE understands, however, that absent an interim waiver, Electrolux's products would not otherwise be tested and rated for energy consumption on a comparable basis as equivalent GE, LG, Samsung, Haier and Whirlpool products for which DOE previously granted waivers, and Electrolux would be required to represent a higher energy consumption for essentially the same product. Therefore, it appears likely that Electrolux's petition for waiver will be granted. Moreover, it is desirable for public policy reasons to grant Electrolux immediate relief pending a determination on the petition for waiver since it is in the public interest to have similar products tested and rated for energy consumption on a comparable basis. As stated above, DOE has already granted similar waivers because the test procedure does not accurately represent the energy consumption of refrigerator-freezers containing relative humidity sensors and adaptive control anti-sweat heaters. The rationale for granting these waivers is equally applicable to Electrolux, which has products containing similar relative humidity sensors and anti-sweat heaters.

For the reasons stated above, DOE grants Electrolux's application for interim waiver from testing of its refrigerator-freezer product line containing relative humidity sensors and adaptive control anti-sweat heaters. Therefore, *it is ordered that:*

The application for interim waiver filed by Electrolux is hereby granted for Electrolux's refrigerator-freezer product line containing relative humidity sensors and adaptive control anti-sweat heaters, subject to the specifications and conditions below.

1. Electrolux shall not be required to test or rate its refrigerator-freezer product line containing relative humidity sensors and adaptive control anti-sweat heaters on the basis of the test procedure under 10 CFR part 430 subpart B, appendix A1.

2. Electrolux shall be required to test and rate its refrigerator-freezer product line containing relative humidity sensors and adaptive control anti-sweat heaters according to the alternate test procedure as set forth in section IV, "Alternate test procedure."

The interim waiver applies to the following basic model groups: EI27BS* * * * FGUN26* * * * CFD26* * *

DOE makes decisions on waivers and interim waivers for only those models specifically set out in the petition, not future models that may or may not be manufactured by the petitioner. Electrolux may submit a new or amended petition for waiver and request for grant of interim waiver, as appropriate, for additional models of refrigerator-freezers for which it seeks a waiver from the DOE test procedure. In addition, DOE notes that grant of an interim waiver or waiver does not release a petitioner from the certification requirements set forth at 10 CFR 430.62.

Further, this interim waiver is conditioned upon the presumed validity of statements, representations, and documents provided by the petitioner. DOE may revoke or modify this interim waiver at any time upon a determination that the factual basis underlying the petition for waiver is incorrect, or upon a determination that the results from the alternate test procedure are unrepresentative of the basic models' true energy consumption characteristics.

IV. Alternate Test Procedure

Electrolux's new line of refrigerator-freezers contains sensors that detect ambient humidity and interact with controls that vary the effective wattage of anti-sweat heaters to evaporate excess moisture. The existing DOE test procedure cannot be used to calculate the energy consumption of these features. The variable anti-sweat heater contribution to the refrigerator-freezer's energy consumption is entirely dependent on the ambient humidity of the test chamber, which the DOE test procedure does not specify. The energy consumption of the anti-sweat heaters will be modeled and added to the energy consumption measured when the anti-sweat heaters are disabled. The anti-sweat contribution to the product's total energy consumption will be calculated using the same methodology that was set forth in the GE petition. The objective of this approach is to simulate the average energy used by the adaptive anti-sweat heaters as activated in refrigerator-freezers of typical consumer households across the U.S.

To determine the conditions in a typical consumer household, GE compiled historical data on the monthly average outdoor temperatures and humidities for the top 50 metropolitan areas of the U.S. over approximately the last 30 years. In light of the similarity of the technologies at issue to the aforementioned GE products, Electrolux is using the same data compiled by GE for its determination of the anti-sweat heater energy use. Like GE, LG, Samsung, Haier and Whirlpool, Electrolux includes in its test procedure a "system-loss factor" to calculate system losses attributed to operating anti-sweat heaters, controls, and related components.

For the duration of the interim waiver, Electrolux shall be required to test the products listed above according to the test procedures for residential electric refrigerator-freezers prescribed

by DOE at 10 CFR part 430, subpart B, appendix A1, except that, for the Electrolux products listed above only:

(A) The following definition is added at the end of Section 1:

1.13 "Variable anti-sweat heater control" means an anti-sweat heater where power supplied to the device is determined by an operating condition variable(s) and/or ambient condition variable(s).

(B) Section 2.2 is revised to read as follows:

2.2 Operational conditions. The electric refrigerator or electric refrigerator-freezer shall be installed and its operating conditions maintained in accordance with HRF–1–1979, section 7.2 through section 7.4.3.3. except that the vertical ambient temperature gradient at locations 10 inches (25.4 cm) out from the centers of the two sides of the unit being tested is to be maintained during the test. Unless shields or baffles obstruct the area, the gradient is to be maintained from 2 inches (5.1 cm) above the floor or supporting platform to a height one foot (30.5 cm) above the unit under test. Defrost controls are to be operative. The anti-sweat heater switch is to be "off" during one test and "on" during the second test. In the case of an electric refrigerator or refrigerator-freezer equipped with variable anti-sweat heater control, the "on" test will be the result of the calculation described in 6.2.3. Other exceptions are noted in 2.3, 2.4, and 5.1 below.

(C) New section 6.2.3 is inserted after section 6.2.2.2.

6.2.3 Variable anti-sweat heater control test. The energy consumption of an electric refrigerator or refrigerator-freezer with a variable anti-sweat heater control in the "on" position (E_{on}), expressed in kilowatt-hours per day, shall be calculated equivalent to:

E_{ON} = E + (Correction Factor)

Where E is determined by 6.2.1.1, 6.2.1.2, 6.2.2.1, or 6.2.2.2, whichever is appropriate, with the anti-sweat heater switch in the "off" position.

Correction Factor = (Anti-sweat Heater Power × System-loss Factor) × (24 hrs/1 day) × (1 kW/1000 W)

Where:

Anti-sweat Heater Power = A1 * (Heater Watts at 5%RH)
+ A2 * (Heater Watts at 15%RH)
+ A3 * (Heater Watts at 25%RH)
+ A4 * (Heater Watts at 35%RH)
+ A5 * (Heater Watts at 45%RH)
+ A6 * (Heater Watts at 55%RH)
+ A7 * (Heater Watts at 65%RH)
+ A8 * (Heater Watts at 75%RH)
+ A9 * (Heater Watts at 85%RH)
+ A10 * (Heater Watts at 95%RH)

Where A1–A10 are obtained from the following table:

A1 = 0.034	A6 = 0.119.
A2 = 0.211	A7 = 0.069.
A3 = 0.204	A8 = 0.047.
A4 = 0.166	A9 = 0.008.
A5 = 0.126	A10 = 0.015.

Heater Watts at a specific relative humidity = the nominal watts used by all heaters at that specific relative humidity, 72°F ambient, and DOE reference temperatures of fresh food (FF) average temperature of 45 °F and freezer (FZ) average temperature of 5 °F.

System-loss Factor = 1.3

V. Summary and Request for Comments

Through today's notice, DOE grants Electrolux an interim waiver from the specified portions of the test procedure applicable to Electrolux's new line of refrigerator-freezers with variable anti-sweat heater controls and adaptive heaters and announces receipt of Electrolux's petition for waiver from those same portions of the test procedure. DOE publishes Electrolux's petition for waiver in its entirety pursuant to 10 CFR 430.27(b)(1)(iv). The petition contains no confidential information. The petition includes a suggested alternate test procedure and calculation methodology to determine the energy consumption of Electrolux's specified refrigerator-freezers with adaptive anti-sweat heaters. Electrolux is required to follow this alternate procedure as a condition of its interim waiver, and DOE is considering including this alternate procedure in its subsequent Decision and Order.

DOE solicits comments from interested parties on all aspects of the petition, including the suggested alternate test procedure and calculation methodology. Pursuant to 10 CFR 430.27(b)(1)(iv), any person submitting written comments to DOE must also send a copy of such comments to the petitioner. The contact information for the petitioner is: Mr. Jean-Cyril Walker, Keller and Heckman, LLP, 1001 G Street, NW., Washington, DC 20001. *Telephone:* (202) 434–4181. *E-mail: millar@khlaw.com.* All submissions received must include the agency name and case number for this proceeding. Submit electronic comments in WordPerfect, Microsoft Word, Portable Document Format (PDF), or text (American Standard Code for Information Interchange (ASCII)) file format and avoid the use of special characters or any form of encryption. Wherever possible, include the electronic signature of the author. DOE does not accept telefacsimiles (faxes).

According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit two copies to DOE: one copy of the document including all the information believed to be confidential, and one copy of the document with the information believed to be confidential deleted. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Issued in Washington, DC, on December 3, 2010.

Cathy Zoi,

Assistant Secretary, Energy Efficiency and Renewable Energy.

September 15, 2010

Via Overnight Delivery

The Honorable Catherine Zoi

Assistant Secretary

Office of Energy Efficiency and Renewable Energy

U.S. Department of Energy

Mail Station EE–10

Forrestal Building,

1000 Independence Avenue, SW., Washington, DC 20585–0121

Re: Petition for Waiver and Application for Interim Waiver from the Department of Energy Residential Refrigerator and Refrigerator-Freezer Test Procedures by Electrolux Home Products, Inc.

Dear Secretary Zoi:

On behalf of our client, Electrolux Home Products, Inc. ("Electrolux"), we respectfully submit this Petition for Waiver and Application for Interim Waiver requesting exemption by the Department of Energy from certain parts of the test procedure for determining refrigerator-freezer energy consumption under 10 CFR § 430.27. The requested waiver will allow Electrolux to test its refrigerator-freezers to the amended procedure set out by this Petition.

This Petition for Waiver contains no confidential business information and may be released pursuant to Freedom of Information Act requests.

I. Petition for Waiver

Electrolux seeks the Department's approval of this proposed amendment to the refrigerator-freezer test procedure to be assured of properly calculating the energy consumption and properly labeling its new refrigerator-freezers. On February 27, 2008 and May 5, 2009, the Department granted Petitions for Waiver filed respectively by General Electric Corporation ("GE") and Whirlpool Corporation ("Whirlpool") to establish a new methodology to calculate the energy consumption of a refrigerator-

freezer when such a product contains adaptive anti-sweat heaters.[2]

Electrolux has developed its own adaptive anti-sweat system that uses a humidity sensor to operate the anti-sweat heaters. On November 6, 2008, Electrolux filed a Petition for Waiver and Application for Interim Waiver from the test procedure applicable to residential electric refrigerators and refrigerator-freezers. Having determined that Electrolux is seeking a waiver similar to the one granted to GE, on December 15, 2009, the Department granted Electrolux a Waiver.[3] Since then, the Department has granted Electrolux two other Waivers from the residential refrigerator and refrigerator-freezer test procedures for additional basic models featuring identical adaptive anti-sweat technology.[4]

Department regulations make clear that once a waiver has been granted, the Department must take steps to incorporate the new procedure and eliminate the need for continuing waivers:

Within one year of the granting of any waiver, the Department of Energy will publish in the **Federal Register** a notice of proposed rulemaking to amend its regulations so as to eliminate any need for the continuation of such waiver. As soon thereafter as practicable, the Department of Energy will publish in the **Federal Register** a final rule. Such waiver will terminate on the effective date of such final rule.[5]

In the interim, however, Electrolux is developing and planning to shortly introduce into the marketplace new models that use the identical adaptive anti-sweat system addressed by the December 15, 2009, March 11, 2010, and April 29, 2010 Waivers granted to Electrolux by the Department. Accordingly, Electrolux is filing this Petition for Waiver and Application for Interim Waiver to address these new models.

The Department's regulations provide that the Assistant Secretary will grant a petition for waiver upon "determination that the basic model for which the waiver was requested contains a design characteristic which either prevents testing of the basic model according to the prescribed test procedures, or the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data."[6]

Electrolux respectfully submits that sufficient grounds exist for the Assistant Secretary to grant this Petition on both points. First, the refrigerator energy test procedure does not allow the energy used by Electrolux's new refrigerator to be accurately calculated. The new refrigerator contains adaptive anti-sweat heaters (i.e., anti-sweat heaters that respond to humidity conditions found in consumers' homes). Since the test conditions specified by the test procedure neither define required humidity conditions nor otherwise take ambient humidity conditions into account in calculating energy consumption, the adaptive feature of Electrolux's new refrigerator models cannot be properly tested.

Second, testing Electrolux's new refrigerator models according to the test procedure would provide results that do not accurately measure the energy used by the new refrigerator.

A. The Refrigerator Energy Test Procedure

The test procedure for calculating energy consumption specifies that the test chamber must be maintained at 90 °Fahrenheit ("F").[7] This ambient temperature is not typical of conditions in most consumers' homes. Rather, it is intended to simulate the heat load of a refrigerator in a 70 °F ambient with typical usage by the consumer. But the test procedure does not specify test chamber humidity conditions. Sweat occurs on refrigerators when specific areas on the unit are below the local dew point. Higher relative humidity levels result in an increase of the dew point. Sweat has been addressed by installing anti-sweat heaters on mullions and other locations where sweat accumulates. Previous anti-sweat heaters operated at a fixed amount of power and turned on or off regardless of the humidity or amount of sweat on the unit.

B. Electrolux's Proposed Modifications

The circumstances of this Petition are similar to those in the Department's earlier decisions granting waiver petitions, including the 2001 Waiver granted in In the Matter of Electrolux Home Appliances.[8] The test procedure at issue in Electrolux's 2001 waiver request was originally developed when simple mechanical defrost timers were the norm. Accordingly, Electrolux sought a test procedure waiver to accommodate its advanced defrost timer. The Assistant Secretary, in granting the Waiver, acknowledged the role of technology advances in evaluating the need for test procedure waivers. With this current Petition, Electrolux again seeks to change how it tests its new models to take into account advances in sensing technology, i.e., sensors that detect temperature and humidity conditions and interact with controls to vary the effective wattage of anti-sweat heaters to evaporate excess sweat.

The Electrolux models, with the anti-sweat technology, subject to this Petition are:

EI27BS * * *
FGUN26 * * *
CFD26 * * *

As with the models covered by the prior petitions, Electrolux proposes to run the energy-consumption test with the anti-sweat heater switch in the "off" position and then, because the test chamber is not humidity-controlled, to add to that result the kilowatt hours per day derived by calculating the energy used when the anti-sweat heater is in the "on" position. This contribution will be calculated by the same method that was proposed by GE and Whirlpool in their Petitions for Waiver,[9] as well as by Electrolux in its earlier Petitions. The objective of the proposed approach is to simulate the average energy used by the adaptive anti-sweat heaters as activated in typical consumer households across the United States.

In formulating its Petition, GE conducted research to determine the

[2] Decision and Order Granting a Waiver to the General Electric Company From the Department of Energy Residential Refrigerator and Refrigerator-Freezer Test Procedure, 73 Fed. Reg. 10425; Decision and Order Granting a Waiver to Whirlpool Corporation From the Department of Energy Residential Refrigerator and Refrigerator-Freezer Test Procedure, 74 Fed. Reg. 20695.

[3] Decision and Order Granting a Waiver to Electrolux Home Products, Inc. From the Department of Energy Residential Refrigerator and Refrigerator-Freezer Test Procedure, 74 Fed. Reg. 66338 (December 15, 2009).

[4] Decision and Order Granting a Waiver to Electrolux Home Products, Inc. From the Department of Energy Residential Refrigerator and Refrigerator-Freezer Test Procedure, 75 Fed. Reg. 11530 (March 11, 2010); Decision and Order Granting a Waiver to Electrolux Home Products, Inc. From the Department of Energy Residential Refrigerator and Refrigerator-Freezer Test Procedure, 75 Fed. Reg. 22584 (April 29, 2010).

[5] 10 CFR § 430.27(m).

[6] 10 CFR § 430.27(l).

[7] 10 CFR Part 430, Subpart B, App. A1.

[8] Granting of the Application for Interim Waiver and Publishing of the Petition for Waiver of Electrolux Home Products from the DOE Refrigerator and Refrigerator-Freezer Test Procedure (Case No. RF–005), 66 Fed. Reg. 40,689 (Aug. 3, 2001).

[9] Publication of the Petition for Waiver of General Electric Company From the Department of Energy Refrigerator and Refrigerator/Freezer Test Procedures, 72 Fed. Reg. 19,189 (Apr. 17, 2007); Publication of the Petition for Waiver of Whirlpool Corporation From the Department of Energy Refrigerator and Refrigerator/Freezer Test Procedures, 73 Fed. Reg. 39,684 (July 10, 2008).

average humidity level experienced across the United States. The result of this research was that GE was able to determine the probability that any U.S. household would experience certain humidity conditions during any month of the year. This data was consolidated into 10 bands each representing a 10% range of relative humidity. In submitting this Petition, Electrolux is confirming the validity of using such bands to represent the average humidity experienced across the United States and will adopt the same population weighting as proposed by GE. The bands proposed by GE are as follows:

	% Relative humidity	Probability (percent)	Constant designation
1	0–10	3.4	A1
2	10–20	21.1	A2
3	20–30	20.4	A3
4	30–40	16.6	A4
5	40–50	12.6	A5
6	50–60	11.9	A6
7	60–70	6.9	A7
8	70–60	4.7	A8
9	80–90	0.8	A9
10	90–100	1.5	A10

Since system losses are involved with operating anti-sweat heaters, Electrolux proposes to include in the calculation a factor to account for such energy. This additional energy includes the electrical energy required to operate the anti-sweat heater control and related components, and the additional energy required to increase compressor run time to remove heat introduced into the refrigerator compartments by the anti-sweat heater. Based on Electrolux's experience, this "System-loss Factor" is 1.3. Simply stated, the Correction Factor that Electrolux proposes to add to the energy-consumption test results obtained with the anti-sweat heater switch in the "off" position is calculated as follows:

Correction Factor = (Anti-sweat Heater Power × System-loss Factor) × (24 hours/1 day) × (1 kW/1000 W)

Continue by calculating the national average power in watts used by the anti-sweat heaters. This is done by totaling the product of constants A1–A10 multiplied by the respective heater watts used by a refrigerator operating in the median percent relative humidity for that band and the following standard refrigerator conditions:

- Ambient temperature of 72 °F;
- Fresh food (FF) average temperature of 45 °F; and
- Freezer (FZ) average temperature of 5 °F.

Anti-sweat Heater Power = A1 * (Heater Watts at 5% RH) + A2 * (Heater Watts at 15% RH) + A3 * (Heater Watts at 25% RH) + A4 * (Heater Watts at 35% RH) + A5 * (Heater Watts at 45% RH) + A6 * (Heater Watts at 55% RH) + A7 * (Heater Watts at 65% RH) + A8 * (Heater Watts at 75% RH) + A9 * (Heater Watts at 85% RH) + A10 * (Heater Watts at 95% RH)

As explained above, bands A1–A10 were selected as representative of humidity conditions in all U.S. households. Utilizing such weighed bands will allow the calculation of the national average energy consumption for each product.

Based on the above, Electrolux proposes to test its new models as if the test procedure were modified to calculate the energy of the unit with the anti-sweat heaters in the on position as equal to the energy of the unit tested with the anti-sweat heaters in the off position plus the Anti-Sweat Heater Power times the System Loss Factor (expressed in KWH/YR).

II. Application for Interim Waiver

Pursuant to Department regulations, the Assistant Secretary will grant an Interim Waiver "if it is determined that the applicant will experience economic hardship if the Application for Interim Waiver is denied, if it appears likely that the Petition for Waiver will be granted, and/or the Assistant Secretary determines that it would be desirable for public policy reasons to grant immediate relief pending a determination on the Petition for Waiver." [10]

The DOE letter granting the Electrolux Interim Waiver recognized that:

* * * public policy would favor granting Electrolux an Interim Waiver, pending determination of the Petition for Waiver. On February 27, 2008, DOE granted the General Electric Company ("GE") a waiver from the refrigerator-freezer test procedure because it takes neither ambient humidity nor adaptive technology into account. 73 FR 10425. The test procedure would not accurately represent the energy consumption of refrigerator-freezers containing relative humidity sensors and adaptive control anti-sweat heaters. This argument is equally applicable to Electrolux, which has products containing similar relative humidity sensors and anti-sweat heaters. Electrolux is seeking a very similar waiver to the one DOE granted to GE, with the same alternate test procedure, and it is very likely Electrolux's Petition for Waiver will be granted.

As Electrolux noted in its November 6, 2008, July 13, 2009, and December 4, 2009 Petitions for Waiver and Applications for Interim Waiver, the Company could have designed its adaptive anti-sweat system so that the anti-sweat heaters showed no impact during energy testing. However, like GE and Whirlpool Corporation, Electrolux is following the intent of the regulations to more accurately represent the energy consumed by the new refrigerators when used in the home.

In addition to more fairly and accurately representing the actual energy usage of appliances equipped with this technology, anti-sweat heaters are now a well-recognized and widely used technology in the industry. The alternate test procedure that is the subject of this Waiver request is now the established method by which the energy performance of anti-sweat heaters is measured, and Electrolux has invested heavily to implement this procedure for its new models. Consequently, requiring Electrolux to use the energy test procedure at 10 CFR § 430.27 would impose an economic hardship on the Company. The adaptive anti-sweat system in the Electrolux models referenced above is similar to those addressed by the December 15, 2009, March 11, 2010, and April 29, 2010 Waivers granted to Electrolux by the

[10] 10 CFR 430.27(g).

Department.[11] Accordingly, Electrolux respectfully submits that sufficient grounds exist for the Assistant Secretary to grant the Electrolux Application for Interim Waiver.

III. Conclusion

Electrolux urges the Assistant Secretary to grant its Petition for Waiver and Application for Interim Waiver to allow Electrolux to test its new refrigerator models as noted above. Granting Electrolux's Petition for Waiver will encourage the introduction of advanced technologies while providing proper consideration of energy consumption.

IV. Affected Persons

Primarily affected persons in the refrigerator-freezer category include BSH Home Appliances Corp. (Bosch-Siemens Hausgerate GmbH), Equator, Fisher & Paykel Appliances Inc., GE Appliances, Haier America Trading, L.L.C., Heartland Appliances, Inc., Liebherr Hausgerate, LG Electronics USA Inc., Northland Corporation, Samsung Electronics America, Inc., Sanyo Fisher Company, Sears, Sub-Zero Freezer Company, U–Line, Viking Range, W. C. Wood Company, and Whirlpool Corporation. The Association of Home Appliance Manufacturers is also generally interested in energy efficiency requirements for appliances. Electrolux will notify all these entities as required by the Department's rules and provide them with a version of this Petition.

Sincerely,

Jean-Cyril Walker

Enclosures

cc: Michael Raymond, DOE Office of Energy Efficiency and Renewable Energy

[FR Doc. 2010–31063 Filed 12–9–10; 8:45 am]

BILLING CODE 6450–01–P

[11] See supra notes 2–3.

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

[Case No. CW–013]

Energy Conservation Program for Consumer Products: Decision and Order Granting a Waiver to the General Electric Company from the Department of Energy Residential Clothes Washer Test Procedure

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

ACTION: Decision and Order.

SUMMARY: The U.S. Department of Energy (DOE) gives notice of the decision and order (Case No. CW–013) that grants to the General Electric Company (GE) a waiver from the DOE clothes washer test procedure for determining the energy consumption of clothes washers. Under today's decision and order, GE shall be required to test and rate its clothes washers with larger clothes containers using an alternate test procedure that takes the larger capacities into account when measuring energy consumption.

DATES: This Decision and Order is effective December 10, 2010.

FOR FURTHER INFORMATION CONTACT: Dr. Michael G. Raymond, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121. *Telephone:* (202) 586–9611, *E-mail: mailto:Michael.Raymond@ee.doe.gov.*

Elizabeth Kohl, U.S. Department of Energy, Office of the General Counsel, Mail Stop GC–71, 1000 Independence Avenue, SW., Washington, DC 20585–0103. *Telephone:* (202) 287–7796, *E-mail: mailto:Jennifer.Tiedeman@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: In accordance with Title 10 of the Code of Federal Regulations (10 CFR 430.27(l)), DOE gives notice of the issuance of its decision and order as set forth below. The decision and order grants GE a waiver from the applicable clothes washer test procedure in 10 CFR part 430, subpart B, appendix J1 for certain basic models of clothes washers with capacities greater than 3.8 cubic feet, provided that GE tests and rates such products using the alternate test procedure described in this notice. Today's decision prohibits GE from making representations concerning the energy efficiency of these products unless the product has been tested consistent with the provisions of the alternate test procedure set forth in the decision and order below, and the representations fairly disclose the test results. Distributors, retailers, and private labelers are held to the same standard when making representations regarding the energy efficiency of these products. 42 U.S.C. 6293(c).

Issued in Washington, DC, on December 3, 2010.

Cathy Zoi,

Assistant Secretary, Energy Efficiency and Renewable Energy.

Decision and Order

In the Matter of: The General Electric Company (Case No. CW–013)

I. Background and Authority

Title III of the Energy Policy and Conservation Act (EPCA) sets forth a variety of provisions designed to improve energy efficiency. Part B of Title III (42 U.S.C. 6291–6309) provides for the "Energy Conservation Program for Consumer Products Other Than Automobiles."[1] Part B includes definitions, test procedures, labeling provisions, energy conservation standards, and the authority to require information and reports from manufacturers. Further, Part B authorizes the Secretary of Energy to prescribe test procedures that are reasonably designed to produce results that measure energy efficiency, energy use, or estimated operating costs, and that are not unduly burdensome to conduct. 42 U.S.C. 6293(b)(3). The test procedure for residential clothes washers, the subject of today's notice, is contained in 10 CFR part 430, subpart B, appendix J1.

DOE's regulations for covered products contain provisions allowing a person to seek a waiver for a particular basic model from the test procedure requirements for covered consumer products when (1) the petitioner's basic model for which the petition for waiver was submitted contains one or more design characteristics that prevent testing according to the prescribed test procedure, or (2) when prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data. 10 CFR 430.27(a)(1). Petitioners must include in their petition any alternate test procedures known to the petitioner to evaluate the basic model in a manner representative of its energy consumption characteristics. 10 CFR 430.27(b)(1)(iii).

The Assistant Secretary for Energy Efficiency and Renewable Energy (the Assistant Secretary) may grant a waiver subject to conditions, including adherence to alternate test procedures. 10 CFR 430.27(l). Waivers remain in effect pursuant to the provisions of 10 CFR 430.27(m).

[1] For editorial reasons, upon codification in the U.S. Code, Part B was re-designated Part A.

Any interested person who has submitted a petition for waiver may also file an application for interim waiver of the applicable test procedure requirements. 10 CFR 430.27(a)(2). The Assistant Secretary will grant an interim waiver request if it is determined that the applicant will experience economic hardship if the interim waiver is denied, if it appears likely that the petition for waiver will be granted, and/or the Assistant Secretary determines that it would be desirable for public policy reasons to grant immediate relief pending a determination on the petition for waiver. 10 CFR 430.27(g).

II. GE's Petition for Waiver: Assertions and Determinations

On June 22, 2010, GE filed a petition for waiver from the test procedure applicable to automatic and semi-automatic clothes washers set forth in 10 CFR part 430, subpart B, appendix J1. In particular, GE requested a waiver to test its clothes washers on the basis of the residential test procedures contained in 10 CFR part 430, Subpart B, Appendix J1, with a revised Table 5.1 extended to larger container volumes. GE's petition was published in the **Federal Register** on September 23, 2010. 75 FR 57915. DOE received no comments on the GE petition.

GE's petition seeks a waiver from the DOE test procedure because the mass of the test load used in the procedure is based on the basket volume of the test unit, which is currently not defined for the basket sizes of the basic models cited in its waiver application. In the DOE test procedure, the relation between basket volume and test load mass is defined for basket volumes between 0 and 3.8 cubic feet. GE has designed a series of clothes washers that contain basket volumes greater than 3.8 cubic feet. In addition, if the current maximum test load mass is used to test these products, the tested energy use would be less than the actual energy usage, and could evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data. DOE notes that Whirlpool Corporation and Samsung Electronics America, Inc. received interim waivers for similar products with basket volumes greater than 3.8 cubic feet on August 22, 2006 (71 FR 48913) and September 16, 2010 (75 FR 57937), respectively.

Table 5.1 of Appendix J1 defines the test load sizes used in the test procedure as linear functions of the basket volume. GE has submitted a proposed revised table to extend the maximum basket volume from 3.8 cubic feet to 5.1 cubic feet, a table the same as one developed by the Association of Home Appliance Manufacturers (AHAM). AHAM provided calculations to extrapolate Table 5.1 of the DOE test procedure to larger container volumes. DOE believes that this is a reasonable procedure because the DOE test procedure defines test load sizes as linear functions of the basket volume. AHAM's extrapolation was performed on the load weight in pounds, however, and AHAM and GE appear to have used the conversion ratio of 1/2.2 (or 0.45454545) to convert pounds to kilograms. Samsung and Whirlpool used the more accurate conversion value of 0.45359237. In a recently published notice of proposed rulemaking (NOPR), DOE published a Table 5.1 with some small differences from the Table 5.1 used by Whirlpool and Samsung, and somewhat larger differences from the Table 5.1 used by AHAM and GE. (75 FR 57556, Sept. 21, 2010). The differences are due to the conversion factor and to rounding. Differences in energy and water use will also be in the range of 0.2%. The Table 5.1 values in the alternate test procedure presented below are from DOE's NOPR.

As DOE has stated in the past, it is in the public interest to have similar products tested and rated for energy consumption on a comparable basis, and DOE will consider using the same alternate test procedure in future waiver decisions. DOE further notes that when the residential clothes washer test procedure rulemaking process is complete, any amended test procedure will supersede the alternate test procedure described in this waiver.

III. Consultations with Other Agencies

DOE consulted with the Federal Trade Commission (FTC) staff concerning the GE petition for waiver. The FTC staff did not have any objections to granting a waiver to GE.

IV. Conclusion

After careful consideration of all the material that was submitted by GE, the interim waivers granted to Whirlpool and Samsung, the clothes washer test procedure rulemaking, and consultation with the FTC staff, it is ordered that:

(1) The petition for waiver submitted by the General Electric Company (Case No. CW–013) is hereby granted as set forth in the paragraphs below.

(2) GE shall not be required to test or rate the following GE models on the basis of the current test procedure contained in 10 CFR part 430, subpart B, appendix J1. Instead, it shall be required to test and rate such products according to the alternate test procedure as set forth in paragraph (3) below:

PTWN8055*, PTWN8050*, PFWS4600*, PFWS4605*, PFWH4400*, PFWH4405*, GFWS3600*, GFWS3605*, GFWS3500*, GFWS3505*, GFWH3400*, GFWH3405*, GFWH2400*, GFWH2405*

(3) GE shall be required to test the products listed in paragraph (2) above according to the test procedures for clothes washers prescribed by DOE at 10 CFR part 430, appendix J1, except that, for the GE products listed in paragraph (2) only, the expanded Table 5.1 below shall be substituted for Table 5.1 of appendix J1.

TABLE 5.1—TEST LOAD SIZES

Container volume		Minimum load		Maximum load		Average load	
cu. ft	liter	lb	kg	Lb	kg	lb	kg
≥ <.	≥ <						
0–0.8	0–22.7	3.00	1.36	3.00	1.36	3.00	1.36
0.80–0.90	22.7–25.5	3.00	1.36	3.50	1.59	3.25	1.47
0.90–1.00	25.5–28.3	3.00	1.36	3.90	1.77	3.45	1.56
1.00–1.10	28.3–31.1	3.00	1.36	4.30	1.95	3.65	1.66
1.10–1.20	31.1–34.0	3.00	1.36	4.70	2.13	3.85	1.75
1.20–1.30	34.0–36.8	3.00	1.36	5.10	2.31	4.05	1.84
1.30–1.40	36.8–39.6	3.00	1.36	5.50	2.49	4.25	1.93
1.40–1.50	39.6–42.5	3.00	1.36	5.90	2.68	4.45	2.02
1.50–1.60	42.5–45.3	3.00	1.36	6.40	2.90	4.70	2.13
1.60–1.70	45.3–48.1	3.00	1.36	6.80	3.08	4.90	2.22

TABLE 5.1—TEST LOAD SIZES—Continued

Container volume		Minimum load		Maximum load		Average load	
cu. ft	liter	lb	kg	Lb	kg	lb	kg
≥ <.	≥ <						
1.70–1.80	48.1–51.0	3.00	1.36	7.20	3.27	5.10	2.31
1.80–1.90	51.0–53.8	3.00	1.36	7.60	3.45	5.30	2.40
1.90–2.00	53.8–56.6	3.00	1.36	8.00	3.63	5.50	2.49
2.00–2.10	56.6–59.5	3.00	1.36	8.40	3.81	5.70	2.59
2.10–2.20	59.5–62.3	3.00	1.36	8.80	3.99	5.90	2.68
2.20–2.30	62.3–65.1	3.00	1.36	9.20	4.17	6.10	2.77
2.30–2.40	65.1–68.0	3.00	1.36	9.60	4.35	6.30	2.86
2.40–2.50	68.0–70.8	3.00	1.36	10.00	4.54	6.50	2.95
2.50–2.60	70.8–73.6	3.00	1.36	10.50	4.76	6.75	3.06
2.60–2.70	73.6–76.5	3.00	1.36	10.90	4.94	6.95	3.15
2.70–2.80	76.5–79.3	3.00	1.36	11.30	5.13	7.15	3.24
2.80–2.90	79.3–82.1	3.00	1.36	11.70	5.31	7.35	3.33
2.90–3.00	82.1–85.0	3.00	1.36	12.10	5.49	7.55	3.42
3.00–3.10	85.0–87.8	3.00	1.36	12.50	5.67	7.75	3.52
3.10–3.20	87.8–90.6	3.00	1.36	12.90	5.85	7.95	3.61
3.20–3.30	90.6–93.4	3.00	1.36	13.30	6.03	8.15	3.70
3.30–3.40	93.4–96.3	3.00	1.36	13.70	6.21	8.35	3.79
3.40–3.50	96.3–99.1	3.00	1.36	14.10	6.40	8.55	3.88
3.50–3.60	99.1–101.9	3.00	1.36	14.60	6.62	8.80	3.99
3.60–3.70	101.9–104.8	3.00	1.36	15.00	6.80	9.00	4.08
3.70–3.80	104.8–107.6	3.00	1.36	15.40	6.99	9.20	4.17
3.80–3.90	107.6–110.4	3.00	1.36	15.80	7.16	9.40	4.26
3.90–4.00	110.4–113.3	3.00	1.36	16.20	7.34	9.60	4.35
4.00–4.10	113.3–116.1	3.00	1.36	16.60	7.53	9.80	4.45
4.10–4.20	116.1–118.9	3.00	1.36	17.00	7.72	10.00	4.54
4.20–4.30	118.9–121.8	3.00	1.36	17.40	7.90	10.20	4.63
4.30–4.40	121.8–124.6	3.00	1.36	17.80	8.09	10.40	4.72
4.40–4.50	124.6–127.4	3.00	1.36	18.20	8.27	10.60	4.82
4.50–4.60	127.4–130.3	3.00	1.36	18.70	8.46	10.80	4.91
4.60–4.70	130.3–133.1	3.00	1.36	19.10	8.65	11.00	5.00
4.70–4.80	133.1–135.9	3.00	1.36	19.50	8.83	11.20	5.10
4.80–4.90	135.9–138.8	3.00	1.36	19.90	9.02	11.40	5.19
4.90–5.00	138.8–141.6	3.00	1.36	20.30	9.20	11.60	5.28
5.00–5.10	141.6–144.4	3.00	1.36	20.70	9.39	11.90	5.38
5.10–5.20	144.4–147.2	3.00	1.36	21.10	9.58	12.10	5.47
5.20–5.30	147.2–150.1	3.00	1.36	21.50	9.76	12.30	5.56
5.30–5.40	150.1–152.9	3.00	1.36	21.90	9.95	12.50	5.65
5.40–5.50	152.9–155.7	3.00	1.36	22.30	10.13	12.70	5.75
5.50–5.60	155.7–158.6	3.00	1.36	22.80	10.32	12.90	5.84
5.60–5.70	158.6–161.4	3.00	1.36	23.20	10.51	13.10	5.93
5.70–5.80	161.4–164.2	3.00	1.36	23.60	10.69	13.30	6.03
5.80–5.90	164.2–167.1	3.00	1.36	24.00	10.88	13.50	6.12
5.90–6.00	167.1–169.9	3.00	1.36	24.40	11.06	13.70	6.21

NOTES: (1) All test load weights are bone dry weights.
(2) Allowable tolerance on the test load weights are ±0.10 lbs (0.05 kg).

(4) Representations. GE may make representations about the energy use of its clothes washer products for compliance, marketing, or other purposes only to the extent that such products have been tested in accordance with the provisions outlined above and such representations fairly disclose the results of such testing.

(5) This waiver shall remain in effect consistent with the provisions of 10 CFR430.27(m).

(6) This waiver is issued on the condition that the statements, representations, and documentary materials provided by the petitioner are valid. DOE may revoke or modify this waiver at any time if it determines the factual basis underlying the petition for waiver is incorrect, or the results from the alternate test procedure are unrepresentative of the basic models' true energy consumption characteristics.

(7) Grant of this waiver does not release a petitioner from the certification requirements set forth at 10 CFR 430.62.

Issued in Washington, DC, on December 3, 2010.

Cathy Zoi,
Assistant Secretary, Energy Efficiency and Renewable Energy.

[FR Doc. 2010–31062 Filed 12–9–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP11–40–000]

East Cheyenne Gas Storage, LLC; Notice of Amendment

December 3, 2010.

Take notice that on November 19, 2010, East Cheyenne Gas Storage, LLC (East Cheyenne), 10901 W. Toller Drive, Suite 200, Littleton, Colorado 80127, filed in the captioned docket an application under section 7 of the Natural Gas Act (NGA), as amended, and part 157 of the Commission's

regulations for an order amending the certificate of public convenience and necessity issued in Docket No. CP10–34–000 to authorize East Cheyenne to make certain changes to its certificated Project, which relate primarily to the design and number of wells to be employed in the initial Project development, all as more fully set forth 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, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or TTY, contact (202) 502–8659.

Any questions concerning this application may be directed to James F. Bowe, Jr., Dewey & LeBoeuf LLP, 1101 New York Avenue, NW., Washington, DC 20005–4213, at (202) 346–8000.

East Cheyenne also seeks reaffirmation of its previously granted authorization to charge market-based rates for its storage and hub services, as well as the various waivers granted in the order issuing certificates. East Cheyenne also requests that the Commission rescind the pre-granted abandonment authorization issued to East Cheyenne because East Cheyenne no longer plans to construct the temporary West Peetz Compressor Station. East Cheyenne refers to this project as the "Well Plan Amendment."

East Cheyenne states that it does not propose any change in capacity, pressures, injection rates or withdrawal rates authorized by the Commission in the original certificate order in this Application. East Cheyenne represents that the Well Plan Amendment will have minimal impact on the natural environment and on adjacent landowners.

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 final environmental impact statement (FEIS) or 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 FEIS or 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 7 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in 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 commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of 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 (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

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 14 copies of the protest or intervention to the Federal Energy regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: December 27, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–31016 Filed 12–9–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 1651–059]

Lower Valley Energy; Notice of Application for Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

December 3, 2010.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Amendment of hydroelectric license.

b. *Project No:* 1651–059.

c. *Date Filed:* November 17, 2010.

d. *Applicant:* Lower Valley Energy, Inc.

e. *Name of Project:* Swift Creek Hydroelectric Project.

f. *Location of Project:* On Swift Creek, a tributary to the Salt River, in Lincoln County, Wyoming, partially within the Bridger-Teton National Forest.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Mr. Wade Hirschi, Compliance Officer, Lower

Valley Energy, Inc., 236 North Washington, P.O. Box 188, Afton, WY 83110; (307) 885–3175.

i. *FERC Contact:* Mr. John Aedo, (415) 369–3335, *john.aedo@ferc.gov.*

j. Deadline for filing comments, motions to intervene, and protest: January 3, 2011.

All documents may be filed electronically via the Internet. *See* 18 CFR 385.2001(a)(1)(iii) or the instructions on the Commission's Web site at *http://www.ferc.gov/docs-filing/efiling.asp.* If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and seven copies should be mailed to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Commenters may submit comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments.

Please include the project number (P–1651–059) on any comments, motions, or protests filed.

k. *Description of Request:* Lower Valley Energy Inc. (licensee) is requesting approval to modify and delete various articles of its license for the Swift Creek Hydroelectric Project (FERC No. 1651). Specifically, the licensee is requesting approval to delete article 411 from its project license, which requires it to conduct surveys to assess channel stability following regular flow maintenance releases. Further, the licensee is proposing to modify license article 413 which requires it to rework the pools between the upper project diversion and upper powerhouse to instead conduct dredging in the lower project reservoir to improve fish habitat. The licensee is also proposing to modify license article 414 which requires it to coordinate with various entities to reestablish trout stocking at the project and conduct creel surveys to instead construct community fishing piers at the upper and lower reservoirs and a handicap accessible ramp at the lower project reservoir.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov/docs-filing/efiling.asp.* Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions To Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents:* All filings must (1) bear in all capital letters the title "COMMENTS", "PROTEST", or "MOTION TO INTERVENE" as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). All comments, motions to intervene, or protests should relate to project works which are the subject of the proposed license amendment. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. If an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–31017 Filed 12–9–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13878–000]

Kahawai Power 1, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

December 3, 2010.

On November 12, 2010, Kahawai Power 1, LLC filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Hanalei River Hydroelectric Project (Hanalei River) to be located on the Hanalei River, Pekoa Stream, Kaapahu Stream, and Kaiwa Stream in the vicinity of Hanalei, Hawaii. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project will consist of the following: (1) A 80-foot-long, 15-foot-high concrete diversion weir and intake structure on the Hanalei River creating a reservoir with a storage capacity of 7.7-acre-feet; (2) a 23,500-foot-long, 3.5-foot-diameter main steel penstock running from the Hanalei diversion weir to the powerhouse; (3) a 35-foot-long, 5-foot-high concrete diversion weir with intake structure located on the Kaiwa Stream creating a reservoir with a storage capacity of less than 0.25 acre-feet; (4) a 1,100-foot-long, 2-foot-diameter steel feeder penstock from the Kaiwa intake structure to the main penstock; (5) a 35-foot-long, 5-foot-high concrete diversion weir with intake structure located on the Kaapahu Stream creating a reservoir with a storage capacity of less than 0.25 acre-feet; (6) a 2,800-foot-long, 2-foot-diameter steel feeder penstock from the Kaapahu intake to the main penstock; (7) a 35-foot-long, 5-foot-high concrete diversion weir with intake structure located on the Pekoa Stream creating a

reservoir with a storage capacity of less than 0.25 acre-feet; (8) a 1,700-foot-long, 2-foot-diameter steel feeder penstock from the Pekoa intake to the main penstock; (9) a 60-foot-long, 40-foot-wide reinforced concrete powerhouse containing one 3.5-megawatt two-jet turgo turbine; (10) a substation with a 4.16/25-kilovolt (kV) three phase step-up transformer; (11) a one-mile-long, 25kV transmission line; and (12) appurtenant facilities. The estimated annual generation of the Hanalei River project would be 12.25 gigawatt-hours.

Applicant Contact: Ramya Swaminathan, Kahawai Power 1, LLC, 33 Commercial Street, Gloucester, MA 01930; phone: (978) 283–2822.

FERC Contact: Kelly Wolcott (202) 502–6480.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the "eLibrary" link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13878–000) in the docket number field to access the document. For assistance, contact FERC Online Support.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–31019 Filed 12–9–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP11–16–000]

Florida Gas Transmission Company, LLC; Notice of Intent to Prepare an Environmental Assessment for the Proposed Miami Mainline Loop Project and Request for Comments on Environmental Issues

December 3, 2010.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of the Miami Mainline Loop Project involving construction and operation of facilities by Florida Gas Transmission Company, LLC (FGT) in Miami-Dade County, Florida. This EA will be used by the Commission in its decision-making process to determine whether the project 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 on the project. Your input will help the Commission staff determine what issues need to be evaluated in the EA. Please note that the scoping period will close on January 3, 2011.

This notice is being sent to the Commission's current environmental mailing list for this project. State and local government representatives are asked to notify their constituents of this planned project and encourage them to comment on their areas of concern.

If you are a landowner receiving this notice, you may be contacted by a pipeline company representative about the acquisition of an easement to construct, operate, and maintain the proposed facilities. The company would seek to negotiate a mutually acceptable agreement. However, if the project is approved by the Commission, that approval conveys with it the right of eminent domain. Therefore, if easement negotiations fail to produce an agreement, the pipeline company could initiate condemnation proceedings where compensation would be determined in accordance with state law.

A fact sheet prepared by the FERC entitled "*An Interstate Natural Gas Facility On My Land? What Do I Need To Know?*" was attached to the project notice FGT provided to landowners. 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 Web site *http://www.ferc.gov*.

Summary of the Proposed Project

FGT proposes to construct and operate 2.98 miles of 24-inch-diameter natural gas pipeline loop [1] in Miami-Dade County, Florida. The project would also include the installation of a pig launcher [2] at FGT's existing No. 22 Compressor Station in Miami-Dade County. According to FGT, the Miami Mainline Loop Project would provide FGT with the ability to maintain service to its existing customers during scheduled hydrostatic testing of its existing 18-inch mainline.

The general location of the project facilities is shown in appendix 1.[3]

Land Requirements for Construction

Construction of the proposed facilities would disturb about 20 acres of land for the aboveground facilities and the pipeline. Following construction, about 8 acres would be maintained for permanent operation of the project's facilities; the remaining acreage would be restored and allowed to revert to former uses. About 76 percent of the proposed pipeline route would be constructed by the Horizontal Directional Drilling method to minimize surface disturbance along the proposed route.

The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us [4] to discover and address 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

[1] A loop is a segment of pipeline that is usually installed adjacent to an existing pipeline and connected to it at both ends. The loop allows more gas to be moved through the system.

[2] A "pig" is a tool that is inserted into and moves through the pipeline, and is used for cleaning the pipeline, internal inspections, or other purposes. A pig launcher is an aboveground facility where pigs are inserted into the pipeline.

[3] The appendices referenced in this notice are not being printed in the **Federal Register**. Copies of appendices were sent to all those receiving this notice in the mail and are available at *http://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.

[4] "We," "us," and "our" refer to the environmental staff of the Commission's Office of Energy Projects.

notice, the Commission requests public comments on the scope of the issues to address in the EA. All comments received will be considered during the preparation of the EA.

In the EA we will discuss impacts that could occur as a result of the construction and operation of the proposed project under these general headings:

- Geology and soils;
- land use;
- water resources, fisheries, and wetlands;
- vegetation and wildlife;
- endangered and threatened species;
- cultural resources;
- air quality and noise; and
- public safety.

We will also evaluate reasonable alternatives to the proposed project or portions of the project, and make recommendations on how to lessen or avoid impacts on the various resource areas.

Our independent analysis of the issues will be presented in the EA. The EA will be placed in the public record and, depending on the comments received during the scoping process, may be published and distributed to the public. A comment period will be allotted if the EA is published for review. We will consider all comments on the EA before we make our recommendations to the Commission. To ensure your comments are considered, please carefully follow the instructions in the Public Participation section beginning on page 4.

With this notice, we are asking agencies with jurisdiction and/or special expertise with respect to environmental issues to formally cooperate with us in the preparation of the EA. These agencies may choose to participate once they have evaluated the proposal relative to their responsibilities. 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.

Public Participation

You can make a difference by providing us with your specific comments or concerns about the project. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please send your comments so they will be received in Washington, DC on or before January 3, 2011.

For your convenience, there are three methods which you can use to submit your comments to the Commission. In all instances please reference the project docket number (CP11–16–000) with your submission. The Commission encourages electronic filing of comments and has expert eFiling staff available to assist you at (202) 502–8258 or *efiling@ferc.gov.*

(1) You may file your comments electronically by using the *eComment* feature, which is located on the Commission's Web site at *http://www.ferc.gov* under the link to *Documents and Filings.* An eComment is an easy method for interested persons to submit brief, text-only comments on a project;

(2) You may file your comments electronically by using the *eFiling* feature, which is located on the Commission's Web site at *http://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 may file a paper copy of your comments at the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Room 1A, Washington, DC 20426.

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. We will update the environmental mailing list as the analysis proceeds to ensure that we send the information related to this environmental review to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed project.

Becoming an Intervenor

In addition to involvement in the EA scoping process, you may want to become an "intervenor" which is an official party to the Commission's proceeding. Intervenors play a more formal role in the process and are able to file briefs, appear at hearings, and be heard by the courts if they choose to appeal the Commission's final ruling. An intervenor formally participates in the proceeding by filing a request to intervene. Instructions for becoming an intervenor are included in the User's Guide under the "e-filing" link on the Commission's Web site.

Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC Web site at *http://www.ferc.gov* using the "eLibrary" link. Click on the eLibrary link, click on "General Search" and enter the docket number, excluding the last three digits in the Docket Number field (*i.e.,* CP11–16). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission now offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *http://www.ferc.gov/esubscribenow.htm.*

Finally, public meetings or site visits will be posted on the Commission's calendar located at *http://www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–31015 Filed 12–9–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12713–002]

Reedsport OPT Wave Park, LLC; Oregon; Notice of Availability of Environmental Assessment

December 3, 2010.

In accordance with the National Environmental Policy Act of 1969 and

the Federal Energy Regulatory Commission's (Commission or FERC's) regulations, 18 CFR part 380 (Order No. 486, 52 FR 47897), the Office of Energy Projects has reviewed Reedsport OPT Wave Park, LLC's application for license for the Reedsport OPT Wave Park Project (FERC Project No. 12713–002), which would be located in Oregon State territorial waters about 2.5 nautical miles off the coast near Reedsport, in Douglas County, Oregon.

Staff prepared an environmental assessment (EA), which analyzes the potential environmental effects of licensing the project and concludes that licensing the project, with appropriate environmental protective measures, would not constitute a major federal action that would significantly affect the quality of the human environment.

A copy of the EA is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site 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 Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, 202–502–8659.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Any comments should be filed within 30 days from the date of this notice. Comments may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov/docs-filing/ferconline.asp*) under the "eFiling" link. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp*. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support. Although the Commission strongly encourages electronic filings, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Please affix Project No. 12713–002 to all comments.

For further information, contact Jim Hastreiter by telephone at 503–552–2760 or by e-mail at *james.hastreiter@ferc.gov*.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–31018 Filed 12–9–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Western Area Power Administration

2015 Resource Pool—Sierra Nevada Region

AGENCY: Western Area Power Administration, DOE.

ACTION: Notice of Final Power Allocations.

SUMMARY: The Western Area Power Administration (Western), a Federal power marketing administration of DOE, announces the Final 2015 Resource Pool allocations pursuant to its 2004 Power Marketing Plan (Marketing Plan) for the Sierra Nevada Customer Service Region (SNR). This notice includes a summary of the comments received on Western's proposed 2015 Resource Pool allocations and Western's responses.

DATES: The Final 2015 Resource Pool allocations will become effective on January 10, 2011.

FOR FURTHER INFORMATION CONTACT: Ms. Sonja Anderson, Power Marketing Manager, Western Area Power Administration, Sierra Nevada Customer Service Region, 114 Parkshore Drive, Folsom, CA 95630–4710, (916) 353–4421, *sanderso@wapa.gov.*

SUPPLEMENTARY INFORMATION:

Background

Western published its Marketing Plan for SNR in the **Federal Register** (64 FR 34417, June 25, 1999). The Marketing Plan specifies the terms and conditions under which Western markets power from the Central Valley Project and the Washoe Project beginning January 1, 2005, and continuing through December 31, 2024. The Marketing Plan sets aside a portion of the SNR's marketable power resources to establish a 2015 Resource Pool for new power allocations.

On June 3, 2009, Western published the Call for 2015 Resource Pool Applications in the **Federal Register** (74 FR 26671). On September 28, 2009, Western published a Notice of Extension in the **Federal Register** (74 FR 49366). The Call for 2015 Resource Pool Applications required that applications be submitted by August 3, 2009, and the Notice of Extension extended the application date to October 28, 2009. In response to the call for applications, Western received 57 applications. After reviewing and considering the applications, on July 30, 2010, Western published the Proposed 2015 Resource Pool Allocations in the **Federal Register** (75 FR 44942) and opened a 30-day comment period on those allocations. The formal comment period on the proposed power allocations from the 2015 Resource Pool ended on August 30, 2010. A summary of the comments received and Western's responses are provided below. After considering all comments, Western has decided to finalize the proposed power allocations.

Responses to Comments Received on The Notice of Proposed 2015 Resource Pool Allocations (75 Fr 44942, July 30, 2010)

During the comment period, Western received six letters commenting on the proposed allocations from the 2015 Resource Pool. Western reviewed and considered all comments. The comments and Western's responses are provided below.

Comment: Two commentors expressed their appreciation and support for the proposed 2015 Resource Pool allocations.

Response: Western notes the comments of support for its 2015 Resource Pool allocations.

Comment: Three commentors requested that Western reconsider providing them with an allocation from the 2015 Resource Pool. One commentor stated the cost of electricity is critical to the success of its programs, which carry out energy-intensive scientific and national defense research. Another stated it is committed to the environment and that commitment is demonstrated through various projects using Western's power such as providing power to docked ships and charging batteries for ground equipment at the airport. Another stated that it is ready and able to use an increased allocation to meet Reclamation Act goals of widespread use.

Response: Western recognizes that the commentors perform important functions. Western has a limited amount of power to allocate, and not all applicants received an allocation of Federal power. The Resource Pool was made up of only 2 percent of the SNR's resources available for marketing. Western received 57 applications for an allocation from the 2015 Resource Pool and evaluated those applications and made allocations according to the eligibility and allocation criteria set forth in the Marketing Plan.

Comment: Four commentors requested that, in the event some allottees are unable to take the

allocation, Western should consider providing the commentors with an allocation/increased allocation from the 2015 Resource Pool. Three of those commentors are expecting their loads to increase in the coming years.

Response: Western will allocate any available power according to the eligibility and allocation criteria set forth in the Marketing Plan.

Comment: One commentor requested an increase in its allocation to the median level of the allocations.

Response: Western considered the size of the applicants' loads when it made the allocations according to the allocation criteria set forth in the Marketing Plan. Because not all applicants' loads are the same size, the allocations were also not the same size.

Comment: Two commentors asked Western to clarify the criteria it used in determining the allocations from the 2015 Resource Pool.

Response: Under the Marketing Plan, Western allocated power to the applicants that met the eligibility criteria set forth in the Marketing Plan. Western then applied the allocation criteria to all applicants receiving an allocation. The eligibility criteria and allocation criteria are discussed in the Marketing Plan and the Call for Applications.

Final 2015 Resource Pool Allocations

The final 2015 Resource Pool allottees are listed below. The allocations are expressed as percentages of the Base Resource (BR) with an estimated megawatthour (MWh) amount of each allocation. The estimated MWh for each allocation assumes an estimated average annual BR of 3,342,000 MWh and are rounded to the nearest MWh. The actual amount of BR a customer will receive will vary hourly, daily, monthly, and annually depending on hydrology and other constraints that may govern the CVP operations. The final allocations are as follows:

Applicant	Base resource allocation percent	Estimated (MWh)
Alameda Municipal Power	0.06140	2,052
Bay Area Rapid Transit District	0.06140	2,052
California State University, Sacramento	0.06140	2,052
Cawelo Water District	0.06140	2,052
Dry Creek Rancheria Band of Pomo Indians	0.07795	2,605
East Bay Municipal Utility District	0.06140	2,052
Fallon, City of	0.06140	2,052
Healdsburg, City of	0.06140	2,052
Hoopa Valley Tribe	0.12274	4,102
Kings River Conservation District	0.00491	164
Klamath Water and Power Agency	0.04668	1,560
Lassen Municipal Utility District	0.06140	2,052
Lodi, City of	0.06140	2,052
Lompoc, City of	0.06140	2,052
Marin Energy Authority	0.62094	20,752
Merced Irrigation District	0.06140	2,052
Navy, U.S. Dept of, Monterey Post Graduate School	0.04873	1,628
Picayune Rancheria of the Chukchansi Indians	0.00674	225
Presidio Trust	0.03503	1,170
Santa Clara Valley Water District	0.06140	2,052
Sonoma County Water Agency	0.06140	2,052
South San Joaquin Irrigation District	0.01400	468
Stockton, Port of	0.02421	809
Truckee Donner Public Utility District	0.06140	2,052
Turlock Irrigation District	0.06140	2,052
University of California, San Francisco	0.06140	2,052
Zone 7, Alameda County Flood Control & Water Conservation District	0.01573	525
	2.00000	66,840

Contracting Process

After the effective date of this notice, Western will begin the contracting process with allottees who are not currently customers. Allottees must execute and return without modification Western's electric service contract to purchase the BR within 6 months of the contract offer, unless otherwise agreed to in writing by Western. Western reserves the right to withdraw and reallocate any power if an allottee does not execute the electric service contract within the 6-month period. The date of initial service under these contracts is January 1, 2015, and these contracts will remain in effect until midnight of December 31, 2024. Existing customers who received power allocations from the 2015 Resource Pool will receive a revised Exhibit A to their BR contracts increasing their percentage of the BR.

If requested, Western will work with customers to develop a custom product to meet their needs. Custom products are described in the Marketing Plan and are offered under contracts separate from the BR.

In the event there is any unallocated power after this process, Western reserves the right to reallocate such power according to the eligibility and allocation criteria set forth in the Marketing Plan. Entities who have submitted an application pursuant to this process need not re-submit an application if they wish to be considered. Western will contact such eligible entities.

Authorities

The Marketing Plan, published in the **Federal Register** (64 FR 34417) on June 25, 1999, was established pursuant to the Department of Energy Organization Act (42 U.S.C. 7101–7352); the Reclamation Act of June 17, 1902 (ch. 1093, 32 Stat. 388) as amended and supplemented by subsequent enactments, particularly section 9(c) of the Reclamation Project Act of 1939 (43 U.S.C. 485(c)); and other acts specifically applicable to the projects involved. This action falls within the

Marketing Plan and, thus, is covered by the same authority.

Regulatory Procedural Requirements: Western addressed the regulatory procedure requirements in its rulemaking for the Marketing Plan (64 FR 34417).

Dated: December 1, 2010.

Timothy J. Meeks,

Administrator.

[FR Doc. 2010–31060 Filed 12–9–10; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2010–0369; FRL–9237–5]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; NSPS for Small Industrial-Commercial-Institutional Steam Generating Units (Renewal), EPA ICR Number 1564.08, OMB Control Number 2060–0202

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR which is abstracted below describes the nature of the collection and the estimated burden and cost.

DATES: Additional comments may be submitted on or before January 10, 2011.

ADDRESSES: Submit your comments, referencing docket ID number EPA–HQ–OECA–2010–0369, to (1) EPA online using *http://www.regulations.gov* (our preferred method), or by e-mail to *docket.oeca@epa.gov*, or by mail to: EPA Docket Center (EPA/DC), Environmental Protection Agency, Enforcement and Compliance Docket and Information Center, mail code 28221T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Robert C. Marshall, Jr., Office of Compliance, Mail Code: 2223A, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: (202) 564–7021; fax number: (202) 564–0050; e-mail address: *marshall.robert@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On June 2, 2010 (75 FR 30813), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under docket ID number EPA–HQ–OECA–2010–0369, which is available for public viewing online at *http://www.regulations.gov,* in person viewing at the Enforcement and Compliance Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center 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 Reading Room is (202) 566–1744, and the telephone number for the Enforcement and Compliance Docket is (202) 566–1752.

Use EPA's electronic docket and comment system at *http://www.regulations.gov,* to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select "docket search," then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted either electronically or in paper, will be made available for public viewing at *http://www.regulations.gov,* as EPA receives them and without change, unless the comment contains copyrighted material, Confidential Business Information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov.*

Title: NSPS for Small Industrial-Commercial-Institutional Steam Generating Units (Renewal).

ICR Numbers: EPA ICR Number 1564.08, OMB Control Number 2060–0202.

ICR Status: This ICR is scheduled to expire on January 31, 2011. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. 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 EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, and displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 60, subpart A, and any changes, or additions to the Provisions specified at 40 CFR part 60, subpart Dc. Owners or operators of the affected facilities must submit a one-time-only report of any physical or operational changes, initial performance tests, and periodic reports and results. Owners or operators 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. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 293 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Owners or operators of small industrial-commercial-institutional steam generating units.

Estimated Number of Respondents: 235.

Frequency of Response: Initially, semiannually and occasionally.

Estimated Total Annual Hour Burden: 159,972.

Estimated Total Annual Cost: $24,455,624, which includes $15,009,479 in labor costs, $1,491,005

in capital/startup costs, and $7,955,140 in operation and maintenance (O&M) costs.

Changes in the Estimates: There is no change in the labor hours, or capital/startup and operation and maintenance costs in this ICR compared to the previous ICR. This is due to two considerations: (1) The regulations have not changed over the past three years and are not anticipated to change over the next three years; and (2) the growth rate for the industry is very low, negative, or non-existent.

There is, however, an adjustment in the labor cost estimate. This ICR uses 2010 labor rates resulting in a labor cost increase.

Dated: December 6, 2010.

John Moses,

Director, Collection Strategies Division.

[FR Doc. 2010–31089 Filed 12–9–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2010–0362; FRL–9237–3]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; NSPS for Phosphate Rock Plants (Renewal), EPA ICR Number 1078.09, OMB Control Number 2060–0111

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR which is abstracted below describes the nature of the collection and the estimated burden and cost.

DATES: Additional comments may be submitted on or before January 10, 2011.

ADDRESSES: Submit your comments, referencing docket ID number EPA–HQ–OECA–2010–0362, to (1) EPA online using *http://www.regulations.gov* (our preferred method), or by e-mail to *docket.oeca@epa.gov*, or by mail to: EPA Docket Center (EPA/DC), Environmental Protection Agency, Enforcement and Compliance Docket and Information Center, mail code 28221T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *Attention:* Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Robert C. Marshall, Jr., Office of Compliance, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; *telephone number:* (202) 564–7021; *fax number:* (202) 564–0050; *e-mail address: marshall.robert@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On June 2, 2010 (75 *FR* 30813), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under docket ID number EPA–HQ–OECA–2010–0362, which is available for public viewing online at *http://www.regulations.gov*, or in person viewing at the Enforcement and Compliance Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center 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 Reading Room is (202) 566–1744, and the telephone number for the Enforcement and Compliance Docket is (202) 566–1752.

Use EPA's electronic docket and comment system at *http://www.regulations.gov*, to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select "docket search," then key in the docket ID number identified above. *Please note* that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *http://www.regulations.gov*, as EPA receives them and without change, unless the comment contains copyrighted material, Confidential Business Information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov*.

Title: NSPS for Phosphate Rock Plants (Renewal)

ICR Numbers: EPA ICR Number 1078.09, OMB Control Number 2060–0111.

ICR Status: This ICR is scheduled to expire on January 31, 2011. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. 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 EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, and displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: The affected entities are subject to the General Provisions of the New Source Performance Standards (NSPS) at 40 CFR part 60, subpart A, and any changes, or additions to the Provisions specified at 40 CFR part 60, subpart NN. Owners or operators of the affected facilities must submit a one-time-only report of any physical or operational changes, initial performance tests, and periodic reports and results. Owners or operators 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. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 55 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Owners or operators of phosphate rock plants.

Estimated Number of Respondents: 13.

Frequency of Response: Initially and semiannually.

Estimated Total Annual Hour Burden: 1,602.

Estimated Total Annual Cost: $274,536, which includes $150,354 in labor costs, $12,210 in capital/startup costs, and $111,972 in operation and maintenance (O&M) costs.

Changes in the Estimates: There is no change in the labor hours, or in the capital/startup and operation and maintenance costs in this ICR compared to the previous ICR. This is due to two considerations: (1) The regulations have not changed over the past three years and are not anticipated to change over the next three years; and (2) the growth rate for the industry is very low, negative, or non-existent.

The increase in labor cost to Respondents and the Agency is due to labor rate adjustments to reflect the most recent available estimates.

Dated: December 6, 2010.

John Moses,

Director, Collection Strategies Division.

[FR Doc. 2010–31076 Filed 12–9–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OW–2010–0689; FRL–9237–2]

Agency Information Collection Activities: Submission to OMB for Review and Approval; Comment Request; 2011 Drinking Water Infrastructure Needs Survey and Assessment (Reinstatement); EPA ICR No. 2234.03; OMB Control No. 2040–0274

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request for a reinstatement collection. The ICR, which is abstracted below, describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before January 10, 2011.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OW–2010–0689, to: (1) EPA online using *http://www.regulations.gov* (our preferred method), by e-mail to *OW–Docket@epa.gov* or by mail to: EPA Docket Center, Environmental Protection Agency, Mailcode: 28221T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, 1200 Pennsylvania Ave., NW., Washington, DC 20460; and (2) OMB by mail to: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Robert Barles, Drinking Water Protection Division (Mail Code 4606M), Office of Ground Water and Drinking Water, U.S. EPA, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: 202–564–3814; fax number: 202–564–3757; e-mail address: *barles.robert@epa.gov*.

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On September 10, 2010 (75 FR 55325), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments during the comment period. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OW–2010–0689, which is available for online viewing at *www.regulations.gov,* or in person viewing at the Water Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC 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 Reading Room is 202–566–1744 and the telephone number for the Water Docket is 202–566–2426.

Use EPA's electronic docket and comment system at *http://www.regulations.gov,* to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select "docket search," then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *http://www.regulations.gov* as EPA receives them and without change, unless the comment contains copyrighted material, confidential business information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov*.

Title: 2011 Drinking Water Infrastructure Needs Survey and Assessment (Reinstatement).

ICR Numbers: EPA ICR No. 2234.03, OMB Control No. 2040–0274.

ICR Status: This ICR seeks reinstatement of a previously approved information collection activity that was discontinued on December 31, 2009. 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 EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, and are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: The purpose of this information collection is to identify the infrastructure needs of public water systems for the 20-year period from January 2011 through December 2031. EPA's Office of Ground Water and Drinking Water (OGWDW) will collect these data to comply with Sections 1452(h) and 1452(i)(4) of the Safe Drinking Water Act (42 U.S.C. 300j–12).

EPA will use a questionnaire to collect capital investment need information from community water systems serving more than 3,300 persons and from American Indian and Alaskan Native Village community water systems and not-for-profit non-community water systems serving more than 25 persons. Participation in the survey is voluntary. The data from the questionnaires will provide EPA with a basis for estimating the nationwide infrastructure needs of public water systems. Also, as mandated by section 1452(a)(1)(D)(ii) of the Safe Drinking Water Act, EPA uses the results of the latest survey to allocate Drinking Water State Revolving Fund (DWSRF) monies to the states. Under the allotment formula, each state receives a grant of the annual DWSRF appropriation in proportion to its share of the total national need—with the proviso that each state receives at least one percent of the total funds available.

Burden Statement: Over the entire survey effort, the annual public reporting and recordkeeping burden for this collection of information is

estimated to average 7.55 hours per response for states and water system respondents combined. However, nearly all of the responses from water systems will occur in the single year of 2011. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. The ICR provides a detailed explanation of the Agency's estimate, which is only briefly summarized here:

Respondents/Affected Entities: Private and Public Water Systems, States, Tribes.

Estimated Number of Respondents: 3,176.

Frequency of Response: Once.

Estimated Total Annual Hour Burden: 16,332 hours.

Estimated Total Annual Cost: $615,842. This cost is exclusively for labor as there are no capital investment or operations and maintenance costs.

Changes in the Estimates: There is no currently approved burden as this ICR was previously discontinued during the gap between the three-year ICR cycle and the four-year Needs Survey cycle. The 2011 survey requests 988 more hours of burden annually than the 2007 survey due to higher observed response rates, survey modifications and an increased number of tribes participating in the survey.

Dated: December 3, 2010.

John Moses,

Director, Collection Strategies Division.

[FR Doc. 2010–31077 Filed 12–9–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2010–0355; FRL–9237–4]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; NESHAP for Beryllium (Renewal), EPA ICR Number 0193.10, OMB Control Number 2060–0092

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR which is abstracted below describes the nature of the collection and the estimated burden and cost.

DATES: Additional comments may be submitted on or before January 10, 2011.

ADDRESSES: Submit your comments, referencing docket ID number EPA–HQ–OECA–2010–0355 to (1) EPA online using *http://www.regulations.gov* (our preferred method), or by e-mail to *docket.oeca@epa.gov,* or by mail to: EPA Docket Center (EPA/DC), Environmental Protection Agency, Enforcement and Compliance Docket and Information Center, mail code 28221T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Learia Williams, Compliance Assessment and Media Programs Division, Office of Compliance, Mail Code 2223A, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: (202) 564–4113; fax number: (202) 564–0050; e-mail address: *williams.learia@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On June 2, 2010 (75 FR 30813), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under docket ID number EPA–HQ–OECA–2010–0355, which is available for public viewing online at *http://www.regulations.gov,* in person viewing at the Enforcement and Compliance Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center 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 Reading Room is (202) 566–1744, and the telephone number for the Enforcement and Compliance Docket is (202) 566–1752.

Use EPA's electronic docket and comment system at *http://www.regulations.gov,* to submit or view public comments, access the index listing of the contents of the docket, and to access those documents, whether submitted electronically or in paper will be made available for public viewing at *http://www.regulations.gov,* as EPA receives them and without change, unless the comment contains copyrighted material, Confidential Business Information (CBI), or other information whose public disclosure is restricted by statute. For further information about in the docket that are available electronically. Once in the system, select "docket search," then key in the docket ID number identified above. Please note that EPA's policy is that public comments the electronic docket, go to *http://www.regulations.gov.*

Title: NESHAP for Beryllium (Renewal).

ICR Numbers: EPA ICR Number 0193.10, OMB Control Number 2060–0092.

ICR Status: This ICR is schedule to expire on January 31, 2011. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. 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 EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, and displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain- EPA regulations is consolidated in 40 CFR part 9.

Abstract: The National Emission Standards for Hazardous Air Pollutants (NESHAP) for Beryllium, 40 CFR, part 61, subpart C, were proposed on

December 7, 1971 (36 FR 23939), and promulgated on April 6, 1973 (38 FR 8826). This standard applies to all extraction plants, ceramic plants, foundries, incinerators, and propellant plants which process beryllium ore, beryllium, beryllium oxide, beryllium alloys, or beryllium-containing waste. The standard also applies to machine shops which process beryllium, beryllium oxides, or any alloy when such alloy contains more than five percent beryllium by weight. All sources known to have caused, or have the potential to cause, dangerous levels of beryllium in the ambient air are covered by the Beryllium NESHAP. This information is being collected to ensure compliance with 40 CFR part 61, subpart C.

There are approximately 236 existing sources subject to this rule. Of the total number of existing sources, we have assumed that approximately 10 sources (*i.e.,* respondents) have elected to comply with an alternative ambient air quality limit by operating a continuous monitor in the vicinity of the affected facility. The monitoring requirements for these facilities provide information on ambient air quality and ensure that locally, the airborne beryllium concentration does not exceed 0.01 micrograms/m^3. The sources that are meeting the rule requirements by means of ambient monitoring are required to submit a monthly report of all measured concentrations to the administrator. The remaining 226 sources have elected to comply with the rule by conducting a one-time-only stack test to determine beryllium emissions levels. We have assumed that 10 percent of the 226 sources (or 23 respondents) complying with the emission limit standard will engage in an operational change at their facilities that could potentially increase beryllium emissions, and would be required to repeat the stack test to determine the beryllium emission limits. Consequently, these sources will have recordkeeping and reporting requirements associated with the stack test. We have assumed that no additional sources are expected to become subject to the standard in the next three years. Therefore, there are 33 respondents for the purpose of determining the recordkeeping and reporting burden associated with this rule.

Any owner or operator subject to the provisions of this part shall maintain a file of these measurements, and retain the file for at least five years following the date of such measurements, maintenance reports, and records. All reports are sent to the delegated state or local authority. In the event that there is no such delegated authority, the reports are sent directly to the EPA regional office. This information is being collected to assure compliance with 40 CFR part 61, subpart C, as authorized in section 112 and 114(a) of the Clean Air Act. The required information consists of emissions data and other information that have been determined to be private.

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 Number for EPA's regulations are list in 40 CFR part 9 and 48 CFR chapter 15, and are identified on the form and/or instrument, if applicable.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 16 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating, and verifying information, processing and maintaining, information, and disclosing and providing information. All existing ways will have to adjust to comply with any previously applicable instructions and requirements that have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Beryllium.

Estimated Number of Respondents: 33.

Frequency of Response: Monthly, and on occasion.

Estimated Total Annual Hour Burden: 2,627.

Estimated Total Annual Cost: $281,442, which includes $246,442 in labor costs, zero capital/startup costs, and $35,000 in operation and maintenance (O&M) costs.

Changes in the Estimates: There is no increase in the number of affected facilities, labor hours, or the number of responses compared to the previous ICR. There is, however, an increase in the estimated labor burden cost as currently identified in the OMB Inventory of Approved Burdens. This increase is not due to any program change. The change in the labor burden cost estimates has occurred because we updated the labor rates, which resulted in an increase in labor costs.

Dated: December 6, 2010.

John Moses,

Director, Collection Strategies Division.

[FR Doc. 2010–31090 Filed 12–9–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–8994–1]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–1399 or *http://www.epa.gov/compliance/nepa/.*

Weekly Receipt of Environmental Impact Statements, Filed 11/29/2010 Through 12/03/2010

Pursuant to 40 CFR 1506.9.

Notice:

In accordance with Section 309(a) of the Clean Air Act, EPA is required to make its comments on EISs issued by other Federal agencies public. Historically, EPA has met this mandate by publishing weekly notices of availability of EPA comments, which includes a brief summary of EPA's comment letters, in the **Federal Register**. Since February 2008, EPA has been including its comment letters on EISs on its Web site at: *http://www.epa.gov/compliance/nepa/eisdata.html.* Including the entire EIS comment letters on the Web site satisfies the Section 309(a) requirement to make EPA's comments on EISs available to the public. Accordingly, on March 31, 2010, EPA discontinued the publication of the notice of availability of EPA comments in the **Federal Register**.

EIS No. 20100458, Draft EIS, FHWA, CA, Phase II—CA–11 and Otay Mesa East Port of Entry Project, Construction of a new State Route and Port of Entry in the East Otay Mesa Are of the City and County of San Diego, CA from the State Route 905/State Route 125 Interchange to the U.S.-Mexico Border, Comment Period Ends: 02/01/2011, Contact: Cesar Perez 916–498–5065.

EIS No. 20100459, Draft EIS, BPA, 00, Big Eddy-Knight Transmission Project, Proposal to Construct, Operate, and Maintain a 27–28 mile long 500-Kilovolt Transmission Line using a Combination of Existing BPA and New 150-Foot wide Right-of-Way, Wasco County, OR and Klickitat County, WA, Comment Period Ends:

01/28/2011, Contact: Stacy Mason 503–230–5455.

EIS No. 20100460, Final EIS, FHWA, WA, WA–520 Bridge Replacement and HOV Program, To Build the New Pontoon Construction Facility, Gray Harbor and Pierce Counties, WA, Wait Period Ends: 01/10/2011, Contact: Allison Hanson 206–805–2880.

EIS No. 20100461, Draft EIS, USFS, WY, Noble Basin Master Development Plan (MDP) Project, Proposes to Drill up to 136 Oil and Gas Wells on Existing Oil and Gas Leases on National Forest System (NFS) Lands, Approval of a Surface Use Plan of Operations (SUPO) for a Master Development Plan (MDP), Sublette County, WY, Comment Period Ends: 03/11/2011, Contact: Jacqueline A. Buchanan 307–739–5510.

Amended Notices

EIS No. 20040229, Final EIS, FHWA, WA, ADOPTION—I–90 Two-Way Transit and HOV Operation Project, Providing Reliable Transportation between Seattle and Bellevue, Sound Transit Regional Express, U.S. Coast Guard Permit and U.S. Corps Nationwide Permit, King County, WA, Contact: John Witmer, 206–220–7964. Revision to FR Notice Published 05/21/2004: The U.S. Department of Transportation's, Federal Transit Administration (DOT/FTA) has ADOPTED the U.S. Department of Transportation's Federal Highway Administration FEIS #20040229, filed on 05/13/2004. DOT/FTA was a Cooperating Agency for the above project. Recirculation of the FEIS is not necessary under 40 CFR 1506.3(c).

EIS No. 20100329, Final EIS, BLM, CA, ADOPTION—Blythe Solar Power Project (09–AFC–6), Application for Right-of Way Grant to Construct and Operate, and Decommission a Solar Thermal Facility on Public Lands, Riverside County, CA, Contact: Matthew McMillen, 202–586–7248. Revision to FR Notice Published 08/20/2010: The U.S. Department of Energy's has adopted the Department of Interior's Bureau of Land Management FEIS #20100329, filed 08/13/2010. DOE was a cooperating agency for the above project. Recirculation of the FEIS is not necessary under 40 CFR 1506.3(c).

EIS No. 20100431, Final EIS, USFS, WA, Dosewallips Road Washout Project, To Reestablish Road Access to both Forest Service Road (FSR) 2610 and Dosewallips Road, Hood Canal Ranger District Olympic National Forest, Olympic National Park, Jefferson County, WA, Wait Period Ends: 01/03/2011, Contact: Tim Davis 360–956–2375. Revision to FR Notice Published 11/05/2010: Extending Wait Period from 12/06/2010 to 01/03/2011.

EIS No. 20100435, Draft EIS, BR, CA, Suisun Marsh Habitat Management, Preservation, and Restoration Plan, Implementation, CA, Comment Period Ends: 12/28/2010, Contact: Doug Kleinsmith 916–978–5034 Revision to FR Notice Published 11/05/2010: Extending Comment Period from 12/20/2010 to 12/28/2010.

EIS No. 20100442, Draft Supplement, FTA, WA, East Link Rail Transit Project, New and Update Information, Proposes to Construct and Operate an Extension of the Light Rail System from downtown Seattle to Mercer Island, Bellevue, and Redmond via Interstate 90, Funding and U.S. Army COE Section 404 and 10 Permits, Seattle, WA, Comment Period Ends: 01/10/2011, Contact: John Witmer 206–220–7950. Revision to FR Notice Published 11/12/2010: Extending Comment Period from 12/27/2010 to 01/10/2011.

EIS No. 20100455, Final EIS, BLM, NV, ON Line Project, (Previously Known as Ely Energy Center) Proposed 236-mile long 500 kV Electric Transmission Line from a new substation near Ely, Nevada approximately 236 mile south to the existing Harry Allen substation near Las Vegas, Clark, Lincoln, Nye and White Pine Counties, NV, Wait Period Ends: 01/04/2011, Contact: Michael Dwyer 775–293–0523. Revision to FR Notice Published 12/06/2010: Correction to Wait Period from 01/03/2010 to 01/04/2011.

EIS No. 20100457, Final EIS, NPS, FL, Big Cyress National Preserve Addition, General Management Plan/Wilderness Study/Off-Road Vehicle Management Plan, Implementation, Collier County, FL, Wait Period Ends: 01/04/2011, Contact: Pedro Ramos 239–695–1101. Revision to FR Notice Published 12/06/2010: Correction to Wait Period from 01/03/2011 to 01/04/2011

Dated: December 7, 2010.

Robert W. Hargrove,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2010–31087 Filed 12–9–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9237–6; Docket ID No. EPA–HQ–ORD–2007–0664]

Integrated Risk Information System (IRIS); Announcement of Availability of Literature Searches for IRIS Assessments

AGENCY: Environmental Protection Agency.

ACTION: Announcement of availability of literature searches for IRIS assessments; request for information.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is announcing the availability of literature searches for four IRIS assessments, acetaldehyde (CAS No. 75–07–0), hexachlorobutadiene (CAS No. 87–68–3), hexahydro-1,3,5-trinitro-1,3,5-triazine (RDX) (CAS No. 121–82–4), and naphthalene (CAS No. 91–20–3) and requesting scientific information on health effects that may result from exposure to these chemical substances. EPA's IRIS is a human health assessment program that evaluates quantitative and qualitative risk information on effects that may result from exposure to specific chemical substances found in the environment.

DATES: EPA will accept information related to the specific substances included herein as well as any other compounds being assessed by the IRIS Program. Please submit any information in accordance with the instructions provided below.

ADDRESSES: Please submit relevant scientific information identified by docket ID number EPA–HQ–ORD–2007–0664, online at *http://www.regulations.gov* (EPA's preferred method); by e-mail to *ord.docket@epa.gov;* mailed to Office of Environmental Information (OEI) Docket (Mail Code: 2822T), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; or by hand delivery or courier to EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC, between 8:30 a.m. and 4:30 p.m. Monday through Friday, excluding legal holidays. Information on a disk or CD–ROM should be formatted in Word or as an ASCII file, avoiding the use of special characters and any form of encryption, and may be mailed to the mailing address above.

FOR FURTHER INFORMATION CONTACT: For information on the IRIS program, contact Karen Hammerstrom, IRIS Program Deputy Director, National Center for Environmental Assessment,

(mail code: 8601D), Office of Research and Development, U.S. Environmental Protection Agency, Washington, DC 20460; telephone: (703) 347–8642, facsimile: (703) 347–8689; or e-mail: *FRNquestions@epa.gov*.

For general questions about access to IRIS, or the content of IRIS, please call the IRIS Hotline at (202) 566–1676 or send electronic mail inquiries to *hotline.iris@epa.gov*.

SUPPLEMENTARY INFORMATION:

Background

EPA's IRIS is a human health assessment program that evaluates quantitative and qualitative risk information on effects that may result from exposure to specific chemical substances found in the environment. Through the IRIS Program, EPA provides the highest quality science-based human health assessments to support the Agency's regulatory activities. The IRIS database contains information for more than 540 chemical substances that can be used to support the first two steps (hazard identification and dose-response evaluation) of the risk assessment process. When supported by available data, IRIS provides oral reference doses (RfDs) and inhalation reference concentrations (RfCs) for chronic noncancer health effects as well as assessments of potential carcinogenic effects resulting from chronic exposure. Combined with specific exposure information, government and private entities use IRIS to help characterize public health risks of chemical substances in a site-specific situation and thereby support risk management decisions designed to protect public health.

This data call-in is a step in the IRIS process. As literature searches are completed, the results will be posted on the IRIS Web site (*http://www.epa.gov/iris*). The public is invited to review the literature search results and submit additional information to EPA.

Request for Public Involvement in IRIS Assessments

EPA is soliciting public involvement in assessments on the IRIS agenda, including new assessments starting in 2011. While EPA conducts a thorough literature search for each chemical substance, there may be unpublished studies or other primary technical sources that are not available through the open literature. EPA would appreciate receiving scientific information from the public during the information gathering stage for the assessments listed in this notice or any other assessments on the IRIS agenda. Interested persons may provide scientific analyses, studies, and other pertinent scientific information. While EPA is primarily soliciting information on new assessments, the public may submit information on any chemical substance at any time.

This notice provides (1) a list of new IRIS assessments for which literature searches have recently become available; and (2) instructions to the public for submitting scientific information to EPA pertinent to the development of assessments.

EPA is announcing the availability of additional literature searches on the IRIS Web site (*http://www.epa.gov/iris*). The public is invited to review the literature search results and submit additional information to EPA. Literature searches are now available for acetaldehyde (CAS No. 75–07–0), hexachlorobutadiene (CAS No. 87–68–3), hexahydro-1,3,5-trinitro-1,3,5-triazine (RDX) (CAS No. 121–82–4), and naphthalene (CAS No. 91–20–3) at *http://www.epa.gov/iris* under "IRIS Agenda and Literature Searches." Additional literature searches will be posted as they are completed. Availability will be announced in the **Federal Register.** Instructions on how to submit information are provided below under General Information.

General Information

Submit your comments, identified by Docket ID No. EPA–HQ–ORD–2007–0664 by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail:* ORD.Docket@epa.gov.
- *Fax:* 202–566–1753.
- *Mail:* Office of Environmental Information (OEI) Docket, (Mail Code: 2822T), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. The phone number is 202–566–1752.
- *Hand Delivery:* The OEI Docket is located in the EPA Headquarters Docket Center, EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center's 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. Such deliveries are only accepted during the docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information. If you provide information by mail or hand delivery, please submit one unbound original with pages numbered consecutively, and three copies of the comments. For attachments, provide an index, number pages consecutively with the main text, and submit an unbound original and three copies.

Instructions: Direct your comments to Docket ID No. EPA–HQ–ORD–2007–0664. It is EPA's policy to include all comments it receives in the public docket without change and to make the comments available online at *http://www.regulations.gov,* including any personal information provided, unless a comment includes information claimed to be Confidential Business Information (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 e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov*, your e-mail 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, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficultiesand cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm*.

Docket: All documents in the docket are listed in the *http://www.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, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the OEI Docket in the EPA Headquarters Docket Center.

Dated: December 3, 2010.

Darrell A. Winner,

Acting Director, National Center for Environmental Assessment.

[FR Doc. 2010–31079 Filed 12–9–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OW–2008–0055; FRL–9233–9]

Notice Regarding National Pollutant Discharge Elimination System (NPDES); General Permit for Discharges Incidental to the Normal Operation of a Vessel

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability.

SUMMARY: EPA announced the final NPDES general permit for discharges incidental to the normal operation of vessels, also referred to as the Vessel General Permit (VGP), in the **Federal Register** on December 29, 2008 (73 FR 79473). The permit was finalized on December 18, 2008 and became effective on February 6, 2009. EPA noticed final issuance of the VGP for the states of Hawaii and Alaska, after receipt of a certification pursuant to section 401 of the Clean Water Act (CWA) from Hawaii and a final response on the national consistency determination required by section 307(c)(1) of the Coastal Zone Management Act (CZMA) from Alaska, which was signed on February 2, 2009, with an effective date of February 6, 2009. On March 11, 2009, a notice of availability in the **Federal Register** provided notice of EPA's deletion of State section 401 certification conditions from the VGP for the States of New Jersey, Illinois, and California (74 FR 10573). Today's notice of availability provides notice of EPA's deletion of specific State section 401 certification conditions from Part 6 of the VGP for the States of Pennsylvania and Iowa.

FOR FURTHER INFORMATION CONTACT: For further information on the final vessel NPDES general permit, contact Robin Danesi at EPA Headquarters, Office of Water, Office of Wastewater Management, Mail Code 4203M, 1200 Pennsylvania Ave., NW., Washington, DC 20460; or at tel. 202–564–1846; or Juhi Saxena at EPA Headquarters, Office of Water, Office of Wastewater Management, Mail Code 4203M, 1200 Pennsylvania Ave., NW., Washington, DC 20460; or at tel. 202–564–0719; or e-mail: *CommercialVesselPermit@epa.gov.*

SUPPLEMENTARY INFORMATION:

A. General Information

Pursuant to Clean Water Act section 401(a) and EPA's implementing regulations, EPA may not issue a NPDES permit (including the VGP) until the appropriate State certifications have been granted or waived. 40 CFR 124.53(a). Through the certification process, States were given the opportunity, before the VGP was issued, to add conditions to the permit they believe are necessary to ensure that the permit complies with the Clean Water Act and other appropriate requirements of State law, including State water quality standards.

Pennsylvania Department of Environmental Protection issued its section 401 certification for the VGP on December 12, 2008, and modified its certification on October 1, 2010. This modification deleted certification conditions 1, 2, and 3. Iowa Department of Natural Resources issued its section 401 certification for the VGP on August 8, 2008, and modified its certification on July 8, 2009. This modification deleted certification conditions 3 and 11. Pursuant to EPA's implementing regulations at 40 CFR 124.55(b), EPA may, at the request of a permittee, modify the VGP based on a modified certification received after final agency action on the permit "only to the extent necessary to delete any conditions based on a condition in a certification invalidated by a court of competent jurisdiction or by an appropriate State board or agency." 40 CFR 124.55(b). In accordance with this provision, EPA has removed these deleted certification conditions from the VGP.[1] EPA's letters notifying the requesting permittees that their requests to delete the permit conditions were granted, and a copy of the VGP reflecting those deletions, can be found in the docket for the VGP (Docket ID No. EPA–HQ–OW–2008–0055).[2]

B. How can I get copies of these documents and other related information?

1. Docket. EPA has established an official public docket for this action under Docket ID No. EPA–HQ–OW–2008–0055. The official public docket is the collection of materials, including the administrative record, for the final permit, required by 40 CFR 124.18. It is available for public viewing at the Water Docket in the EPA Docket Center, (EPA/DC) EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC 20460. Although all documents in the docket are listed in an index, some information is not publicly available, *i.e.,* CBI or other information whose disclosure is restricted by statute. Publicly available docket materials are available electronically through *http://www.regulations.gov* and in hard copy at the EPA Docket Center Public Reading Room, 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 Water Docket is (202) 566–2426.

2. Electronic Access. You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr/.* An electronic version of the public docket is available through the Federal Docket Management System (FDMS) found at *http://www.regulations.gov.* You may use the FDMS to view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once at the Web site, enter the appropriate Docket ID No. in the "Search" box to view the docket.

Certain types of information will not be placed in the EPA dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Section B.1.

Authority: Clean Water Act, 33 U.S.C. 1251 *et seq.*

[1] In order for EPA to remove these deleted conditions from the VGP, the regulations at 40 CFR 124.55(b) also require that EPA receive a request from a permittee asking that the deleted State certification conditions be removed from the permit. EPA received such requests to remove deleted conditions from The Vane Brothers Company in Pennsylvania on November 24, 2009 and from Alter Barge Line, Inc. in Iowa on December 31, 2009.

[2] In addition, the permit may be found at *http://www.epa.gov/npdes/vessels.*

Dated: November 17, 2010.

Jon M. Capacasa,

Director, Water Protection Division, EPA Region 3.

Dated: November 17, 2010.

Karen Flournoy,

Acting Director, Water, Wetlands, and Pesticides Division, EPA Region 7.

[FR Doc. 2010–31088 Filed 12–9–10; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Submitted for Review and Approval to the Office of Management and Budget (OMB), Comments Requested

November 30, 2010.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, 44 U.S.C. 3501–3520. Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid OMB control number.

DATES: Submit written Paperwork Reduction Act (PRA) comments on or before January 10, 2011. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Submit all PRA comments to Nicholas A. Fraser, Office of Management and Budget, via fax at 202–395–5167 or the Internet at *Nicholas_A._Fraser@omb.eop.gov;* and to *Judith-B. Herman@fcc.gov,* Federal Communications Commission. Send your PRA comments by e-mail to *PRA@fcc.gov.* To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the web page *http://reginfo.gov/public/do/PRAMain,* (2) look for the section of the web page called "Currently Under Review", (3) click on the downward-pointing arrow in the "Select Agency" box below the "Currently Under Review" heading, (4) select "Federal Communications Commission" from the list of agencies presented in the "Select Agency" box, (5) click the "Submit" button to the right of the "Select Agency" box, and (6) when the list of FCC ICRs currently under review appears, look for the title of this ICR (or its OMB Control Number, if there is one) and then click on the ICR Reference Number to view detailed information about this ICR.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Judith B. Herman at 202–418–0214 or via the Internet at *Judith-B.Herman@fcc.gov.*

SUPPLEMENTARY INFORMATION: *OMB Control Number:* 3060–0360.

Title: Section 80.409, Station Logs.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit, not-for-profit institutions, and state, local or tribal government.

Number of Respondents: 18,876 respondents; 18,876 responses.

Estimated Time per Response: 27.3 hours.

Frequency of Response: Recordkeeping requirement.

Obligation to Respond: Mandatory. Statutory authority for this information collection is contained in 47 U.S.C. sections 151–154, 301–609, 3 UST 3450, 3 UST 4726, 12 UST 2377.

Total Annual Burden: 533,458 hours.

Total Annual Cost: N/A.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: There is no need for confidentiality.

Needs and Uses: The Commission will submit this expiring information collection (IC) to the OMB as an extension during this comment period to obtain the full three-year clearance from them. The Commission is reporting no change in recordkeeping requirement. The Commission is reporting a 41,050 hour reduction in burden which is due to 1,583 fewer respondents/responses. Therefore, the total annual burden has been adjusted. The recordkeeping requirements contained in section 80.409 is necessary to document the operation and public correspondence service of public coast radiotelegraph, public coast radiotelephone stations and Alaska-public fixed stations, including the logging of distress and safety calls where applicable.

The information is used by FCC personnel during inspections and investigations to ensure compliance with applicable rules and to assist in accident investigations. If the information was not maintained, documentation concerning the operation of public coast radiotelegraph stations, public coast radiotelephone stations and Alaska-public fixed stations would not be available.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2010–31119 Filed 12–9–10; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that the Federal Deposit Insurance Corporation's Board of Directors will meet in open session at 10 a.m. on Tuesday, December 14, 2010, to consider the following matters:

Summary Agenda

No substantive discussion of the following items is anticipated. These matters will be resolved with a single vote unless a member of the Board of Directors requests that an item be moved to the discussion agenda.

Disposition of minutes of previous Board of Directors' Meetings.

Summary reports, status reports, and reports of actions taken pursuant to authority delegated by the Board of Directors.

Memorandum and resolution re: Joint Final Rule: Amendment to the Community Reinvestment Act Regulation.

Discussion Agenda

Risk-Based Capital Standards: Market Risk.

Risk-Based Capital Standards: Advanced Capital Adequacy Framework—Basel II; Establishment of a Risk-Based Capital Floor.

Final Rule Setting the Designated Reserve Ratio.

Proposed 2011 Corporate Operating Budget.

The meeting will be held in the Board Room on the sixth floor of the FDIC Building located at 550 17th Street, NW., Washington, DC.

This Board meeting will be Webcast live via the Internet and subsequently made available on-demand approximately one week after the event. Visit *http://www.vodium.com/goto/fdic/boardmeetings.asp* to view the event. If you need any technical assistance, please visit our Video Help page at: *http://www.fdic.gov/video.html.*

The FDIC will provide attendees with auxiliary aids (*e.g.,* sign language interpretation) required for this meeting. Those attendees needing such assistance should call 703–562–2404 (Voice) or 703–649–4354 (Video Phone) to make necessary arrangements.

Requests for further information concerning the meeting may be directed to Mr. Robert E. Feldman, Executive Secretary of the Corporation, at 202–898–7043.

Dated: December 7, 2010.

Valerie J. Best,

Assistant Executive Secretary, Federal Deposit Insurance Corporation.

[FR Doc. 2010–31154 Filed 12–8–10; 11:15 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the National Coordinator for Health Information Technology; Health Information Technology; Request for Information Regarding the President's Council of Advisors on Science and Technology (PCAST) Report Entitled "Realizing the Full Potential of Health Information Technology To Improve Healthcare for Americans: The Path Forward"

AGENCY: Office of the National Coordinator for Health Information Technology (ONC), Department of Health and Human Services (HHS).

ACTION: Request for information.

SUMMARY: This document is a request for comments regarding the recently released PCAST report and its implications for the nation's health information technology (HIT) agenda and ONC's implementation of the Health Information Technology for Economic and Clinical Health Act (HITECH Act).

DATES: *Comment Date:* To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on January 17, 2011.

ADDRESSES: Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission. You may submit comments by any of the following methods (please do not submit duplicate comments).

- *Electronically:* You may submit electronic comments on this request for information at *http://www.regulations.gov.* Follow the "Submit a comment" instructions. Attachments should be in Microsoft Word or Excel, WordPerfect, or Adobe PDF.
- *Regular, Express, or Overnight Mail:* Department of Health and Human Services, Office of the National Coordinator for Health Information Technology, Attention: Steven Posnack, Hubert H. Humphrey Building, Suite 729D, 200 Independence Ave., SW., Washington, DC 20201. Please submit one original and two copies. Please also allow sufficient time for mailed comments to be received before the close of the comment period.
- *Hand Delivery or Courier:* Office of the National Coordinator for Health Information Technology, Attention: Steven Posnack, Hubert H. Humphrey Building, Suite 729D, 200 Independence Ave., SW., Washington, DC 20201. Please submit one original and two copies. (Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal government identification, commenters are encouraged to leave their comments in the mail drop slots located in the main lobby of the building.)

FOR FURTHER INFORMATION CONTACT: Steven Posnack, Director, Federal Policy Division, Office of Policy and Planning, Office of the National Coordinator for Health Information Technology, 202–690–7151.

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: All comments received before the close of the comment period will be available for public inspection, including any personally identifiable or confidential business information that is included in a comment. Please do not include anything in your comment submission that you do not wish to share with the general public. Such information includes, but is not limited to: A person's Social Security number; date of birth; driver's license number; State identification number or foreign country equivalent; passport number; financial account number; credit or debit card number; any personal health information; or any business information that could be considered to be proprietary. We will post all comments received before the close of the comment period at *http://www.regulations.gov.* Follow the search instructions on that Web site to view public comments.

I. Background

On December 8, 2010, the President's Council of Advisors on Science and Technology (PCAST) released an important new report entitled "Realizing the Full Potential of Health Information Technology To Improve Healthcare for Americans: The Path Forward" (the PCAST Report). (The full report is available at *http://www.whitehouse.gov/administration/eop/ostp/pcast* and also available on ONC's Web site *http://healthit.hhs.gov*). PCAST is an advisory group of the nation's leading scientists and engineers who directly advise the President and the Executive Office of the President. PCAST makes policy recommendations in the many areas where understanding of science, technology, and innovation is key to strengthening our economy and forming policy that works for the American people. PCAST is administered by the Office of Science and Technology Policy (OSTP). PCAST's report and its recommendations have significant implications for the nation's HIT agenda and the implementation of the HITECH Act, passed as part of the American Recovery and Reinvestment Act of 2009 (Recovery Act) (Pub. L. 111–5). ONC seeks public comment on the PCAST report's vision and recommendations and how they may be best addressed.

II. Solicitation of Comments

ONC seeks comment on the questions below. Comments on other aspects of the PCAST report are also welcome.

1. What standards, implementation specifications, certification criteria, and certification processes for electronic health record (EHR) technology and other HIT would be required to implement the following specific recommendations from the PCAST report:

a. That ONC establish minimal standards for the metadata associated with tagged data elements;

b. That ONC facilitate the rapid mapping of existing semantic taxonomies into tagged data elements;

c. That certification of EHR technology and other HIT should focus on interoperability with reference implementations developed by ONC.

2. What processes and approaches would facilitate the rapid development

and use of these standards, implementation specifications, certification criteria and certification processes?

3. Given currently implemented information technology (IT) architectures and enterprises, what challenges will the industry face with respect to transitioning to the approach discussed in the PCAST report?

a. Given currently implemented provider workflows, what are some challenges to populating the metadata that may be necessary to implement the approach discussed in the PCAST report?

b. Alternatively, what are proposed solutions, or best practices from other industries, that could be leveraged to expedite these transitions?

4. What technological developments and policy actions would be required to assure the privacy and security of health data in a national infrastructure for HIT that embodies the PCAST vision and recommendations?

5. How might a system of Data Element Access Services (DEAS), as described in the report, be established, and what role should the Federal government assume in the oversight and/or governance of such a system?

6. How might ONC best integrate the changes envisioned by the PCAST report into its work in preparation for Stage 2 of Meaningful Use?

7. What are the implications of the PCAST report on HIT programs and activities, specifically, health information exchange and Federal agency activities, and how could ONC address those implications?

8. Are there lessons learned regarding metadata tagging in other industries that ONC should be aware of?

9. Are there lessons learned from initiatives to establish information-sharing languages ("universal languages") in other sectors?

Dated: December 7, 2010.

David Blumenthal,

National Coordinator, Office of the National Coordinator for HIT.

[FR Doc. 2010–31159 Filed 12–8–10; 11:15 am]

BILLING CODE 4150–45–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Epidemiologic and Ecologic Determinants of Monkeypox in a Disease-Endemic Setting, Funding Opportunity Announcement (FOA) CK11–003, Initial Review

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the aforementioned meeting:

Time and Date: 12 p.m.–2 p.m., February 1, 2011 (Closed).

Place: Teleconference.

Status: The meeting will be closed to the public in accordance with provisions set forth in Section 552b(c)(4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463.

Matters to Be Discussed: The meeting will include the initial review, discussion, and evaluation of applications received in response to "Epidemiologic and Ecologic Determinants of Monkeypox in a Disease-endemic Setting, Funding Opportunity Announcement FOA CK11–003."

Contact Person for More Information: Amy Yang, PhD, Scientific Review Officer, CDC, 1600 Clifton Road, NE., Mailstop E60, Atlanta, Georgia 30333, *Telephone:* (404) 498–2733.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: December 2, 2010.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2010–31046 Filed 12–9–10; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–1500(08–05)]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the Agency's function; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* Reinstatement of a previously approved collection; *Title of Information Collection:* Health Insurance Common Claims Form and Supporting Regulations at 42 CFR part 424, Subpart C; *Form Number:* CMS–1500(08–05), CMS–1490–S (OMB#: 0938–0999); *Use:* The Form CMS–1500 answers the needs of many health insurers. It is the basic form prescribed by CMS for the Medicare program for claims from physicians and suppliers. The Medicaid State Agencies, CHAMPUS/TriCare, Blue Cross/Blue Shield Plans, the Federal Employees Health Benefit Plan, and several private health plans also use it; it is the de facto standard "professional" claim form.

Medicare carriers use the data collected on the CMS–1500 and the CMS–1490S to determine the proper amount of reimbursement for Part B medical and other health services (as listed in section 1861(s) of the Social Security Act) provided by physicians and suppliers to beneficiaries. The CMS–1500 is submitted by physicians/suppliers for all Part B Medicare. Serving as a common claim form, the CMS–1500 can be used by other third-party payers (commercial and nonprofit health insurers) and other Federal programs (*e.g.,* CHAMPUS/TriCare, Railroad Retirement Board (RRB), and Medicaid).

However, as the CMS–1500 displays data items required for other third-party payers in addition to Medicare, the form is considered too complex for use by beneficiaries when they file their own claims. Therefore, the CMS–1490S (Patient's Request for Medicare Payment) was explicitly developed for

easy use by beneficiaries who file their own claims. The form can be obtained from any Social Security office or Medicare carrier. *Frequency:* Reporting—On occasion; *Affected Public:* State, Local, or Tribal Government, Business or other-for-profit, Not-for-profit institutions; *Number of Respondents:* 1,048,243; *Total Annual Responses:* 991,160,925; *Total Annual Hours:* 23,815,541. (For policy questions regarding this collection contact Brian Reitz at 410–786–5001. For all other issues call 410–786–1326.)

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS Web Site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995,* or e-mail your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov,* or call the Reports Clearance Office on (410) 786–1326.

To be assured consideration, comments and recommendations for the proposed information collections must be received by the OMB desk officer at the address below, no later than 5 p.m. on *January 10, 2011.*

OMB, Office of Information and Regulatory Affairs.

Attention: CMS Desk Officer.

Fax Number: (202) 395–6974.

E-mail:

OIRA_submission@omb.eop.gov.

Dated: December 6, 2010.

Michelle Shortt,

Director, Regulations Development Group Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2010–31075 Filed 12–9–10; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–21 and CMS–21B, CMS–37, CMS–64, CMS–10120, CMS–10224, CMS–10098, CMS–10292 and CMS–10220]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS) is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* Extension without change of a currently approved collection; *Title of Information Collection:* CMS–21 (Quarterly Children's Health Insurance Program (CHIP) Statement of Expenditures for the Title XXI Program) and CMS–21B (State Children's Health Insurance Program Budget Report for the Title XXI Program State Plan Expenditures); *Use:* Forms CMS–21 and –21B provide CMS with the information necessary to issue quarterly grant awards, monitor current year expenditure levels, determine the allowability of State claims for reimbursement, develop CHIP financial management information, provide for State reporting of waiver expenditures, and ensure that the Federally established allotment is not exceeded. Further, these forms are necessary in the redistribution and reallocation of unspent funds over the Federally mandated timeframes; *Form Numbers:* CMS–21 and CMS–21B (OMB#: 0938–0731); *Frequency:* Quarterly; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 56; *Total Annual Responses:* 448; *Total Annual Hours:* 7,840. (For policy questions regarding this collection contact Jonas Eberly at 410–786–6232. For all other issues call 410–786–1326.)

2. *Type of Information Collection Request:* Extension without change of a currently approved collection; *Title of Information Collection:* Medicaid Program Budget Report; *Use:* Form CMS–37 is prepared and submitted to the Centers for Medicare & Medicaid Services (CMS) by State Medicaid agencies. Form CMS–37 is the primary document used by CMS in developing the national Medicaid budget estimates that are submitted to the Office of Management and Budget and the Congress; *Form Number:* CMS–37 (OMB#: 0938–0101); *Frequency:* Quarterly; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 56; *Total Annual Responses:* 224; *Total Annual Hours:* 7,616. (For policy questions regarding this collection contact Jonas Eberly at 410–786–6232. For all other issues call 410–786–1326.)

3. *Type of Information Collection Request:* Extension without change of a currently approved collection; *Title of Information Collection:* Quarterly Medicaid Statement of Expenditures for the Medical Assistance Program; *Use:* Form CMS–64 has been used since January 1980 by the Medicaid State Agencies to report their actual program benefit costs and administrative expenses to CMS. CMS uses this information to compute the Federal financial participation (FFP) for the State's Medicaid Program costs. Certain schedules of the CMS–64 form are used by States to report budget, expenditure and related statistical information required for implementation of the Medicaid portion of the State Children's Health Insurance Programs; *Form Number:* CMS–64 (OMB#: 0938–0067); *Frequency:* Quarterly; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 56; *Total Annual Responses:* 224; *Total Annual Hours:* 16,464. (For policy questions regarding this collection contact Jonas Eberly at 410–786–6232. For all other issues call 410–786–1326.)

4. *Type of Information Collection Request:* Extension without change of a currently approved collection; *Title of Information Collection:* 1932 State Plan Amendment Template; *Use:* Section 1932(a)(1)(A) of the Social Security Act (the Act) grants states the authority to enroll Medicaid beneficiaries on a mandatory basis into managed care entities, managed care organizations (MCOs) and primary care case managers (PCCMs). Under this authority, a state can amend its Medicaid state plan to require certain categories of Medicaid beneficiaries to enroll in managed care entities without being out of compliance. This template may be used by states to easily modify their state plans if they choose to implement the provisions of section 1932(a)(1)(A).

The State Medicaid Agencies will complete the template. CMS will review the information to determine if the state has met all the requirements of section 1932(a)(1)(A) and 42 CFR 438.50. If the requirements are met, CMS will approve the amendment to the state's title XIX plan giving the state the authority to enroll Medicaid beneficiaries on a mandatory basis into managed care entities MCOs and PCCMs. For a state to receive Medicaid funding, there must be an approved title XIX state plan; *Form Number:* CMS–10120 (OMB#:

0938–0933); *Frequency:* Occasionally; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 56; *Total Annual Responses:* 10; *Total Annual Hours:* 100. (For policy questions regarding this collection contact Camille Dobson at 410–786–7065. For all other issues call 410–786–1326.)

5. *Type of Information Collection Request:* Revision of currently approved collection; *Title of Information Collection:* Healthcare Common Procedure Coding System (HCPCS); *Use:* In October 2003, the Secretary of Health and Human Services delegated the Center for Medicare and Medicaid Services (CMS) authority to maintain and distribute HCPCS Level II Codes. As a result, the National Panel was delineated and CMS continued with the decision-making process under its current structure, the CMS HCPCS Workgroup (herein referred to as "the Workgroup". CMS' HCPCS Workgroup is an internal workgroup comprised of representatives of the major components of CMS, and private insurers, as well as other consultants from pertinent Federal agencies. Currently the application intake is paper-based. However, the process has grown and the HCPCS staff is exploring electronic processes for the collection and storage of applications. We have received feedback on the nature of the application; and have streamlined the form into a user-friendly application. The content of the material is the same, but the questions have been refined in accordance with comments received from industry members; and the level of necessity of the information required to render quality coding decision as determined by the CMS workgroup. The information on the form is used to update the HCPCS code set. All information is received and distributed to CMS' HCPCS workgroup and is reviewed and discussed at workgroup meetings. In turn, CMS' HCPCS workgroup reaches a decision as to whether a change should be made to codes in the HCPCS code set. The respondent who submits the application form can be anyone who has an interest in obtaining a code or modifying an existing code. However, respondents are usually manufacturers of products, or consultants on behalf of the manufacturer. *Form Number:* CMS–10224 (OMB#: 0938–1042; *Frequency:* Occasionally; *Affected Public:* Private Sector, Business and other for-profit and not-for-profit institutions; *Number of Respondents:* 300; *Total Annual Responses:* 300; *Total Annual Hours:* 3300. (For policy questions regarding this collection contact Felicia Eggleston at 410–786–9287 or Lori Anderson at 410–786–6190. For all other issues call 410–786–1326.)

6. *Type of Information Collection Request:* Reinstatement with change of a previously approved collection; *Title of Information Collection:* Beneficiary Satisfaction Survey; *Use:* The Beneficiary Satisfaction survey is performed to insure that the CMS 1–800–MEDICARE Helpline contractor is delivering satisfactory service to the Medicare beneficiaries. It gathers data on several Helpline operations such as print fulfillment and websites tool hosted on *http://www.medicare.gov.* Respondents to the survey are Medicare beneficiaries that have contacted 1–800–MEDICARE for information on benefits and services. CMS is seeking approval for additional questions to be added to the original collection entitled 800-Medicare Beneficiary Satisfaction survey. The original set of questions was used when placing outbound calls to callers regarding the service they received when they called the 800 Medicare Helpline with a Medicare question. The new expanded collection will include multiple survey methods to measure customer satisfaction not only with the Beneficiary Contact Center's (BCC's) handling of issues via telephone, but also the service provided to beneficiaries when they write a letter regarding their Medicare issue or use the e-mail and/or web chat services provided by the BCC. The use of Customer Satisfaction Surveys is critical to the CMS mission to provide service to beneficiaries that is convenient, accessible, accurate, courteous, professional and responsive to the needs of diverse groups. *Form Number:* CMS–10098 (OMB#: 0938–0919); *Frequency:* Weekly, Monthly, and Yearly; *Affected Public:* Individuals and Households; *Number of Respondents:* 36,144; *Total Annual Responses:* 36,144; *Total Annual Hours:* 6033. (For policy questions regarding this collection contact Mark Broccolino at 410–786–6128. For all other issues call 410–786–1326.)

7. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* State Medicaid Health Information Technology Plan, Planning-Advance Planning Document and Update, Implementation Advance Planning Document and Update, and Annual Implementation of Advance Planning Document to Implement Section 4201 of the American Reinvestment and Recovery Act of 2009; *Use:* Section 4201 of Recovery Act establishes 100 percent Federal Financial Participation (FFP) as reimbursement to States for making incentive payments to providers for meaningful use of certified electronic health record technology and 90 percent FFP for administering these payments. Additionally, States are required to conduct oversight of this program and ensure no duplicate payments; thus, CMS is requiring States to submit information to CMS for prior approval before drawing down funding. These documents, if States choose to implement these flexibilities, will require a collection of information to effectuate these changes.

The State Medicaid agencies will complete the templates. CMS will review the information to determine if the State has met all of the requirements of the Recovery Act provisions the States choose to implement. If the requirements are met, CMS will approve the amendments giving the State the authority to implement their Health Information Technology (HIT) strategy and implementation plans. For a State to receive Medicaid Title XIX funding, there must be an approved State Medicaid HIT Plan, Planning Advance Planning Document and Implementation Advance Planning Document; *Form Number:* CMS–10292 (OMB#: 0938–1088); *Frequency:* Yearly, Once, Occasionally; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 56; *Total Annual Responses:* 56; *Total Annual Hours:* 56. (For policy questions regarding this collection contact Sherry Armstead at 410–786–4342. For all other issues call 410–786–1326.)

8. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Provider Enrollment, Chain and Ownership System (PECOS) Security Consent Form; *Use:* The primary function of the Medicare enrollment application is to obtain information about the provider or supplier and whether the provider or supplier meets Federal and/or State qualifications to participate in the Medicare program. In addition, the Medicare enrollment application gathers information regarding the provider or supplier's practice location, the identity of the owners of the enrolling organization, and information necessary to establish the correct claims payment. In establishing a Web based application process, we allow providers and suppliers the ability to enroll in the Medicare program via the Internet. For these applicants, no security consent form is needed to enroll or make a change in their Medicare enrollment information. These applicants receive complete access to their own

enrollments through Internet-based Provider Enrollment, Chain and Ownership System (PECOS).

In order to allow a provider or supplier to delegate the Medicare credentialing process to another individual or organization, it is necessary to establish a Security Consent Form for those providers and suppliers who choose to have another individual or organization access their enrollment information and complete enrollments on their behalf. These users could consist of administrative staff, independent contractors, or credentialing departments and are represented as Employer Organizations. Employer Organizations and its members must request access to enrollment data through a Security Consent Form. The security consent form replicates business service agreements between Medicare applicants and organizations providing enrollment services.

We are proposing two different versions of the Security Consent Form. The form, once signed, mailed and approved, grants an employer organization or its members access to all current and future enrollment data for the Medicare provider. *Form Number:* CMS–10220 (OMB#: 0938–1035); *Frequency:* Occasionally; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 197,500; *Total Annual Responses:* 197,500; *Total Annual Hours:* 49,375. (For policy questions regarding this collection contact Alisha Banks at 410–786–0671. For all other issues call 410–786–1326.)

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS' Web site at *http://www.cms.hhs.gov/PaperworkReductionActof1995*, or E-mail your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov,* or call the Reports Clearance Office on (410) 786–1326.

In commenting on the proposed information collections please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in one of the following ways by February 8, 2011:

1. *Electronically.* You may submit 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) 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.

Dated: December 6, 2010.

Michelle Shortt,

Director, Regulations Development Group, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2010–31071 Filed 12–9–10; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–E–0510]

Determination of Regulatory Review Period for Purposes of Patent Extension; COARTEM

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined the regulatory review period for COARTEM 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 Patents and Trademarks, Department of Commerce, for the extension of a patent which claims that human drug product.

ADDRESSES: Submit electronic comments to *http://www.regulations.gov.* Submit written petitions along with three copies and written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 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. 6222, Silver Spring, MD 20993–0002, 301–796–3602.

SUPPLEMENTARY INFORMATION: 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 Patents and Trademarks 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 recently approved for marketing the human drug product COARTEM (artemether/lumefantrine). COARTEM is indicated for treatment of acute, uncomplicated malaria infections due to *Plasmodium falciparum* in patients of 5 kilograms bodyweight and above. Subsequent to this approval, the Patent and Trademark Office received a patent term restoration application for COARTEM (U.S. Patent No. 5,677,331) from Novartis AG, and the Patent and Trademark Office requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated February 17, 2010, FDA advised the Patent and Trademark Office that this human drug product had undergone a regulatory review period and that the approval of COARTEM represented the first permitted commercial marketing or use of the product. Thereafter, the Patent and Trademark Office requested that FDA determine the product's regulatory review period.

FDA has determined that the applicable regulatory review period for COARTEM is 285 days. Of this time, zero days occurred during the testing phase of the regulatory review period, while 285 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 (the FD&C act) (21 U.S.C. 355(i)) became effective:* not applicable. FDA has verified the

applicant's claim that there was no investigational new drug application for COARTEM.

2. *The date the application was initially submitted with respect to the human drug product under section 505(b) of the FD&C act:* June 27, 2008. FDA has verified the applicant's claim that the new drug application (NDA) 22–268 was submitted on June 27, 2008.

3. *The date the application was approved:* April 7, 2009. FDA has verified the applicant's claim that NDA 22–268 was approved on April 7, 2009.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the U.S. Patent and Trademark Office applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 284 days of patent term extension.

Anyone with knowledge that any of the dates as published are incorrect may submit to the Division of Dockets Management (*see* **ADDRESSES**) either electronic or written comments and ask for a redetermination by February 8, 2011. 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 June 8, 2011. To meet its burden, the petition must contain sufficient facts to merit an FDA investigation. (*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.

Interested persons may submit to the Division of Dockets Management (*see* **ADDRESSES**) electronic or written comments and written petitions. It is only necessary to send one set of comments. It is no longer necessary to send three copies of mailed comments. However, if you submit a written petition, you must submit three copies of the petition. Identify comments with the docket number found in brackets in the heading of this document.

Comments and petitions that have not been made publicly available on regulations.gov may be viewed in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: October 22, 2010.

Jane A. Axelrad,

Associate Director for Policy, Center for Drug Evaluation and Research.

[FR Doc. 2010–31074 Filed 12–9–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA–2010–E–0039 and FDA–2010–E–0040]

Determination of Regulatory Review Period for Purposes of Patent Extension; MULTAQ

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined the regulatory review period for MULTAQ 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 Patents and Trademarks, Department of Commerce, for the extension of patents which claim that human drug product.

ADDRESSES: Submit electronic comments to *http://www.regulations.gov.* Submit written petitions along with three copies and written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 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. 6222, Silver Spring, MD 20993–0002, 301–796–3602.

SUPPLEMENTARY INFORMATION: 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 Patents and Trademarks 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 recently approved for marketing the human drug product MULTAQ (dronedarone hydrochloride). MULTAQ is indicated to reduce the risk of cardiovascular hospitalization in patients with paroxysmal or persistent atrial fibrillation (AF) or atrial flutter (AFL), with a recent episode of AF/AFL and associated cardiovascular risk factors who are in sinus rhythm or who will be cardioverted. Subsequent to this approval, the Patent and Trademark Office received patent term restoration applications for MULTAQ (U.S. Patent Nos. 5,223,510 and 7,323,493) from Sanofi-Aventis, and the Patent and Trademark Office requested FDA's assistance in determining the patents' eligibility for patent term restoration. In a letter dated March 3, 2010, FDA advised the Patent and Trademark Office that this human drug product had undergone a regulatory review period and that the approval of MULTAQ represented the first permitted commercial marketing or use of the product. Thereafter, the Patent and Trademark Office requested that FDA determine the product's regulatory review period.

FDA has determined that the applicable regulatory review period for MULTAQ is 5,076 days. Of this time, 3,593 days occurred during the testing phase of the regulatory review period, while 1,483 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 (the FFD&C act) (21 U.S.C. 355(i)) became effective:* August 10, 1995. FDA has verified the applicant's claim that the date the investigational new drug application became effective was on August 10, 1995.

2. *The date the application was initially submitted with respect to the human drug product under section 505(b) of the FFD&C act:* June 10, 2005. FDA has verified the applicant's claim that the first new drug application (NDA) for MULTAQ (NDA 21–913) was submitted on June 10, 2005.

3. *The date the application was approved:* July 1, 2009. FDA has verified the applicant's claim that NDA 21–425 for MULTAQ was approved on July 1, 2009.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the U.S. Patent and Trademark Office applies several statutory limitations in its calculations of the actual period for patent extension. In its applications for patent extension, this applicant seeks 519 days and 5 years, respectively, of patent term extension.

Anyone with knowledge that any of the dates as published are incorrect may submit to the Division of Dockets Management (*see* **ADDRESSES**) either electronic or written comments and ask for a redetermination by February 8, 2011. 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 June 8, 2011. To meet its burden, the petition must contain sufficient facts to merit an FDA investigation. (*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.

Interested persons may submit to the Division of Dockets Management (*see* **ADDRESSES**) electronic or written comments and written petitions. It is only necessary to send one set of comments. It is no longer necessary to send three copies of mailed comments. However, if you submit a written petition, you must submit three copies of the petition. Identify comments with the docket number found in brackets in the heading of this document.

Comments and petitions that have not been made publicly available on regulations.gov may be viewed in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: October 22, 2010.

Jane A. Axelrad,

Associate Director for Policy, Center for Drug Evaluation and Research.

[FR Doc. 2010–31064 Filed 12–9–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2005–D–0072] (formerly Docket No. 2005D–0042)

Guidance for the Public, FDA Advisory Committee Members, and FDA Staff: The Open Public Hearing at FDA Advisory Committee Meetings; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a guidance entitled "Guidance for the Public, FDA Advisory Committee Members, and FDA Staff: The Open Public Hearing at FDA Advisory Committee Meetings." We are issuing the guidance to provide information on how the public may participate at the open public hearing (OPH) portion of FDA advisory committee meetings. The guidance also provides recommendations regarding financial disclosure by persons participating in the OPH portion of advisory committee meetings.

DATES: Submit electronic or written comments on agency guidances at any time.

ADDRESSES: Submit written requests for single copies of this guidance to the Office of Special Medical Programs, Office of the Commissioner, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, rm. 5103, Silver Spring, MD 20993. Send one self-addressed adhesive label to assist that office in processing your request. *See* the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance. Submit electronic comments on the guidance to *http://www.regulations.gov.* Submit written comments on the guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Michael Ortwerth, Office of Special Medical Programs, Office of the Commissioner, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, rm. 5103, Silver Spring, MD 20993, *e-mail: Michael.Ortwerth@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In the February 15, 2005, issue of the **Federal Register** (70 FR 7747), FDA issued a notice announcing the availability of a draft guidance entitled "The Open Public Hearing; FDA Advisory Committee Meetings." The guidance is intended for members of the public who choose to participate in the OPH portion of an FDA advisory committee meeting.

FDA issues guidance documents for FDA staff, applicants and sponsors of regulated products, and the public that describe the agency's current thinking on a regulatory matter, including its interpretation of, and policies regarding, statutes and regulations. FDA's advisory committees provide independent expert advice and recommendations to the agency on scientific, technical, and policy matters related to FDA-regulated products. Although advisory committees provide recommendations to FDA, FDA makes the final decisions on any matters considered by an advisory committee (21 CFR 14.5). Under 21 CFR 14.25(a), every meeting of an FDA advisory committee includes an OPH session during which interested persons may present relevant information or views orally or in writing. The hearing session is conducted in accordance with the procedures set forth in 21 CFR 14.29.

FDA encourages participation from all public stakeholders in our decisionmaking processes. We issued the draft guidance to answer questions about how the public may participate at an OPH session. Participants may include, but are not limited to, general members of the public, individuals or spokespersons from the regulated industry, consumer advocacy groups, and professional organizations, societies, and associations. The guidance provides information on such matters as how to submit a request to speak at an OPH session, logistical procedures, and disclosure of financial relationships relevant to the meeting topic.

We received two comments on the draft guidance. In response to the comments and at our own initiative, we have revised the guidance in several respects, including with regard to how the OPH session is conducted and instructions regarding financial disclosure.

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the agency's thinking on participation in the OPH portion of FDA advisory committee meetings. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the

requirements of the applicable statutes and regulations.

II. Comments

Interested persons may submit to the Division of Dockets Management (*see* **ADDRESSES**) either electronic or written comments regarding this document. It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

III. Electronic Access

Persons with access to the Internet may obtain the guidance at *http://www.fda.gov/oc/advisory/default.htm.*

Dated: December 6, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–31022 Filed 12–9–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0001]

Tobacco Products Scientific Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Tobacco Products Scientific Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the Agency on FDA's regulatory issues.

Date and Time: The meeting will be held on January 10 and 11, 2011 from 8 a.m. until 5 p.m.

Location: FDA White Oak Conference Center, Bldg. 31, rm. 1503, 10903 New Hampshire Ave., Silver Spring, MD 20993–0002. Information regarding special accommodations due to a disability, visitor parking and transportation may be accessed at: *http://www.fda.gov/AdvisoryCommittees/default.htm*; under the heading "Resources for You," click on "White Oak Conference Center Parking and Transportation Information for FDA Advisory Committee Meetings." Please note that visitors to the White Oak Campus must have a valid driver's license or other picture ID, and must enter through Building 1.

Contact Person: Caryn Cohen, Office of Science, Center for Tobacco Products, Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 1–877–287–1373 (choose Option 4), e-mail: *TPSAC@fda.hhs.gov*, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 8732110002. Please call the Information Line for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the Agency's Web site and call the appropriate advisory committee hot line/phone line to learn about possible modifications before coming to the meeting.

Agenda: On January 10 and 11, 2011, the Committee will continue to (1) receive updates from the Menthol Report Subcommittee and (2) receive and discuss presentations regarding the data requested by the Committee at the March 30 and 31, 2010, meeting of the Tobacco Products Scientific Advisory Committee.

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 Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm*. Scroll down to the appropriate advisory committee link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before December 30, 2010. Oral presentations from the public will be scheduled between approximately 3 p.m. and 4 p.m. on January 10, 2011. 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 21, 2010. 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 22, 2010.

Persons attending FDA's advisory committee meetings are advised that the Agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Caryn Cohen at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: December 3, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–31066 Filed 12–9–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Submission for OMB Review; Comment Request; Generic Clearance for Surveys of Customers and Partners of the Office of Extramural Research of the National Institutes of Health

SUMMARY: Under the provisions of Section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the Office of Extramural Research (OER), the National Institutes of Health (NIH) has submitted to the Office of Management and Budget (OMB) a request for review and approval of the information collection listed below. This proposed information collection was previously published in the **Federal Register** on September 13, 2010 (Volume 75, Number 176, page 55585) and allowed 60 days for public comment. One public comment was received. The purpose of this notice is to allow an additional 30 days for public comment. The National Institutes of Health may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

Proposed Collection: Title: Generic Clearance for Surveys of Customers and Partners of the Office of Extramural Research of the National Institutes of Health. *Type of Information Collection Request:* NEW. *Need and Use of Information Collection:* OER develops, coordinates the implementation of, and evaluates NIH-wide policies and procedures for the award of extramural funds . To move forward with our initiatives to ensure success in accomplishing the NIH mission, input from partners and customers is

essential. Quality management principles have been integrated into OER's culture and these surveys will provide customer satisfaction input on various elements of OER's business processes. The approximately 14 (10 quantitative and 4 qualitative) customer satisfaction surveys that will be conducted under this generic clearance will gather and measure customer and partner satisfaction with OER processes and operations. The data collected from these surveys will provide the feedback to track and gauge satisfaction with NIH's statutorily mandated operations and processes. OER/OD/NIH will present data and outcomes from these surveys to inform the NIH staff, officers, leadership, advisory committees, and other decision-making bodies as appropriate. Based on feedback from these stakeholders, OER/OD/NIH will formulate improvement plans and take action when necessary. *Frequency of Response:* 1 response. *Affected Public:* Individuals. *Type of Respondents:* Science professionals (applicants, reviewers, Institutional Officials), adult science trainees, and the general public. The annual reporting burden is as follows:

Quantitative surveys:

Estimated Number of Respondents per Survey: 9,820; *Estimated Number of Responses per Respondent:* 1; *Average Burden Hours per Response:* 0.25; *Estimated Total Annual Burden Hours Requested per Quantitative Survey:* 2,455; *Estimated Total Annual Burden Hours Requested for 10 Quantitative Surveys:* 24,550.

Qualitative surveys:

Estimated Number of Respondents per Survey: 30; *Estimated Number of Responses per Respondent:* 1; *Average Burden Hours per Response:* 1.0; *Estimated Total Annual Burden Hours Requested per Qualitative Survey:* 30; *Estimated Total Annual Burden Hours Requested for 4 Qualitative Surveys:* 120.

Based on an estimated 10 quantitative and 4 qualitative surveys per year:

Estimated Total Combined Annual Hours of Burden Requested in Each of 3 Years: 24,670.

Estimated Total Combined Cost to Respondents: $728,326.

Based on an estimated 10 quantitative and 4 qualitative surveys per year over 3 years:

Estimated Total Hours of Burden to Respondents for 2011, 2012, and 2013 Combined: 74,010.

Estimated Total Cost to Respondents for 2011, 2012, and 2013 Combined: $2,184,978.

There are no Capital Costs to report. There are no Operating or Maintenance Costs to report.

Request for Comments: Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Direct Comments to OMB: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the: Office of Management and Budget, Office of Regulatory Affairs, *OIRA_submission@omb.eop.gov* or by fax to 202–395–6974, Attention: Desk Officer for NIH. To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact Dr. Gwynne L. Jenkins, Special Assistant to the Director, Office of Extramural Programs, OER, NIH, 6705 Rockledge Drive, Suite 350, Bethesda, MD 20892, or call non-toll-free number (301) 496–9232 or e-mail your request, including your address to: *OEPMailbox@mail.nih.gov.*

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 30 days of the date of this publication.

Dated: December 2, 2010.

Sherry Mills,

Director, Office of Extramural Programs.

[FR Doc. 2010–31053 Filed 12–9–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel Member Conflict: CASEKNOD Applications.

Date: January 3, 2011.

Time: 11 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Telephone Conference Call).

Contact Person: Robert Weller, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3160, MSC 7770, Bethesda, MD 20892. (301) 435–0694. *wellerr@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel Member Conflict: Molecular Neuroscience.

Date: January 4, 2011.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Telephone Conference Call).

Contact Person: Carol Hamelink, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4192, MSC 7850, Bethesda, MD 20892. (301) 213–9887. *hamelinc@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel Member Conflict: Pharmacology and Liver Pathobiology.

Date: January 4, 2011.

Time: 1 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Telephone Conference Call).

Contact Person: Peter J. Perrin, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2180, MSC 7818, Bethesda, MD 20892. (301) 435–0682. *perrinp@csr.nih.gov.*

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review Group Developmental Brain Disorders Study Section.

Date: January 27–28, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Marina del Rey Hotel, 13534 Bali Way, Marina del Rey, CA 90292.

Contact Person: Pat Manos, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5200, MSC 7846, Bethesda, MD 20892. (301) 408–9866. *manospa@csr.nih.gov.*

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review Group, Cell Death in Neurodegeneration Study Section.

Date: January 27–28, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Marina del Rey Hotel, 13534 Bali Way, Marina del Rey, CA 90292.

Contact Person: Kevin Walton, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5200, MSC 7846, Bethesda, MD 20892. (301) 435–1785. *kevin.walton@nih.hhs.gov.*

Name of Committee: Cell Biology Integrated Review Group, Molecular and Integrative Signal Transduction Study Section.

Date: January 27–28, 2011.

Time: 8 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Palomar, 2121 P Street, NW., Washington, DC 20037.

Contact Person: Raya Mandler, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5134, MSC 7840, Bethesda, MD 20892. (301) 402–8228. *rayam@csr.nih.gov.*

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review Group, Pathophysiological Basis of Mental Disorders and Addictions Study Section.

Date: January 27–28, 2011.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: InterContinental Mark Hopkins Hotel, 999 California Street, San Francisco, CA 94108.

Contact Person: Julius Cinque, MS, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5186, MSC 7846, Bethesda, MD 20892. (301) 435–1252. *cinquei@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, RFA Panel: Investigations on Primary Immunodeficiency Diseases.

Date: January 31, 2011.

Time: 12 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Virtual Meeting).

Contact Person: Scott Jakes, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4198, MSC 7812, Bethesda, MD 20892. (301) 495–1506. *jakesse@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 3, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–31058 Filed 12–9–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel Cell Biology IRG Member SEP.

Date: December 21, 2010.

Time: 2 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Telephone Conference Call).

Contact Person: Jonathan Arias, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5170, MSC 7840, Bethesda, MD 20892. 301–435–2406. *ariasj@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 3, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–31057 Filed 12–9–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel Small Business: Biological Chemistry and Biophysics Specials.

Date: December 17, 2010.

Time: 3 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Telephone Conference Call).

Contact Person: Sergei Ruvinov, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4158, MSC 7806, Bethesda, MD 20892. 301–435–1180. *ruvinser@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: *December 3, 2010.*

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–31054 Filed 12–9–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Toxicology Program (NTP); Center for the Evaluation of Risks to Human Reproduction (CERHR); NTP Workshop: Role of Environmental Chemicals in the Development of Diabetes and Obesity

AGENCY: National Institute of Environmental Health Sciences

(NIEHS); National Institutes of Health (NIH).

ACTION: Announcement of a workshop and request for information and comments.

SUMMARY: The NTP announces a workshop on January 11–13, 2011, to evaluate the science associating exposure to certain chemicals or chemical classes with the development of diabetes and obesity in humans. The NTP invites the submission of public comments and relevant data for consideration at the workshop. Registration to attend the workshop is closed; however, slides presented during the plenary sessions will be webcast over the Internet. Information about the workshop may be found at *http://cerhr.niehs.nih.gov/evals/diabetesobesity/index.html.*

DATES: The workshop will be held January 11–13, 2011, and begin each day at 8:30 a.m. Eastern Standard Time and end at approximately 5 p.m. on January 11 and 12 and approximately 12:30 p.m. on January 13. Written comments and data should be received by January 3, 2010, to enable review by NIEHS/NTP staff and workshop panelists prior to the meeting.

ADDRESSES: The meeting will be held at the Marriott Crabtree Valley Hotel, 4500 Marriott Drive, Raleigh, NC 27612 (919–781–7000). All correspondence should be directed to Dr. Kristina Thayer, NTP/CERHR, NIEHS, P.O. Box 12233, MD K2–04, Research Triangle Park, NC 27709 (mail), 919–541–5021 (telephone), or *thayer@niehs.nih.gov* (e-mail). Courier address: NIEHS, 530 Davis Drive, Room K2163, Morrisville, NC 27560. The Web site for the meeting is *http://cerhr.niehs.nih.gov/evals/diabetesobesity/index.html.*

FOR FURTHER INFORMATION CONTACT: Dr. Kristina Thayer at 919–541–5021 or *thayer@niehs.nih.gov.*

SUPPLEMENTARY INFORMATION:

Background

There has been increasing interest in the concept that environmental chemicals may be contributing factors to the epidemics of diabetes and obesity. The NTP is holding a workshop to evaluate the science associating exposure to certain chemicals or chemical classes with the development of diabetes and obesity in humans. The workshop's overall goals are to:

- Evaluate strengths/weaknesses, consistency, and biological plausibility of findings reported in humans and experimental animals for certain environmental chemicals including arsenic, cadmium, chlorinated organohalogens, other organohalogens, bisphenol A, phthalates, and organotins.
- Identify the most useful and relevant endpoints in experimental animals and *in vitro* models.
- Identify relevant pathways and biological targets for assays for the Toxicology Testing in the 21st Century ("Tox21") high throughput screening initiative.
- Identify data gaps and areas for future evaluation/research.

The workshop will include plenary sessions and breakout group sessions for in-depth discussion. This meeting is open to the public with time set aside for public comments during the plenary session on the first day. The public is invited to attend the breakout groups as observers. Please note that registration for physical attendance at the meeting is closed because the capacity to accommodate participants has been reached. The NTP also invites the submission of written public comments and relevant data for consideration in the workshop. A copy of the agenda and any additional information about the workshop, including background materials, public comments, and invited participants, will be posted on the meeting page *http://cerhr.niehs.nih.gov/evals/diabetesobesity/index.html.* Slide presentations made during plenary sessions of the meeting will be Webcast with instructions for access posted on the meeting page. Individuals will need to request access to a teleconference line in order to hear the audio portions of plenary sessions (discussed in more detail below).

Request for Information and Comments

CERHR invites the public and other interested parties to submit information relevant to the workshop including completed and ongoing studies and information on planned studies. This information will be considered by NTP staff and invited participants prior to the workshop and may be discussed at the public meeting. Information should be submitted to Dr. Thayer (see **ADDRESSES**). Public input at this meeting is invited and time is set aside for the presentation of public comments during the plenary session on January 11, 2011. Each organization is allowed one speaker during the public comment period. At least 7 minutes will be allotted to each speaker, and if time permits, may be extended to 10 minutes. Registration to attend the meeting in person is closed as capacity to accommodate participants has been reached. Persons not already registered to attend the meeting who wish to present oral comments by phone on January 11 are encouraged to pre-register on the meeting Web site and select the option "Submitting Public Comments, Oral (by telephone)."

There will be 50 telephone lines available for providing public comments on January 11th and to hear the audio portions of plenary sessions; availability will be on a first-come, first-served basis. The available lines will be open from 8:30 a.m. until 5 p.m. on January 11 and January 12 and open from 8:30 a.m. until adjournment on January 13. The access number for the teleconference line will be provided to registrants by e-mail prior to the meeting. Registration for oral comments will also be available onsite, although time allowed for presentation by on-site registrants may be less than that for pre-registered speakers and will be determined by the number of persons who register at the meeting. Written statements can supplement and may expand the oral presentation. If registering onsite and reading from written text, please bring 50 copies of the statement for distribution and to supplement the record. Written comments received in response to this notice will be posted on the meeting page *http://cerhr.niehs.nih.gov/evals/diabetesobesity/index.html* identified by the submitter's name and affiliation and/or sponsoring organization (if applicable). Persons submitting written comments should include their name, affiliation, mailing address, phone, fax, e-mail, and sponsoring organization (if any) with the document.

Registration: Registration to attend the meeting in person is closed as the capacity to accommodate participants has been reached. Persons needing interpreting services in order to attend should contact 301–402–8180 (voice) or 301–435–1908 (TTY) and are asked to notify the NTP at least 7 business days in advance of the meeting.

Background Information on CERHR

The NTP and the National Institute of Environmental Health Sciences established the NTP Center for the Evaluation of Risks to Human Reproduction (CERHR) in 1998 (63 FR 68782) to serve as an environmental health resource to the public and to regulatory and health agencies. CERHR evaluations assess the evidence whether environmental chemicals, physical substances, or mixtures (collectively referred to as "substances") cause adverse effects on reproduction and development and provide opinion on whether these substances are hazardous for humans. CERHR also organizes workshops or state-of-the-science evaluations to address issues of importance in environmental health

sciences. CERHR assessments are published as NTP Monographs. Information about CERHR can be obtained from its homepage *http://cerhr.niehs.nih.gov.*

Dated: December 2, 2010.

John R. Bucher,

Associate Director, National Toxicology Program.

[FR Doc. 2010–31052 Filed 12–9–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Public Consultation on Personnel Reliability and Culture of Responsibility Issues

AGENCY: National Institutes of Health, HHS.

ACTION: Notice of Public Consultation on Guidance for Enhancing Personnel Reliability and Strengthening the Culture of Responsibility at the Local Level.

SUMMARY: The National Science Advisory Board for Biosecurity (NSABB), an advisory committee to the Federal Government, is hosting a public consultation to obtain input from the scientific community and general public regarding strategies for enhancing personnel reliability and strengthening the culture of responsibility at facilities that conduct research with dangerous pathogens. The discussion will inform NSABB deliberations and ultimately the development of an NSABB report on the topic.

DATE AND TIME: The one day public consultation will be held on January 5, 2011 from 8:30 a.m.–6 p.m.

ADDRESSES: The public meeting will be held at the Bethesda Hyatt Regency, 7400 Wisconsin Avenue (One Bethesda Metro Center), Bethesda, MD 20814.

FOR FURTHER INFORMATION CONTACT: Ms. Ronna Hill, NIH Office of Biotechnology Activities, by e-mail at *hillro@od.nih.gov* or by telephone at 301–435–2137. Faxes may be sent to the NIH Office of Biotechnology Activities at 301–496–9839.

SUPPLEMENTARY INFORMATION:

Background

In light of heightened concerns about insider threats at facilities that conduct research with highly pathogenic agents, the NSABB was tasked with advising on ways to enhance personnel reliability among individuals with access to select agents. In its 2009 report, the NSABB recommended a number of ways to strengthen personnel reliability, including by enhancing the culture of responsibility that currently exists within the scientific community, particularly with respect to biosecurity and dual use research. The U.S. Government has asked the NSABB to expand on its general recommendations in this regard and to develop specific guidance that reflects broad input from the scientific community.

The NSABB is seeking input from the scientific community on practices that will strengthen personnel reliability and enhance the culture of responsibility regarding biosecurity. This input will inform NSABB deliberations on these topics and contribute to the development of guidance that is sound, effective, and feasible.

The meeting will be structured around five discussion panels: (1) Engaged institutional leadership for promoting biosecurity, personnel reliability, and a culture of responsibility; (2) Encouraging biosecurity awareness and promoting responsible conduct in the laboratory through communication, lab rapport, and a strong sense of team; (3) Peer reporting of concerning behaviors; (4) Addressing impediments to disclosure of negative information about job candidates; and (5) Assessment of effectiveness and impact of practices for strengthening personnel reliability and culture of responsibility. Each session will include ample time for input from meeting attendees. Specific discussion questions are noted on the meeting agenda, which can be accessed at *http://www.biosecurityboard.gov.*

The meeting is open to the public and is free of charge. Please note that this meeting will *not* be webcast. Pre-registration is encouraged to ensure that we can accommodate all attendees. Please pre-register at *http://www.biosecurityboard.gov.* Any individuals or organizations that cannot attend the meeting but wish to provide comments are encouraged to submit written comments to: *nsabb@od.nih.gov.*

More information about the NSABB is available at *http://www.biosecurityboard.gov.*

Dated: December 6, 2010.

Amy P. Patterson,

Acting Associate Director for Science Policy, NIH, National Institutes of Health.

[FR Doc. 2010–31056 Filed 12–9–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: Arrival and Departure Record (Forms I–94 and I–94W) and Electronic System for Travel Authorization

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

ACTION: 30-Day notice and request for comments; Extension of an existing information collection: 1651–0111.

SUMMARY: U.S. Customs and Border Protection (CBP) of the Department of Homeland Security will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act: CBP Form I–94 (Arrival/Departure Record), CBP Form I–94W (Nonimmigrant Visa Waiver Arrival/Departure), and the Electronic System for Travel Authorization (ESTA). This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with no change to the information collected. This document is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (75 FR 59733) on September 28, 2010, allowing for a 60-day comment period. No comments were received. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before January 10, 2011.

ADDRESSES: Interested persons are invited to submit written comments on this proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the OMB Desk Officer for Customs and Border Protection, Department of Homeland Security, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–5806.

SUPPLEMENTARY INFORMATION: U.S. Customs and Border Protection (CBP) encourages the general public and affected Federal agencies to submit written comments and suggestions on proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act (Pub. L. 104–13). Your comments should address one of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies/components estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collections of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological techniques or other forms of information.

Title: Arrival and Departure Record, Nonimmigrant Visa Waiver Arrival/Departure, and Electronic System for Travel Authorization (ESTA).

OMB Number: 1651–0111.

Form Numbers: I–94 and I–94W.

Abstract: CBP Form I–94 (Arrival/Departure Record) and CBP Form I–94W (Nonimmigrant Visa Waiver Arrival/Departure Record) are used to document a traveler's admission into the United States. These forms are filled out by aliens and are used to collect information on citizenship, residency, and contact information. The data elements collected on these forms enable DHS to perform its mission related to the screening of alien visitors for potential risks to national security, and the determination of admissibility to the United States. The Electronic System for Travel Authorization (ESTA) applies to aliens traveling to the United States under the Visa Waiver Program (VWP) and requires that VWP travelers provide information electronically to CBP before embarking on travel to the United States.

ESTA can be accessed at *http://www.cbp.gov/xp/cgov/travel/id_visa/esta/* Instructions and samples of CBP Forms I–94 and I–94W can be viewed at *http://www.cbp.gov/xp/cgov/travel/id_visa/i-94_instructions/filling_out_i94.xml* and *http://www.cbp.gov/xp/cgov/travel/id_visa/business_pleasure/vwp/i94_samples.xml.*

Current Actions: This submission is being made to extend the expiration date with no change to the burden hours.

Type of Review: Extension (without change).

Affected Public: Individuals, Carriers, and the Travel and Tourism Industry.

I–94 (Arrival and Departure Record):

Estimated Number of Respondents: 14,000,000.

Estimated Number of Total Annual Responses: 14,000,000.

Estimated Time per Response: 8 minutes.

Estimated Total Annual Burden Hours: 1,862,000.

Estimated Total Annualized Cost on the Public: $84,000,000.

I–94W (Nonimmigrant Visa Waiver Arrival/Departure):

Estimated Number of Respondents: 100,000.

Estimated Number of Total Annual Responses: 100,000.

Estimated Time per Response: 8 minutes.

Estimated Total Annual Burden Hours: 13,300.

Estimated Total Annualized Cost on the Public: $600,000.

Electronic System for Travel Authorization (ESTA):

Estimated Number of Respondents: 18,900,000.

Estimated Number of Total Annual Responses: 18,900,000.

Estimated Time per Response: 15 minutes.

Estimated Total Annual Burden Hours: 4,725,000.

If additional information is required contact: Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 799 9th Street, NW., 5th Floor, Washington, DC 20229–1177, at 202–325–0265.

Dated: December 6, 2010.

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2010–31045 Filed 12–9–10; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Notice of Cancellation of Customs Broker Licenses

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

ACTION: General Notice.

SUMMARY: Pursuant to section 641 of the Tariff Act of 1930, as amended, (19 U.S.C. 1641) and the U.S. Customs and Border Protection regulations (19 CFR 111.51), the following Customs broker licenses and all associated permits are cancelled without prejudice.

Name	License No.	Issuing port
C.P. Express, Inc	21848	New York.
GEMM Customs Brokers, Inc	09879	New York.
Richard Penack	09782	New York.
G.W. Harder Company, Inc	24177	New York.
ATE Logistics, Inc	17486	Seattle.
Mares-Shreve & Associates, Inc	09996	Seattle.
Universal Freight Forwarders, Ltd	10429	Seattle.
Universal Freight Forwarders, Ltd	22435	Seattle.
Alpha Sun International, Inc	16403	Atlanta.
Interstar Solutions, LLC	23366	Houston.

Dated: November 30, 2010.

Daniel Baldwin,

Assistant Commissioner, Office of International Trade.

[FR Doc. 2010–31042 Filed 12–9–10; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5375–N–48]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

FOR FURTHER INFORMATION CONTACT: Juanita Perry, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 7262, Washington, DC 20410; telephone (202) 708–1234; TTY number for the hearing- and speech-impaired (202) 708–2565, (these telephone numbers are not toll-free), or call the toll-free Title V information line at 800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with the December 12, 1988 court order in *National Coalition for the Homeless v. Veterans Administration,* No. 88–2503–OG (D.D.C.), HUD publishes a Notice, on a weekly basis, identifying unutilized, underutilized, excess and surplus Federal buildings and real property that HUD has reviewed for suitability for use to assist the homeless. Today's Notice is for the purpose of announcing that no additional properties have been determined suitable or unsuitable this week.

Dated: December 2, 2010.

Mark R. Johnston,

Deputy Assistant Secretary for Special Needs.

[FR Doc. 2010–30691 Filed 12–9–10; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5415–N–36]

Notice of Availability: Notice of Funding Availability (NOFA) for HUD's Fiscal Year (FY) 2010 Capacity Building for Community Development and Affordable Housing Grants

AGENCY: Office of the Chief of the Human Capital Officer, HUD.

ACTION: Notice.

SUMMARY: HUD announces the availability on its website of the applicant information, submission deadlines, funding criteria, and other requirements for HUD's Fiscal Year (FY) 2010 Capacity Building for Community Development and Affordable Housing Grants NOFA. This NOFA announces the availability of $49.5 million in Fiscal Year (FY) 2010 funding to carry out the eligible activities related to affordable housing and community development for the Section 4 capacity building program, of which at least $5 million shall be made available for rural capacity building activities. This competition is limited to the organizations identified in the Consolidated Appropriations Act, 2010 (Pub. L. 111–117). The eligible organizations are: Enterprise Community Partners, Inc. (formerly The Enterprise Foundation), the Local Initiatives Support Corporation (LISC), and Habitat for Humanity International.

The notice providing information regarding the application process, funding criteria and eligibility requirements can be found using the Department of Housing and Urban Development agency link on the Grants.gov/Find Web site at *http://www.grants.gov/search/agency.do.* A link to Grants.gov is also available on the HUD Web site at *http://www.hud.gov/offices/adm/grants/fundsavail.cfm.* The Catalogue of Federal Domestic Assistance (CFDA) number for this program is 14.252. Applications must be submitted electronically through Grants.gov.

FOR FURTHER INFORMATION CONTACT: Questions regarding specific program requirements should be directed to the agency contact identified in the program NOFA. Program staff will not be available to provide guidance on how to prepare the application. Questions regarding the 2010 General Section should be directed to the Office of Grants Management and Oversight at (202) 708–0667 or the NOFA Information Center at 800–HUD–8929 (toll free). Persons with hearing or speech impairments may access these numbers via TTY by calling the Federal Information Relay Service at 800–877–8339.

Dated: November 23, 2010.

Barbara S. Dorf,

Director, Office of Departmental Grants Management and Oversight, Office of the Chief of the Human Capital Officer.

[FR Doc. 2010–31116 Filed 12–9–10; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5415–N–28]

Notice of Availability: Notice of Funding Availability (NOFA) for HUD's Fiscal Year (FY) 2010 Emergency Capital Repair Grants for Multifamily Housing Projects Designated for Occupancy by the Elderly

AGENCY: Office of the Chief of the Human Capital Officer, HUD.

ACTION: Notice.

SUMMARY: HUD announces the availability on its website of the applicant information, submission deadlines, funding criteria, and other requirements for HUD's Fiscal Year (FY) 2010 Emergency Capital Repair Grants for Multifamily Housing Projects Designated for Occupancy by the Elderly NOFA. This NOFA announces the availability of approximately $5 million in FY2010, grant funds to make emergency capital repairs to eligible multifamily projects owned by private nonprofit entities that are designated for occupancy by elderly tenants. The capital repair needs must relate to items that present an immediate threat to the health, safety, and quality of life of the tenants. The intent of these grants is to provide one-time assistance for emergency items that could not be absorbed within the project's operating budget and other project resources, and where the tenants' continued occupancy in the immediate near future would be jeopardized by a delay in initiating the proposed cure.

The notice providing information regarding the application process, funding criteria and eligibility requirements can be found using the Department of Housing and Urban Development agency link on the Grants.gov/Find Web site at *http://www.grants.gov/search/agency.do.* A link to Grants.gov is also available on the HUD Web site at *http://www.hud.gov/offices/adm/grants/fundsavail.cfm.* The Catalogue of Federal Domestic Assistance (CFDA)

number for this program is 14.315; Emergency Capital Repair Grants for Multifamily Housing Projects Designated for Occupancy by the Elderly. Applications must be submitted electronically through *Grants.gov.*

FOR FURTHER INFORMATION CONTACT: Questions regarding specific program requirements should be directed to the agency contact identified in the program NOFA. Program staff will not be available to provide guidance on how to prepare the application. Questions regarding the 2010 General Section should be directed to the Office of Grants Management and Oversight at (202) 708–0667 or the NOFA Information Center at 800–HUD–8929 (toll free). Persons with hearing or speech impairments may access these numbers via TTY by calling the Federal Information Relay Service at 800–877–8339.

Dated: November 23, 2010.

Barbara S. Dorf,

Director, Office of Departmental Grants Management and Oversight, Office of the Chief of the Human Capital Officer.

[FR Doc. 2010–31114 Filed 12–9–10; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

South Coast Conduit/Upper Reach Reliability Project, Santa Barbara County, CA

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of availability of the Final Environmental Impact Statement and Environmental Impact Report (Final EIS/EIR).

SUMMARY: Pursuant to the National Environmental Policy Act (NEPA) and the California Environmental Quality Act (CEQA), the Bureau of Reclamation (Reclamation), the Federal lead agency, and the Cachuma Operation and Maintenance Board (COMB), the State lead agency, have prepared a Final EIS/EIR for the South Coast Conduit/Upper Reach Reliability Project (SCC/URRP). The SCC/URRP involves installation of a second water pipeline for improving water supply reliability to Cachuma Project (CP) and State Water Project (SWP) customers on the South Coast of Santa Barbara County.

A Notice of Availability of the joint Draft EIS/EIR was published in the **Federal Register** on Wednesday, August 20, 2008 (73 FR 49218). The written comment period on the Draft EIS/EIR ended October 3, 2008. The Final EIS/EIR contains responses to all comments received and reflects comments and any additional information received during the review period.

DATES: Reclamation will not make a decision on the proposed action until at least 30 days after release of the Final EIS/EIR. After the 30-day waiting period, Reclamation will complete a Record of Decision (ROD). The ROD will state the action that will be implemented and will discuss all factors leading to the decision.

ADDRESSES: A compact disc or a copy of the Final EIS/EIR may be requested from Ms. Rain Healer, Bureau of Reclamation, 1243 'N' Street, Fresno, CA 93721–1831, by calling 559–487–5196, TTY 800–735–2929, or via e-mail at *rhealer@usbr.gov,* or from Ms. Kate Rees, Cachuma Operation and Maintenance Board, 3301 Laurel Canyon Road, Santa Barbara, CA 93105–2017, by calling 805–687–4011, or at *krees@cachuma-board.org.* The Final document is also available on the following Web sites: *http://www.usbr.gov/mp/nepa/nepa_projdetails.cfm?Project_ID=3368* or *www.cachuma-board.org.*

See **SUPPLEMENTARY INFORMATION** section for locations where copies of the Final EIS/EIR are available.

FOR FURTHER INFORMATION CONTACT: Ms. Rain Healer, Bureau of Reclamation, or Ms. Kate Rees, COMB, at the phone numbers or e-mail addresses above.

SUPPLEMENTARY INFORMATION: The existing SCC/Upper Reach pipeline provides approximately 80 percent of the water supply for communities along the South Coast of Santa Barbara County. Reclamation owns the SCC facilities and COMB manages the facilities under a Transfer of Operations and Maintenance Contract with Reclamation. The SCC operates at capacity for extended periods of time, and during peak demands it is not able to provide the water needed. No redundant supply or pipeline exists to convey CVP or SWP water to the South Coast if the Upper Reach of the SCC is out of service due to scheduled and/or unexpected repairs. The proposed project would increase the operational flexibility, reliability, and conveyance capacity of the SCC between the South Portal of Tecolote Tunnel and the Corona Del Mar Water Treatment Plant to accommodate peak demand levels and to allow maintenance of one pipeline while the other is operational. The total amount of water delivered per year, however, would not increase.

The Final EIS/EIR considered the direct, indirect, and cumulative effects on the physical, natural, and human environment that may result from the construction and operation of the SCC/Upper Reach second pipeline. The Final EIS/EIR addressed potentially significant environmental issues and recommends adequate and feasible mitigation measures to reduce or eliminate significant environmental impacts, where possible. Three alternative pipeline alignments as well as no project and no action alternatives were addressed.

A public meeting was held on September 10, 2008, in Santa Barbara, CA.

Copies of the Final EIS/EIR are available for public review at the following locations:

- Bureau of Reclamation, South-Central California Area Office, 1243 'N' Street, Fresno, CA 93721–1831.
- Santa Barbara Central Public Library, 40 East Anapamu Street, Santa Barbara, CA 93101.
- Goleta Public Library, 500 North Fairview Avenue, Goleta, CA 93117.
- COMB office, 3301 Laurel Canyon Road, Santa Barbara, CA 93105–2017.

Before including your name, address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: July 13, 2010.

Pablo R. Arroyave,

Deputy Regional Director, Mid-Pacific Region.

[FR Doc. 2010–31039 Filed 12–9–10; 8:45 am]

BILLING CODE 4310–MN–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Pursuant to the Comprehensive Environmental Response, Compensation and Liability Act

Pursuant to 28 CFR 50.7, notice is hereby given that on December 1, 2010, a proposed consent decree in *United States* v. *Great American Financial Resources, Inc.,* Civil Action No. 6:10–cv–01783, was lodged with the United States District Court for the Middle District of Florida.

In this action the United States sought from the Great American Financial Resources, Inc. (GAFRI) (a) reimbursement of costs incurred and to be incurred by the United States

Environmental Protection Agency (EPA) for response actions taken related to Operable Unit 1 (OU1) of the Sprague Electric Company Superfund Alternative Site (Site), located in Longwood, Seminole County, Florida, together with the accrued interest; and (b) performance of the remedial design and the remedial action for OU1 consistent with the National Contingency Plan, 40 CFR part 300 (as amended). The parties have reached a proposed settlement that requires GAFRI (a) to reimburse the United States for all past and future incurred costs relating to OU1 and (b) to undertake all OU1 response work for the Site.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the proposed consent decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to U.S. Department of Justice, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611,[1] and should refer to *United States* v. *Great American Financial Resources, Inc.,* Civil Action No. 6:10–cv–01783, D.J. Ref. 90–11–3–09974.

The proposed consent decree may be examined at the Office of the United States Attorney, 501 West Church Street, Suite 300, Orlando, FL 32805, and at U.S. EPA Region 4, 61 Forsyth Street, SW., Atlanta, GA 30303. During the public comment period, the Consent Decree may also be examined on the following Department of Justice Web site—*http://www.usdoj.gov/enrd/Consent_Decree.html.* A copy of the proposed consent decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy, please enclose a check in the amount of $45.25 (25 cents per page reproduction cost) payable to the U.S. Treasury. Alternatively, to request a copy of the proposed consent decree from the Consent Decree Library that does not include exhibits, please enclose a check in the amount of $11.50 (25 cents per page reproduction cost) payable to the U.S. Treasury.

Maureen Katz,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2010–31047 Filed 12–9–10; 8:45 am]

BILLING CODE 4410–15–P

[1] Comments should be addressed to the Assistant Attorney General even if the settlement was approved by some other officer of the Department (*e.g.,* Section Chief or Associate Attorney General).

DEPARTMENT OF LABOR

Comment Request for Information Collection for Labor Surplus Areas Extension Without Changes

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Employment and Training Administration is soliciting comments concerning the collection of data for state petitions to add areas to the Labor Surplus Areas List. The expiration date is March 30, 2011.

A copy of the proposed information collection request (ICR) can be obtained by contacting the office listed below in the **ADDRESSES** section of this notice.

DATES: Written comments must be submitted to the office listed in the **ADDRESSES** section below on or before February 8, 2011.

ADDRESSES: Submit written comments to Samuel Wright, Room S–4231 Employment and Training Administration, 200 Constitution Avenue NW., Washington, DC 20210. Telephone number: 202–693–2870 (this is not a toll-free number). E-mail: *wright.samuel.e@dol.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Under Executive Orders 12073 and 10582, the Secretary of Labor is required to classify labor surplus areas (LSAs) for the use of Federal agencies in directing procurement activities and in locating new plants or facilities in areas of high unemployment. The LSAs list is issued annually, effective October 1 of each year, and is based upon the average unemployment rate during the previous two calendar years for each area in comparison with the national average rate for the same period.

II. Review Focus

The Department of Labor is particularly interested in comments which: Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

III. Current Actions

Type of Review: Extension without changes.

Title: Labor Surplus Areas.

OMB Number: 1205–0207.

Affected Public: Only the states requesting an area to be added to the Labor Surplus Areas list under the exceptional circumstances provision.

Form(s): None.

Total Annual Respondents: No more than three states have submitted exceptional circumstance petitions in any year.

Annual Frequency: No more than three requests per year.

Total Annual Responses: In the most recent year, three states have requested areas to be added to the Labor Surplus Areas list. Prior to that year only one or two states have made requests.

Average Time per Response: Three hours.

Estimated Total Annual Burden Hours: 9 hours.

Total Annual Burden Cost for Respondents: $356 (9 hours @ $39.59 an hour).

Comments submitted in response to this request will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Signed: At Washington, DC, this 15th day of November 2010.

Jane Oates,

Assistant Secretary, Employment and Training Administration.

[FR Doc. 2010–31065 Filed 12–9–10; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

Proposed Extension of Information Collection Request Submitted for Public Comment; Affordable Care Act Internal Claims and Appeals and External Review Procedures for Non-Grandfathered Plans

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Notice.

SUMMARY: The Department of Labor (the Department), in accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Employee Benefits Security Administration (EBSA) is soliciting comments on the proposed extension of the information collection provisions of the regulations under the Patient Protection and Affordable Care Act (Affordable Care Act) that are discussed below. A copy of the information collection requests (ICRs) may be obtained by contacting the office listed in the **ADDRESSES** section of this notice. ICRs also are available at reginfo.gov (*http://www.reginfo.gov/public/do/PRAMain*).

DATES: Written comments must be submitted to the office shown in the **ADDRESSES** section on or before February 8, 2011.

ADDRESSES: G. Christopher Cosby, Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue, NW., Washington, DC 20210, (202) 693–8410, FAX (202) 693–4745 (these are not toll-free numbers).

SUPPLEMENTARY INFORMATION: This notice requests public comment on the Department's request for extension of the Office of Management and Budget's (OMB) approval of the information collection requests (ICRs) contained in the rule described below that relates to the Affordable Care Act. OMB approved the ICR under the emergency procedures for review and clearance in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35) and 5 CFR 1320.13. The Department is not proposing any changes to the existing ICRs at this time. An agency may not conduct or sponsor, and a person is not required to respond to, an information collection unless it displays a valid OMB control number. A summary of the ICRs and the current burden estimates follows:

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Affordable Care Act Internal Claims and Appeals and External Review Procedures for Non-grandfathered Plans.

Type of Review: Extension without change of a currently approved collection of information.

OMB Number: 1210–0144.

Affected Public: Individuals or households; Business or other for-profit; Not-for-profit institutions.

Respondents: 606,709.

Responses: 61,803.

Estimated Total Burden Hours: 263.

Estimated Total Burden Cost (Operating and Maintenance): $242,828.

Description: The Affordable Care Act added Public Health Service Act (PHS Act) section 2719, which provides rules relating to internal claims and appeals and external review processes. On July 23, 2010, interim final regulations were issued implementing PHS Act section 2719 for internal claims and appeals and external review processes.[1] With respect to internal claims and appeals processes for group health coverage, PHS Act section 2719 and paragraph (b)(2)(i) of the interim final regulations provide that group health plans and health insurance issuers offering group health insurance coverage must comply with the internal claims and appeals processes set forth in 29 CFR 2560.503–1 (the DOL claims procedure regulation) and update such processes in accordance with standards established by the Secretary of Labor in paragraph (b)(2)(ii) of the regulations.

PHS Act section 2719 and the interim final regulations also provide that group health plans and issuers offering group health insurance coverage must comply either with a State external review process or a Federal review process. The regulations provide a basis for determining when plans and issuers must comply with an applicable State external review process and when they must comply with the Federal external review process.

The claims procedure regulation imposes information collection requests (ICRs) as part of the reasonable procedures that an employee benefit plan must establish regarding the handling of a benefit claim. These requirements include third-party notice and disclosure requirements that the plan must satisfy by providing information to participants and beneficiaries of the plan. The ICR currently is scheduled to expire on February 28, 2011.

[1] 75 FR 43330.

Focus of Comments

The Department of Labor (Department) is particularly interested in comments that:

- Evaluate whether the collections of information are 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 collections 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 collections 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.,* by permitting electronic submissions of responses.

Comments submitted in response to this notice will be summarized and/or included in the ICRs for OMB approval of the extension of the information collection; they will also become a matter of public record.

Dated: *November 29, 2010.*

Joseph S. Piacentini,

Director, Office of Policy and Research, Employee Benefits Security Administration.

[FR Doc. 2010–31105 Filed 12–9–10; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2009–0025]

Expansion of the Scope of NRTL Recognition of Underwriters Laboratories Inc.; Modification to the Scopes of NRTL Recognition of FM Approvals LLC, Intertek Testing Services NA Inc., and Underwriters Laboratories Inc.

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

ACTION: Notice.

SUMMARY: This notice announces the Occupational Safety and Health

Administration's final decision expanding the recognition of Underwriters Laboratories Inc., (UL) as a Nationally Recognized Testing Laboratory (NRTL) under 29 CFR 1910.7. This notice also modifies the scopes of recognition of the following three NRTLs: FM Approvals LLC, Intertek Testing Services NA Inc., and Underwriters Laboratories Inc.

DATES: The expansion of recognition and modification to the scopes of recognition becomes effective on December 10, 2010.

FOR FURTHER INFORMATION CONTACT: MaryAnn Garrahan, Director, Office of Technical Programs and Coordination Activities, NRTL Program, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–3655, Washington, DC 20210, or phone (202) 693–2110.

SUPPLEMENTARY INFORMATION:

Notice of Final Decision

The Occupational Safety and Health Administration (OSHA) hereby gives notice that it is expanding recognition of Underwriters Laboratories Inc., (UL) as an NRTL. UL's expansion covers the use of additional test standards. OSHA's current scope of recognition for UL is in the following informational Web page: *http://www.osha.gov/dts/otpca/nrtl/ul.html.*

OSHA recognition of an NRTL signifies that the organization meets the legal requirements specified in 29 CFR 1910.7. Recognition is an acknowledgment that the organization can perform independent safety testing and certification of the specific products covered within its scope of recognition, and is not a delegation or grant of government authority. As a result of recognition, employers may use products approved by the NRTL to meet OSHA standards that require product testing and certification.

The Agency processes applications by an NRTL for initial recognition, or for expansion or renewal of this recognition, following requirements in Appendix A to 29 CFR 1910.7. This appendix requires that the Agency publish two notices in the **Federal Register** in processing such an application. In the first notice, OSHA announces the application and provides its preliminary finding and, in the second notice, the Agency provides its final decision on the application. These notices set forth the NRTL's scope of recognition or modifications of that scope. OSHA maintains an informational Web page for each NRTL that details its scope of recognition. These pages are available from the Web site at *http://www.osha.gov/dts/otpca/nrtl/index.html.* Each NRTL's scope of recognition has three elements: (1) The type of products the NRTL may test, with each type specified by its applicable test standard; (2) the recognized site(s) that has/have the technical capability to perform the testing and certification activities for test standards within the NRTL's scope; and (3) the supplemental program(s) that the NRTL may use, each of which allows the NRTL to rely on other parties to perform activities necessary for product testing and certification.

UL submitted an application, dated February 20, 2008, as an amendment to its application for renewal of recognition. (Ex. 2–UL expansion application dated 2/20/2008.) This amendment requested an expansion of recognition to add 98 standards [1] to UL's scope, and to delete several test standards from its scope. The NRTL Program staff determined that 49 of the requested standards are "appropriate test standards" within the meaning of 29 CFR 1910.7(c). UL later modified its request to reduce the number of the appropriate standards to 35. (Ex. 3–UL amended expansion application dated 2/16/2010.)

In connection with this request, NRTL Program staff did not perform any on-site review of UL's recognized sites. The staff only performed a comparability analysis,[2] and recommended expansion of UL's recognition to include the 35 test standards. The Agency published a preliminary notice announcing the expansion application in the **Federal Register** on April 26, 2010 (79 FR 21664). OSHA requested comments on the notice by May 11, 2010; OSHA received no comments in response to this notice. OSHA now is proceeding with this final notice to grant UL's expansion application.

All public documents pertaining to the UL application are available for review by contacting the Docket Office, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–2625, Washington, DC 20210. These materials also are available online at *http://www.regulations.gov* under Docket No. OSHA–2009–0025.

[1] UL requested recognition for ANSI/AAMI ES60601–1:2005, but OSHA has not yet determined whether this standard may be used by NRTLs. OSHA will request public comment on the suitability of this standard in an upcoming **Federal Register** notice.

[2] This analysis involves determining whether the testing and evaluation requirements of test standards already in an NRTL's scope are comparable to the requirements in the standards requested by the NRTL.

Final Decision and Order

NRTL Program staff examined UL's application, the comparability analysis, and other pertinent information. Based upon this examination and the analysis, OSHA finds that UL meets the requirements of 29 CFR 1910.7 for expansion of its recognition, subject to the limitation and conditions listed below. Pursuant to the authority granted by 29 CFR 1910.7, OSHA hereby expands the recognition of UL, subject to this limitation and these conditions.

Limitation

OSHA limits the expansion of UL's recognition to testing and certification of products for demonstration of conformance to the following test standards, each of which OSHA determines is an appropriate test standard within the meaning of 29 CFR 1910.7(c):

IEEE C37.20.4 Indoor AC Switches (1 kV–38 kV) for Use in Metal-Enclosed Switchgear [a]
IEEE C37.20.6 4.76 kV to 38 kV Rated Grounding and Testing Devices Used in Enclosures [a]
IEEE C37.23 Metal-Enclosed Bus [a]
IEEE C37.41 High-Voltage Fuses, Distribution Enclosed Single-Pole Air Switches, Fuse Disconnecting Switches, and Accessories [a]
IEEE C37.74 Subsurface, Vault, and Pad-Mounted Load-Interrupter Switchgear and Fused Load-Interrupter Switchgear for Alternating Current Systems Up to 38 kV Switchgear [a]
IEEE C57.12.44 Secondary Network Protectors [a]
ISA 12.12.01 Nonincendive Electrical Equipment for Use in Class I and II, Division 2 and Class III, Divisions 1 and 2 Hazardous (Classified) Locations
UL 5C Surface Raceways and Fittings for Use with Data, Signal, and Control Circuits
UL 283 Air Fresheners and Deodorizers
UL 458 Power Converters/Inverters and Power Converter/Inverter Systems for Land Vehicles and Marine Crafts [b]
NFPA 496 Purged and Pressurized Enclosures for Electrical Equipment
UL 852 Metallic Sprinkler Pipe for Fire Protection Service
UL 962 Household and Commercial Furnishings [c]
UL 1340 Hoists
UL 1626 Residential Sprinklers for Fire Protection Service
UL 2225 Cables and Cable Fittings for Use in Hazardous (Classified) Locations
UL 2443 Flexible Sprinkler Hose with Fittings for Fire Protection Service
UL 5085–2 Low Voltage Transformers—Part 2: General Purpose Transformers

UL 60730–2–8 Automatic Electrical Controls for Household and Similar Use; Part 2: Particular Requirements for Electrically Operated Water Valves, Including Mechanical Requirements
UL 60745–2–1 Particular Requirements for Drills and Impact Drills
UL 60745–2–3 Particular Requirements for Grinders, Polishers and Disk-Type Sanders
UL 60745–2–11 Particular Requirements for Reciprocating Saws
UL 60745–2–12 Particular Requirements for Concrete Vibrators
UL 60745–2–14 Particular Requirements for Planers
UL 60745–2–17 Particular Requirements for Routers and Trimmers
UL 60745–2–18 Particular Requirements for Strapping Tools
UL 60745–2–19 Particular Requirements for Jointers
UL 60745–2–2 Particular Requirements for Screwdrivers and Impact Wrenches
UL 60745–2–20 Particular Requirements for Band Saws
UL 60745–2–21 Particular Requirements for Drain Cleaners
UL 60745–2–4 Particular Requirements for Sanders and Polishers Other Than Disk Type
UL 60745–2–5 Particular Requirements for Circular Saws
UL 60745–2–6 Particular Requirements for Hammers
UL 60745–2–8 Particular Requirements for Shears and Nibblers
UL 60745–2–9 Particular Requirements for Tappers

Notes:

[a] Recognition for this standard does not apply to testing and certification of equipment or materials used in installations excluded from the provisions of subpart S in 29 CFR 1910 by section 1910.302(a)(2).

[b] OSHA limits recognition for this standard to testing and certification of products used within recreational vehicles and mobile homes.

[c] OSHA limits recognition of this standard to testing and certification of the electrical devices falling within the standard's scope.

The designations and titles of the above test standards were current at the time of the preparation of this notice.

OSHA limits recognition of any NRTL for a particular test standard to equipment or materials (*i.e.,* products) for which OSHA standards require third-party testing and certification before use of the product in the workplace. Consequently, if a test standard also covers any product for which OSHA does not require such testing and certification, an NRTL's scope of recognition does not include that product.

The American National Standards Institute (ANSI) may approve the test standards listed above as American National Standards. However, for convenience, we may use the designation of the standards-developing organization for the standard as opposed to the ANSI designation. Under the NRTL Program's policy (see OSHA Instruction CPL 1–0.3, Appendix C, paragraph XIV), any NRTL recognized for a particular test standard may use either the proprietary version of the test standard or the ANSI version of that standard. Contact ANSI to determine whether a test standard is currently ANSI-approved.

Conditions

UL also must abide by the following conditions of the recognition, in addition to those conditions already required by 29 CFR 1910.7:

1. UL must allow OSHA access to its facilities and records to ascertain continuing compliance with the terms of its recognition, and to perform investigations as OSHA deems necessary;

2. If UL has reason to doubt the efficacy of any test standard it is using under this program, it must promptly inform the test standard-developing organization of this concern and provide that organization with appropriate relevant information upon which it bases its concern;

3. UL must not engage in, or permit others to engage in, any misrepresentation of the scope or conditions of its recognition. As part of this condition, UL agrees that it will allow no representation that it is either a recognized or an accredited NRTL without clearly indicating the specific equipment or material to which this recognition applies, and also clearly indicating that its recognition is limited to specific products;

4. UL must inform OSHA as soon as possible, in writing, of any change of ownership, facilities, or key personnel, and of any major changes in its operations as an NRTL, including details of these changes;

5. UL will meet all the terms of its recognition, and will always comply with all OSHA policies pertaining to this recognition; and

6. UL will continue to meet the requirements for recognition in all areas covered by its scope of recognition.

Issue Regarding NFPA Standards

In this notice, OSHA is modifying the scopes of recognition of three NRTLs. Specifically, five standards that OSHA currently includes, to varying degrees, in the scopes of recognition of these NRTLs are not "appropriate test standards" under 29 CFR 1910.7(c) because they do not primarily cover product-safety testing. In addition, OSHA has no requirement for NRTL approval of the systems covered by these standards. Consequently, OSHA is removing the test standards from the scopes of recognition of each affected NRTL (*see* list below).

OSHA specifies a scope of recognition for each NRTL that includes a list of product-safety test standards that the NRTL may use in testing and certifying (i.e., approving) products; NRTLs must demonstrate that the products conform to "appropriate test standards," as defined under 29 CFR 1910.7(c). "Appropriate test standards" are consensus-based product-safety test standards developed and maintained by U.S.-based standards-developing organizations (SDOs). These test standards are not OSHA standards, which are general requirements that employers must meet; the test standards specify technical safety requirements that particular types of products must meet.

The notice for the expansion described above also proposed the removal of these five test standards from each affected NRTL's scope of recognition. OSHA requested comments on the notice by May 11, 2010; OSHA received no comments in response to this notice. OSHA now is proceeding with this final notice modifying the scopes of recognition of the affected NRTLs (see list below).

OSHA will incorporate the modifications specified by this notice on its informational Web page for each affected NRTL. This page details OSHA's official scope of recognition for the NRTL, including the standards the NRTL may use to certify products under OSHA's NRTL Program. Access to these Web pages is available through *http://www.osha.gov/dts/otpca/nrtl/index.html.*

Modification to Each NRTL's Scope of Recognition: [3]

[3] For each test standard deleted, OSHA uses the name as it now appears on OSHA's informational Web page for each NRTL. These names may differ from the standard's current name (*i.e.,* name as of the date of this notice), which are as follows:

ANSI/NFPA 11 Low-, Medium-, and High-Expansion Foam

ANSI/NFPA 12 Carbon Dioxide Extinguishing Systems

ANSI/NFPA 12A Halon 1301 Fire Extinguishing Systems

ANSI/NFPA 16 Standard for the Installation of Foam-Water Sprinkler and Foam-Water Spray Systems

ANSI/NFPA 17 Dry Chemical Extinguishing Systems

FM Approvals LLC (FM)

Deleted Test Standards:

ANSI 11 Low Expansion Foam and Combined Agent Systems
ANSI 12 Carbon Dioxide Extinguishing Systems
ANSI 12A Halon 1301 Fire Extinguishing Agent Systems
ANSI 16 Deluge Foam-Water Sprinkler and Spray Systems
ANSI 17 Dry Chemical Extinguishing Systems

Intertek Testing Services NA, Inc. (ITSNA)

Deleted Test Standards:

ANSI/NFPA 11 Low Expansion Foam and Combined Agent Systems
ANSI/NFPA 12 Carbon Dioxide Extinguishing Systems
ANSI/NFPA 12A Halon 1301 Fire Extinguishing Agent Systems
ANSI/NFPA 17 Dry Chemical Extinguishing Systems

Underwriters Laboratories Inc. (UL)

Deleted Test Standards:

ANSI/NFPA 11 Low Expansion Foam and Combined Agent Systems
ANSI/NFPA 12 Carbon Dioxide Extinguishing Systems
ANSI/NFPA 12A Halon 1301 Fire Extinguishing Agent Systems
ANSI/NFPA 17 Dry Chemical Extinguishing Systems

Authority and Signature

David Michaels, PhD, MPH, Assistant Secretary of Labor for Occupational Safety and Health, 200 Constitution Avenue, NW., Washington, DC 20210, directed the preparation of this notice. Accordingly, the Agency is issuing this notice pursuant to Sections 6(b) and 8(g) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655 and 657), Secretary of Labor's Order No. 4–2010 (75 FR 55355), and 29 CFR part 1911.

Signed at Washington, DC, on December 6, 2010.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2010–31048 Filed 12–9–10; 8:45 am]

BILLING CODE 4510–26–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (10–159)]

Notice of Information Collection

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of information collection.

SUMMARY: The National Aeronautics and Space Administration, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. 3506(c)(2)(A)).

DATES: All comments should be submitted within 30 calendar days from the date of this publication.

ADDRESSES: All comments should be addressed to Lori Parker, National Aeronautics and Space Administration, Washington, DC 20546–0001.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Lori Parker, NASA Clearance Officer, NASA Headquarters, 300 E Street, SW., JF0000, Washington, DC 20546, (202) 358–1351, *Lori.Parker@nasa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

Recordkeeping and reporting are required to ensure proper accounting of Federal funds and property provided under grants and cooperative agreements with state and local governments.

II. Method of Collection

Electronic funds transfer is used for payment under Treasury guidance. Submission of almost all information required under grants or cooperative agreements with state and local governments, including property, financial, performance, and financial reports, is submitted electronically.

III. Data

Title: Grants and Cooperative Agreements with State and Local Governments.

OMB Number: 2700–0093.

Type of review: Revision of currently approved collection.

Affected Public: State, Local or Tribal Governments.

Estimated Number of Respondents: 70.

Estimated Time per Response: 10 hours for record-keeping and 1 hour for each of different report types.

Estimated Total Annual Burden Hours: 1370 hours.

Estimated Total Annual Cost: $0.00.

IV. Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) of the proposed collection of information; (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 automated collection techniques or the use of other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

Lori Parker,

NASA PRA Clearance Officer.

[FR Doc. 2010–31031 Filed 12–9–10; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (10–158)]

Notice of Information Collection

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of information collection.

SUMMARY: The National Aeronautics and Space Administration, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. 3506(c)(2)(A)).

DATES: All comments should be submitted within 30 calendar days from the date of this publication.

ADDRESSES: All comments should be addressed to Lori Parker, National Aeronautics and Space Administration, Washington, DC 20546–0001.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Lori Parker, NASA PRA Officer, NASA Headquarters, 300 E Street, SW., JF0000, Washington, DC 20546, (202) 358–1351, *Lori.Parker@nasa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

Grantees and cooperative agreement partners are required to submit new technology reports indicating new inventions and patents.

II. Method of Collection

Grant recipients are encouraged to use information technology to prepare patent reports through a hyperlink to the electronic New Technology Reporting Web (eNTRe) site *http://www.invention.nasa.gov.* This Web site has been created to help NASA employees and parties under NASA funding agreements (*i.e.,* contracts, grants, cooperative agreements, and subcontracts) to report new technology and patent notification directly, via a secure Internet connection, to NASA.

III. Data

Title: Patents—Grants and Cooperative Agreements.

OMB Number: 2700–0048.

Type of Review: Extension of currently approved collection.

Affected Public: Business or other for-profit, Not-for-profit institutions, Federal Government, and State, Local or Tribal Government.

Estimated Number of Respondents: 5,451.

Estimated Time per Response: 4,361 negative responses/0.166 Hour, 1,090 responses/8 Hours.

Estimated Total Annual Burden Hours: 9,444.

Estimated Total Annual Cost: $0.

IV. Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) of the proposed collection of information; (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 automated collection techniques or the use of other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

Lori Parker,

NASA PRA Clearance Officer.

[FR Doc. 2010–31032 Filed 12–9–10; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[NOTICE (10–157)]

Notice of Information Collection

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of information collection.

SUMMARY: The National Aeronautics and Space Administration, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. 3506(c)(2)(A)).

DATES: All comments should be submitted within 30 calendar days from the date of this publication.

ADDRESSES: All comments should be addressed to Lori Parker, National Aeronautics and Space Administration, Washington, DC 20546–0001.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Lori Parker, NASA Clearance Officer, NASA Headquarters, 300 E Street, SW., JF0000, Washington, DC 20546, (202) 358–1351, *Lori.Parker@nasa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This information collection helps to ensure that engineering changes to contracts are made quickly and in a cost effective manner. Proposals supporting such change orders contain detailed information to obtain best goods and services for the best prices.

II. Method of Collection

NASA does not prescribe a format for submission, though most contractors have cost collection systems which are used for proposal preparation. NASA encourages the use of computer technology for preparing proposals and submission.

III. Data

Title: Modifications Related to Engineering Change Proposals.

OMB Number: 2700–0054.

Type of review: Revision of currently approved collection.

Affected Public: Business or other for-profit and not-for-profit institutions.

Estimated Number of Respondents: 150.

Estimated Time per Response: 30 hours.

Estimated Total Annual Burden Hours: 4500 hours.

Estimated Total Annual Cost: $0.00.

IV. Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) of the proposed collection of information; (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 automated collection techniques or the use of other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

Lori Parker,

NASA PRA Clearance Officer.

[FR Doc. 2010–31034 Filed 12–9–10; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[NOTICE (10–155)]

Notice of Information Collection

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of information collection.

SUMMARY: The National Aeronautics and Space Administration, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. 3506(c)(2)(A)).

DATES: All comments should be submitted within 30 calendar days from the date of this publication.

ADDRESSES: All comments should be addressed to Lori Parker, National Aeronautics and Space Administration, Washington, DC 20546–0001.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Lori Parker, NASA PRA Officer, NASA Headquarters, 300 E Street, SW., JF0000, Washington, DC

20546, (202) 358–1351, *Lori.Parker@nasa.gov*.

SUPPLEMENTARY INFORMATION:

I. Abstract

Contractors performing research and development are required by statutes, NASA implementing regulations, and OMB policy to submit reports of inventions, patents, data, and copyrights, including the utilization and disposition of same. The NASA New Technology Summary Report reporting form is being used for this purpose.

II. Method of Collection

NASA FAR Supplement clauses for patent rights and new technology encourage the contractor to use an electronic form and provide a hyperlink to the electronic New Technology Reporting Web (eNTRe) site *http://invention.nasa.gov.* This Web site has been set up to help NASA employees and parties under NASA funding agreements (*i.e.,* contracts, grants, cooperative agreements, and subcontracts) to report new technology information directly, via a secure Internet connection, to NASA.

III. Data

Title: NASA FAR Supplement, Part 1827, Patents, Data, and Copyrights.

OMB Number: 2700–0052.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit, Not-for-profit institutions, Federal Government, and State, Local or Tribal Government.

Estimated Number of Respondents: 1,016.

Estimated Time per Response: 0.166 hour.

Estimated Total Annual Burden Hours: 3,391.

Estimated Total Annual Cost: $0.

IV. Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) of the proposed collection of information; (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 automated collection techniques or the use of other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

Lori Parker,

NASA PRA Clearance Officer.

[FR Doc. 2010–31036 Filed 12–9–10; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[NOTICE (10–153)]

Notice of Information Collection

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of information collection.

SUMMARY: The National Aeronautics and Space Administration, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. 3506(c)(2)(A)).

DATES: All comments should be submitted within 30 calendar days from the date of this publication.

ADDRESSES: All comments should be addressed to Lori Parker, National Aeronautics and Space Administration, Washington, DC 20546–0001.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Lori Parker, NASA Clearance Officer, NASA Headquarters, 300 E Street, SW., JF0000, Washington, DC 20546, (202) 358–1351, *Lori.Parker@nasa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The new NASA Explorer Schools (NES) project is a national education project, which works with K–12 teachers to provide content and curricular support selected as the best from among the resources NASA has developed. This data collection will help to assess the NES project implementation and to provide data that can inform decisions made by NASA leadership and project staff about project modifications and implementation.

II. Method of Collection

The current paper-based system is used to collect the information. It is deemed not cost effective to collect the information using a Web site form since the reports submitted vary significantly in format and volume.

III. Data

Title: NASA Explorer Schools Evaluation.

OMB Number: 2700–XXXX.

Type of review: New Collection.

Affected Public: Individuals or households.

Estimated Number of Respondents: 4,080.

Estimated Number of Responses per Respondent: 7.

Estimated Time per Response: .25 hour.

Estimated Total Annual Burden Hours: 5,050 hours.

Estimated Annual Cost for Respondents: $0.00.

IV. Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) of the proposed collection of information; (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 automated collection techniques or the use of other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

Lori Parker,

NASA Clearance Officer.

[FR Doc. 2010–31038 Filed 12–9–10; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[NOTICE (10–154)]

Notice of Information Collection

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of information collection.

SUMMARY: The National Aeronautics and Space Administration, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or

continuing information collections, as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. 3506(c)(2)(A)).

DATES: All comments should be submitted within 30 calendar days from the date of this publication.

ADDRESSES: All comments should be addressed to Lori Parker, National Aeronautics and Space Administration, Washington, DC 20546–0001.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Lori Parker, NASA Clearance Officer, NASA Headquarters, 300 E Street, SW., JF0000, Washington, DC 20546, (202) 358–1351, *Lori.Parker@nasa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The information is used by NASA to effectively maintain an appropriate internal control system for grants and cooperative agreements with institutions of higher education and other non-profit organizations, and to comply with statutory requirements, *e.g.,* Chief Financial Officer's Act, on the accountability of Federal funds.

II. Method of Collection

Electronic funds transfer is used for payment under Treasury guidance. In addition, NASA encourages the use of computer technology and is participating in Federal efforts to extend the use of information technology to more Government processes via the Internet.

III. Data

Title: Financial Monitoring and Control—Grants and Cooperative Agreements.

OMB Number: 2700–0049.

Type of review: Extension of Currently Approved Collection.

Affected Public: Not-for-profit institutions.

Estimated Number of Respondents: 1172.

Estimated Number of Responses per Respondent: 41.

Estimated Time per Response: 6 hours.

Estimated Total Annual Burden Hours: 291,326 hours.

Estimated Total Annual Cost: $0.00.

IV. Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) of the proposed collection of information; (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 automated collection techniques or the use of other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

Lori Parker,

NASA PRA Clearance Officer.

[FR Doc. 2010–31037 Filed 12–9–10; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[NOTICE (10–156)]

Notice of Information Collection

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of information collection.

SUMMARY: The National Aeronautics and Space Administration, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. 3506(c)(2)(A)).

DATES: All comments should be submitted within 30 calendar days from the date of this publication.

ADDRESSES: All comments should be addressed to Lori Parker, National Aeronautics and Space Administration, Washington, DC 20546–0001.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Lori Parker, NASA PRA Officer, NASA Headquarters, 300 E Street, SW., JF0000, Washington, DC 20546, (202) 358–1351, *Lori.Parker@nasa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This information collection has to do with recordkeeping and reporting required to ensure proper accounting of Federal funds and property provided under NASA cooperative agreements with commercial firms.

II. Method of Collection

Electronic funds transfer is used for payment under Treasury guidance. In addition, NASA encourages the use of computer technology and is participating in Federal efforts to extend the use of information technology to more Government processes via the Internet. Specifically, progress has been made in the area of property reporting, most of it being done electronically.

III. Data

Title: Cooperative Agreements with Commercial Firms.

OMB Number: 2700–0092.

Type of review: Revision of Currently Approved Collection.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 288.

Estimated Total Annual Burden Hours: 1496.

Estimated Total Annual Cost to Government: $0.

IV. Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) of the proposed collection of information; (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 automated collection techniques or the use of other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

Lori Parker,

NASA PRA Clearance Officer.

[FR Doc. 2010–31035 Filed 12–9–10; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL SCIENCE FOUNDATION

Notice of Intent To Extend an Information Collection

AGENCY: National Science Foundation.

ACTION: Notice and Request for Comments.

SUMMARY: Under the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3501 *et seq.*), and as part of its continuing effort to reduce paperwork and respondent burden, the National Science Foundation (NSF) is inviting the general public or other Federal agencies to comment on this proposed continuing information collection. The National Science Foundation (NSF) will publish periodic summaries of proposed projects.

Comments: Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Written comments on this notice must be received by February 8, 2011 to be assured consideration. Comments received after that date will be considered to the extent practicable. Send comments to address below.

FOR ADDITIONAL INFORMATION OR COMMENTS: For further information or for a copy of the collection instruments and instructions, contact Ms. Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Boulevard, Suite 295, Arlington, Virginia 22230; telephone (703) 292–7556; or send e-mail to *splimpto@nsf.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Title of Collection: Survey of Earned Doctorates.

OMB Approval Number: 3145–0019.

Expiration Date of Approval: May 31, 2012.

Type of Request: Intent to seek approval to extend an information collection for three years.

1. *Abstract:* The National Science Foundation Act of 1950, as subsequently amended, includes a statutory charge to "* * * provide a central clearinghouse for the collection, interpretation, and analysis of data on scientific and engineering resources, and to provide a source of information for policy formulation by other agencies of the Federal Government." The Survey of Earned Doctorates is part of an integrated survey system that meets the human resources part of this mission.

The Survey of Earned Doctorates has been conducted annually since 1958 and is jointly sponsored by six Federal agencies in order to avoid duplication. It is an accurate, timely source of information on one of our Nation's most important resources—highly educated individuals. Data are obtained via paper questionnaire or Web survey from each person earning a research doctorate at the time they receive the degree. Data are collected on their field of specialty, educational background, sources of support in graduate school, debt level, postgraduation plans for employment, and demographic characteristics.

The Federal government, universities, researchers, and others use the information extensively. The National Science Foundation, as the lead agency, publishes statistics from the survey in several reports, but primarily in the annual publication series, "Science and Engineering Doctorates" and the Interagency Report "Doctorate Recipients from U.S. Universities." These reports are available in print and electronically on the World Wide Web.

The survey will be collected in conformance with the Privacy Act of 1974. Responses from individuals are voluntary. NSF will ensure that all individually identifiable information collected will be kept strictly confidential and will be used for research or statistical purposes, analyzing data, and preparing scientific reports and articles.

2. *Expected Respondents:* A total response rate of 92.3% of the 49,562 persons who earned a research doctorate was obtained in academic year 2008/2009. This level of response rate has been consistent for several years. The respondents will be individuals and the estimated number of respondents annually is around 46,000 (based on 2009 data).

3. *Estimate of Burden:* In 2012, approximately 51,000 individuals are expected to receive research doctorates from United States institutions. The Foundation estimates that, on average, 20 minutes per respondent will be required to complete the survey. The annual respondent burden for completing the Survey of Earned Doctorates is therefore estimated at 17,000 hours, based on 51,000 respondents.

Additional time is needed to complete the Missing Information Letter (MIL), which is sent to any survey respondent who did not provide data on any of eight "critical items" (year of Master's, year of Bachelor's, postgraduation location (state or country), birth date, citizenship status, race, ethnicity, and gender) on their original response. Most MILs address fewer than eight missing items. Based on past results, the average respondent is expected to spend two minutes completing the MIL. The SED receives an average of 2,000 completed MILs each survey round, for an annual MIL completion burden estimate of 67 hours.

In addition to the actual survey, the SED also requires the collection of administrative data from participating institutions. The Institutional Contact at the institution helps distribute the survey, track it, collect it and submit the completed questionnaires to the SED survey contractor. Based on focus groups conducted with Institutional Contacts, it is estimated that the SED demands no more than 1% of the Institutional Contact's time over the course of a year, which computes to 20 hours per year per individual contact (40 hours per week × 50 weeks per year × .01). With 530 programs participating in the SED, the estimated annual burden to Institutional Contacts of administering the SED is 10,600 hours.

Therefore, the total annual information burden for the SED is estimated to be 27,667 hours. This is higher than the last annual estimate approved by OMB due to the increased number of respondents (doctorate recipients).

Dated: December 6, 2010.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2010–31008 Filed 12–9–10; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Sunshine Act Meeting Notice; National Science Board

The National Science Board's Subcommittee on Facilities, pursuant to NSF regulations (45 CFR Part 614), the National Science Foundation Act, as amended (42 U.S.C. 1862n–5), and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of a meeting for the transaction of National Science Board business and other matters specified, as follows:

DATE: December 15, 2010.

TIME & SUBJECT MATTER OPEN: 11 a.m. to 12:30 p.m.

- NSF Principles & Portfolio Review.
- Future Budgetary Issues FY 2012 and beyond.

STATUS: Closed.

LOCATION: The closed session of this teleconference will be held at the National Science Foundation, 4201 Wilson Blvd., Arlington, VA 22230.

UPDATES & POINT OF CONTACT: Please refer to the National Science Board Web site *http://www.nsf.gov/nsb* for additional information and schedule updates (time, place, subject matter or status of meeting) may be found at *http://www.nsf.gov/nsb/notices/.* Point of contact for this meeting is: Jennie Moehlmann, National Science Board Office, 4201Wilson Blvd., Arlington, VA 22230. Telephone: (703) 292–7000.

Daniel A. Lauretano,

Counsel to the National Science Board.

[FR Doc. 2010–31157 Filed 12–8–10; 11:15 am]

BILLING CODE 7555–01–P

NEIGHBORHOOD REINVESTMENT CORPORATION

Regular Board of Directors Meeting; Sunshine Act

TIME AND DATE 2:30 p.m., Wednesday, December 15, 2010.

PLACE: 1325 G Street, NW., Suite 800, Boardroom, Washington, DC 20005.

STATUS: Open.

CONTACT PERSON FOR MORE INFORMATION: Erica Hall, Assistant Corporate Secretary, (202) 220–2376; *ehall@nw.org.*

AGENDA:

I. Call to order
II. Approval of the Minutes
III. Summary Report of the Corporate Administration Committee
IV. Summary Report of the Finance, Budget and Program Committee
V. Summary Report of the Corporate Administration Committee
VI. Summary Report of the Audit Committee
VII. Approval of the Minutes
VIII. Approval of the Minutes
IX. Approval of the Minutes
X. Approval of the Revised Minutes
XI. Board Policy Regarding Elected Officials
XII. Financial Report
XIII. Corporate Scorecard
XIV. Chief Executive Officer's Management Report
XV. Strategic Planning Discussion
XVI. CEO Search Update
XVII. CAC Report on Interim Salary Adjustments
XVIII. Adjournment

Erica Hall,

Assistant Corporate Secretary.

[FR Doc. 2010–31009 Filed 12–9–10; 8:45 am]

BILLING CODE 7570–02–M

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–266 and 50–301; NRC–2010–0380]

Nextera Energy Point Beach, LLC; Point Beach Nuclear Plant, Units 1 and 2, Draft Environmental Assessment and Draft Finding of No Significant Impact Related to the Proposed License Amendment To Increase the Maximum Reactor Power Level

In accordance with Title 10 of the *Code of Federal Regulations* (10 CFR) Section 51.21, the U.S. Nuclear Regulatory Commission (NRC) has prepared a draft Environmental Assessment (EA) and draft Finding of No Significant Impact (FONSI) as part of its evaluation of a request by Florida Power & Light (FPL) Energy (the licensee) (now NextEra Energy Point Beach, LLC (NextEra)) for a license amendment to increase the maximum thermal power at the Point Beach Nuclear Plant (PBNP), Units 1 and 2 from 1,540 megawatts thermal (MWt) to 1,800 MWt for each unit. This represents a power increase of approximately 17 percent over the current licensed thermal power, with a net increase of electrical output from 519 megawatts-electric (MWe) to 607 MWe for each unit, and approximately an 18 percent increase from the original licensed power level of 1,518 MWt. In 2003, PBNP received approval from the NRC to increase their power by 1.4 percent, to the current power level of 1,540 MWt. The NRC staff did not identify any significant environmental impact associated with the proposed action based on its evaluation of the information provided in the licensee's extended power uprate (EPU) application and other available information. The draft EA and draft FONSI are being published in the **Federal Register** with a 30-day public comment period ending January 8, 2011.

Draft Environmental Assessment

Plant Site and Environs

The PBNP site is located approximately 6 miles (10 kilometers) east-northeast of the town of Mischot on the western shore of Lake Michigan, midway along the western shore, near the northeastern corner of Manitowoc County, Wisconsin. The City of Green Bay is located approximately 25 miles (40 kilometers) northwest of PBNP, and the Kewaunee Nuclear Plant is located approximately 4 miles (6 kilometers) north of PBNP on the shore of Lake Michigan. The PBNP site is comprised of approximately 1,260 acres (510 hectares), with 104 acres (42 hectares) that includes the two nuclear reactors, parking and ancillary facilities. Approximately 1,050 acres (425 hectares) are used for agriculture, and the remaining land is a mixture of woods, wetlands, and open areas. Each of the two units at PBNP use Westinghouse pressurized water reactors.

Identification of the Proposed Action

By application dated April 7, 2009, the licensee requested an amendment for an EPU for PBNP to increase the licensed thermal power level from 1,540 MWt to 1,800 MWt for each unit, which represents an increase of approximately 17 percent above the current licensed thermal power and approximately 18 percent over the original licensed thermal power level. This change in core thermal level requires the NRC to amend the facility's operating license. The operational goal of the proposed EPU is a corresponding increase in electrical output for each unit from 519 MWe to 607 MWe. The proposed action is considered an EPU by NRC because it exceeds the typical 7 percent power increase that can be accommodated with only minor plant changes. EPUs typically involve extensive modifications to the nuclear steam supply system.

The licensee plans to make extensive physical modifications to the plant's secondary side to implement the proposed EPU over the course of two refueling outages currently scheduled for the Spring 2011 and the Fall 2011. The actual power uprate, if approved by the NRC, would occur in two stages following the 2011 refueling outages.

The Need for the Proposed Action

The need for the additional power generation is based upon the goals and recommendations of Wisconsin's 2007 Final Report on "Strategic Energy Assessment Energy 2012" for maintaining a robust energy planning reserve margin of 18 percent. In this report, the State of Wisconsin, Public Service Commission, forecasted an annual growth rate of over 2 percent in demand for electricity. The proposed action provides the licensee with the flexibility to increase the potential electrical output of PBNP Units 1 and 2 from its existing power station, and to reduce Wisconsin's dependence on obtaining power from Illinois via a congested transmission grid connection. The additional 90 MWe provided by each unit would contribute to meeting the goals of the State of Wisconsin to provide efficient and stable nuclear electrical generation.

Environmental Impacts of the Proposed Action

As part of the licensing process for PBNP Units 1 & 2, the NRC published a Final Environmental Statement (FES) in October 1970, for PBNP Unit 1, and in March 1973 for PBNP Unit 2. The two FESs provide an evaluation of the environmental impacts associated with the operation of PBNP Units 1 & 2 over their licensed lifetimes. In addition, in 2005, the NRC evaluated the environmental impacts of operating PBNP for an additional 20 years beyond its current operating license, and determined that the environmental impacts of license renewal were small. The NRC staff's evaluation is contained in NUREG–1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Plant, Supplement 23, Regarding Point Beach Nuclear Plant, Units 1 and 2" (SEIS–23) issued in August 2005 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML052230490). The NRC staff used information from the licensee's license amendment request, the FESs, and the SEIS–23 to perform its EA for the proposed EPU.

There will be extensive changes made to the secondary side of the PBNP related to the EPU action, but no new construction is planned outside of existing facilities, and no extensive changes are anticipated to buildings or plant systems that directly or indirectly interface with the environment. All necessary modifications would be performed in existing buildings at PBNP. Modifications to the secondary side of each unit include the following: Replacing the high-pressure side of the turbine; replacing all of the feedwater heaters, feedwater and condensate pumps and motors to operate at higher capacity; providing supplemental cooling for some plant systems; implementing electrical upgrades; other modifications to accommodate greater steam and condensate flow rates; and changing setpoints and modifying software.

The sections below describe the non-radiological and radiological impacts in the environment that may result from the proposed EPU.

Non-Radiological Impacts

Land Use and Aesthetic Impacts

Potential land use and aesthetic impacts from the proposed EPU include impacts from plant modifications at PBNP. While some plant components would be modified, most plant changes related to the proposed EPU would occur within existing structures, buildings, and fenced equipment yards housing major components within the developed part of the site. No new construction would occur outside of existing facilities and no expansion of buildings, roads, parking lots, equipment lay-down areas, or transmission facilities would be required to directly support the proposed EPU.

Existing parking lots, road access, equipment lay-down areas, offices, workshops, warehouses, and restrooms would be used during plant modifications. Therefore, land use conditions would not change at PBNP. Also, there would be no land use changes along transmission lines (no new lines would be required for the proposed EPU), transmission corridors, in switch yards, or in substations.

Since land use conditions would not change at PBNP, there would be no significant impact from EPU-related plant modifications on land use and aesthetic resources in the vicinity of PBNP.

Air Quality Impacts

Air quality within the Point Beach area is generally considered good, with an exception occurring for a designated ozone nonattainment area. PBNP is located in Manitowoc County within the Lake Michigan Intrastate Air Quality Control Region (AQCR). With the exception of the 8-hour standard for ozone, the Lake Michigan AQCR is designated as being in attainment or unclassifiable for all air-quality criteria pollutants in the Environmental Protection Agency's 40 CFR 81.350.

There are approximately 650 people employed at the PBNP on a full-time basis, and 150 long and short-term contractors. This workforce is typically augmented by an additional 700 persons during regularly scheduled refueling outages. For the EPU work conducted during the Spring 2011 outage and the Fall 2011 outage, there will be approximately 1,200 more workers supplementing the typical 700 additional workers scheduled for refueling outages. The workforce numbers would be somewhat larger than for a routine outage and would take longer to complete, but would still be of a relatively short duration (approximately 68 days). A typical refueling outage typically requires 35 days to complete. During implementation of the EPU at PBNP, some minor and short duration air quality impacts would occur. The main source of the air emissions would be from the vehicles of the additional outage workers needed for the EPU work. An approximate 727 additional truck deliveries will be needed to support EPU modifications for the Spring 2011 outage, and approximately 774 additional truck deliveries will support the EPU modifications for the Fall 2011 EPU modifications.

The majority of the EPU work would be performed inside existing buildings and would not impact air quality. Operation of the reactor at the increased power level would not result in increased non-radioactive emissions that would have a significant impact on air quality in the region. Therefore, there would be no significant impact on air quality during and following implementation of the proposed EPU.

Water Use Impacts

Groundwater

The PBNP is not connected to a municipal water system, and utilizes groundwater from the Silurian aquifer for potable and sanitary purposes withdrawn from five wells located within the plant yard. PBNP has approval from the Wisconsin Department of Natural Resources through the State's water appropriation permit program for groundwater withdrawal from wells with a combined withdrawal for over 10,000 gallons per day (gpd). Groundwater withdrawals from these five wells at PBNP have historically averaged about 6.5 gallons per minute (gpm) (9,300 gpd). While potable water in the vicinity of PBNP is drawn primarily from Lake Michigan, groundwater does provide potable water for smaller towns and rural residences in the plant region.

Groundwater samples taken from PBNP's supply wells as part of the PBNP site environmental monitoring program have shown no contamination. There are no discharges to groundwater from PBNP requiring permits by regulatory agencies, and discharge of wastewater to onsite retention ponds ended in 2002.

The EPU is not projected to increase groundwater use or liquid effluent discharges by PBNP during the operating life of the plant. As a result, local and regional groundwater users would not be affected by the proposed EPU. While potable water use would be expected to increase over the short term in association with the influx of the 1,200 additional workers supporting EPU implementation activities, this potential increase would be within the capacity of PBNP's wells and would be unlikely to have any effect on other groundwater users. Therefore, there would be no significant impact on groundwater resources following implementation of the proposed EPU.

Surface Water

The PBNP uses surface water from Lake Michigan for its once-through cooling system for both units for its plant condenser cooling, auxiliary water systems, the service water system, and for fire protection. The cooling system removes waste heat from the condensers and other plant equipment, and discharges the water through separate flumes for each unit back into Lake Michigan. As described in the licensee's application and SEIS–23, cooling water is circulated through PBNP at 680,000 gpm, and will remain unchanged under EPU conditions. Thus, no change in PBNP's water use or on the availability of water for other Lake Michigan users is expected.

Main condenser cooling water is withdrawn from Lake Michigan at a depth of approximately 22 feet (7 meters) from an offshore intake located approximately 1,750 feet (533 meters) east of the shoreline. The plant has two discharges located about 200 feet (60 meters) from the shoreline. Non-radioactive chemical effluent discharges into Lake Michigan are regulated in accordance with a Wisconsin Pollutant Discharge Elimination System (WPDES) permit (WI–0000957–07). The applicant submitted an application for renewal to the State in December 2008. The current WPDES permit is valid until the new WPDES permit is issued. The licensee's evaluation stated that no significant changes in WPDES permit-regulated discharges to outfalls are expected from EPU-operations. Therefore, there would be no significant impact on surface water resources following implementation of the proposed EPU.

Aquatic Resources Impacts

The potential impacts to aquatic biota from the proposed action could include impingement, entrainment, and chemical and thermal discharge effects. A permanent acoustic fish-deterrent system was installed around the intake structures at PBNP in 2002, to help reduce the influx of fish into the intake structure and to reduce potential impingement. The intake structures were originally constructed in areas of the lake devoid of fish spawning habitat or nursery grounds, which reduces the rate of entrainment. The proposed EPU will not result in an increase in water being withdrawn from Lake Michigan, nor will it result in an increase in the amount of water discharged to Lake Michigan. Therefore, there would be no potential increase in aquatic impacts from entrainment and impingement as a result of the proposed licensing action. The potential impacts at PBNP would remain consistent with the NRC's conclusion in the SEIS–23, that the aquatic impacts as a result of PBNP operation during the term of license renewal would continue to be small.

However, the proposed EPU will result in an approximate 17 percent increase in the amount of waste heat discharged into Lake Michigan. According to a modeling study performed by the licensee in 2008, the temperature of the discharge water is expected to increase by a maximum of 3.6 °F (2.0 °C) as a result of the proposed EPU. While the cooling water thermal plume of PBNP is expected to be somewhat larger as a result of the proposed EPU, it is not expected to disrupt the balanced indigenous community of aquatic resources, and will have a negligible impact on Representative Important Species of Lake Michigan. The current WPDES permit for PBNP does not contain thermal effluent limitations. In addition, the NRC staff concluded in the SEIS–23 that PBNP was in compliance with its current WPDES permit, and was using the best available technology for the minimization of adverse environmental impacts from entrainment, impingement, and heat shock, and further mitigation measures would not be warranted.

The circulating water system and service water system for PBNP are treated with biocides, sodium hypochlorite, and an electrolytic system adding copper to control biofouling from zebra mussels (*Dreissena polymorpha*) and to control algal growth. The NRC staff concluded in the SEIS–23 that there are no significant impacts of discharge of chlorine or other biocides during the license renewal term. The chemicals used for the above treatments at PBNP are regulated through the PBNP WPDES permit. The licensee has noted that they will maintain compliance with the WPDES permit and all other licenses, permits, approvals or other requirements currently held by the plant as a function of the proposed EPU.

The State of Wisconsin Coastal Management Program (WCMP) informed the licensee on March 16, 2010, that the WCMP has no comments on the project and will not conduct a Federal consistency review for PBNP as part of their WPDES permit. Therefore, there would be no significant adverse impacts to the aquatic biota from entrainment, impingement, thermal discharges, or from biocides for the proposed action.

Terrestrial Resources Impacts

As discussed in the Plant Site and Environs section, the PBNP site consists of approximately 1,260 acres, with over 2 miles (3 kilometers) of shoreline on Lake Michigan. Approximately 104 acres are used for power generation and support facilities. Much of the remaining area (1,050 acres) is farmed, and approximately 100 acres consists largely of woods, wetlands, and open areas. As previously discussed in the Land Use and Aesthetic Impacts section, the proposed action would not affect land use at PBNP. Therefore, there would be no significant impacts on terrestrial biota associated with the proposed action.

Threatened and Endangered Species Impacts

Correspondence between the licensee and the U.S. Fish and Wildlife Service (USFWS) in connection with the PBNP license renewal environmental review indicated that no Federally-listed endangered, threatened, or candidate terrestrial or aquatic species are likely to occur in the vicinity of the PBNP site. However, two species that are Federally-listed, the endangered piping plover (*Charadrius melodus*) and the threatened dune or Pitcher's thistle (*Cirsium pitchen*) have been recorded in Manitowoc County. In addition, the dwarf lake iris (*Iris lacustris*) has been documented in Brown County, which is traversed by the PBNP transmission line. The USFWS determined that portions of the PBNP shoreline may be suitable nesting habitat for the piping plover. And there is critical breeding habitat designated for the piping plover at Point Beach State Forest, which is approximately 3 miles (5 kilometers) southeast of PBNP, although no piping plovers have been recorded as breeding at this location. The bald eagle (*Haliaeetus leucocephalus*) (now delisted, but still protected under the Bald and Golden Eagle Protection Act) has not been observed foraging on or near the plant area, but bald eagles have been observed foraging on smaller, interior water bodies that may be found near the transmission lines. Regardless, the planned construction-related activities related to the proposed EPU primarily involve changes to existing structures, systems, and components internal to existing buildings within the plant, and would not involve earth disturbance. While traffic and worker activity in the developed parts of the plant site during the Spring 2011 and Fall 2011 refueling outages would be somewhat greater than a normal refueling outage, the potential impact on terrestrial wildlife would be minor and temporary.

Since there are no planned changes to the terrestrial wildlife habitat on the

PBNP site from the proposed EPU, and the potential impacts from worker activity would be minor and temporary, there would be no significant impacts to any threatened or endangered species for the proposed action.

Historic and Archaeological Resources Impacts

Records at the Wisconsin Historical Society identify several historic and archaeological sites in the vicinity of PBNP and three sites on PBNP property. None of these sites have been determined eligible for listing on the National Register of Historic Places (NRHP). There are a number of historic properties in Manitowoc County listed on the NRHP and the nearest, the Rawley Point Light Station, is within 6 miles (10 kilometers) of PBNP.

As previously discussed, all EPU-related plant modifications would take place within existing buildings and facilities at PBNP, including replacing two electrical transformers on an existing pad. Since no ground disturbance or construction-related activities would occur outside of previously disturbed areas and existing electrical transmission facilities, there would be no significant impact from EPU-related plant modifications on historic sites and to archaeological resources located on and within the vicinity of the PBNP.

Socioeconomic Impacts

Potential socioeconomic impacts from the proposed EPU include temporary increases in the size of the workforce at the PBNP and associated increased demand for public services, housing, and increased traffic in the region. The proposed EPU could also increase tax payments due to increased power generation.

Currently, there are approximately 800 workers employed at the PBNP, residing primarily in Manitowoc County, Wisconsin. During regularly scheduled refueling outages the number of workers at PBNP increases by as many as 700 workers for 35 days.

The proposed EPU is expected to temporarily increase the size of the refueling outage workforce by approximately 1,200 additional workers. The refueling outage would last approximately 68 days during two refueling outages (one for each unit). The majority of the EPU-related modifications would take place during the Spring 2011 and Fall 2011 refueling outages. Once completed, the size of the refueling outage workforce at the PBNP would return to approximately 700 workers, with no significant increases during future refueling outages. After EPU-related plant modifications, the number of plant operations workers would return to approximately 800 workers.

Most of the EPU-related plant modification workers would relocate temporarily to Manitowoc County, resulting in short-term increases in the local population along with increased demands for public services and housing. Because plant modification work would be short-term, most workers would stay in available rental homes, apartments, mobile homes, and camper-trailers. According to the 3-year average estimate (2006–2008) for census housing data, there were nearly 3,200 vacant housing units in Manitowoc County that could potentially ease the demand for local rental housing. Therefore, a temporary increase in plant employment for a short duration would have little or no noticeable effect on the availability of housing in the region.

The additional number of refueling outage workers and truck material and equipment deliveries needed to support EPU-related plant modifications would cause short-term level of service impacts on access roads in the immediate vicinity of PBNP. Due to the short duration of the outages, increased traffic volumes during normal refueling outages typically have not degraded the level of service capacity on local roads. However, an additional 727 truck deliveries are anticipated to support implementation of the EPU modifications during the Spring 2011 outage, and an additional 774 deliveries are anticipated to support the Fall 2011 outage. Based on this information and given that EPU-related plant modifications would occur during a normal refueling outage, there could be noticeable short term (during certain hours of the day) level-of-service traffic impacts beyond what is experienced during normal outages. During periods of high traffic volume (*i.e.*, morning and afternoon shift changes), work schedules could be staggered and employees and/or local police officials could be used to direct traffic entering and leaving PBNP to minimize level of service impacts on State Route 42.

NextEra pays a lump sum "gross revenue" tax to the State of Wisconsin in lieu of property taxes. Portions of this tax are based on the "net book value" of the PBNP and the amount of megawatts generated. The annual amount of taxes paid by NextEra would increase due to increased power generation. Future tax payments would also take into account the increased net book value of the PBNP as a result of the EPU implementation and "incentive payments," should megawatt production exceed negotiated annual benchmarks as power generation increases.

The proposed EPU would also increase local tax revenues generated by sales taxes and State and Federal income taxes paid by temporary workers residing in Manitowoc County. However, due to the short duration of EPU-related plant modification activities, there would be little or no noticeable effect on tax revenue streams in Manitowoc County. Therefore, there would be no significant adverse socioeconomic impacts from EPU-related plant modifications and operations under EPU conditions in the vicinity of the PBNP.

Environmental Justice Impacts

The environmental justice impact analysis evaluates the potential for disproportionately high and adverse human health and environmental effects on minority and low-income populations that could result from activities associated with the proposed EPU at the PBNP. Such effects may include human health, biological, cultural, economic, or social impacts. Minority and low-income populations are subsets of the general public residing in the vicinity of the PBNP, and all are exposed to the same health and environmental effects generated from activities at the PBNP.

The NRC staff considered the demographic composition of the area within a 50-mile (80-km) radius of the PBNP to determine the location of minority and low-income populations and whether they may be affected by the proposed action.

Minority populations in the vicinity of PBNP, according to the U.S. Census Bureau data for 2000, comprise 7.6 percent of the population (approximately 722,000 individuals) residing within a 50-mile (80-kilometer) radius of PBNP. The largest minority group was Hispanic or Latino (approximately 19,000 persons or 2.7 percent), followed by Asian (approximately 17,000 persons or about 2.4 percent). According to the U.S. Census Bureau, about 5.0 percent of the Manitowoc County population identified themselves as minorities, with persons of Asian origin comprising the largest minority group (2.0 percent). According to census data, the 3-year average estimate for 2006–2008 for the minority population of Manitowoc County, as a percent of total population, increased to 6.4 percent, with persons of Hispanic or Latino origin comprising the largest minority group (2.5 percent).

Low-income populations in the vicinity of PBNP, according to 2000 census data, comprise approximately

7,300 families and 40,900 individuals (approximately 3.8 and 5.7 percent, respectively) residing within a 50-mile (80-kilometer) radius of the PBNP. These individuals and families were identified as living below the Federal poverty threshold in 1999. The 1999 Federal poverty threshold was $17,029 for a family of four.

According to census data in the 2006–2008 American Community Survey
3-Year Estimates, the median household income for Wisconsin was $52,249, with 10.7 percent of the State population and 7.0 percent of families determined to be living below the Federal poverty threshold. Manitowoc County had a lower median household income average ($49,867) than the State of Wisconsin, but had lower percentages of county individuals (7.9 percent) and families (4.8 percent), respectively, living below the poverty level.

Environmental Justice Impact Analysis

Potential impacts to minority and low-income populations would mostly consist of environmental and socioeconomic effects (*e.g.*, noise, dust, traffic, employment, and housing impacts). Radiation doses from plant operations after the EPU are expected to continue to remain well below regulatory limits.

Noise and dust impacts would be short-term and limited to onsite activities. Minority and low-income populations residing along site access roads could experience increased commuter vehicle traffic during shift changes. Increased demand for rental housing during the refueling outages that would include EPU-related plant modifications could disproportionately affect low-income populations. However, due to the short duration of the EPU-related work and the availability of rental housing, impacts to minority and low-income populations would be short-term and limited. According to census information, there were approximately 3,200 vacant housing units in Manitowoc County.

Based on this information and the analysis of human health and environmental impacts presented in this environmental assessment, the proposed EPU would not have disproportionately high and adverse human health and environmental effects on minority and low-income populations residing in the vicinity of the PBNP.

Non-Radiological Impacts Summary

As discussed above, the proposed EPU would not result in any significant non-radiological impacts. Table 1 summarizes the non-radiological environmental impacts of the proposed EPU at PBNP.

TABLE 1—SUMMARY OF NON-RADIOLOGICAL ENVIRONMENTAL IMPACTS

Land Use	No significant impact on land use conditions and aesthetic resources in the vicinity of the PBNP.
Air Quality	Temporary short-term air quality impacts from vehicle emissions related to the workforce. No significant impacts to air quality.
Water Use	Water use changes resulting from the EPU would be relatively minor. No significant impact on groundwater or surface water resources.
Aquatic Resources	No significant impact to aquatic resources due to impingement, entrainment, and chemical or thermal discharges.
Terrestrial Resources	No significant impact to terrestrial resources.
Threatened and Endangered Species	No significant impact to federally-listed species.
Historic and Archaeological Resources	No significant impact to historic and archaeological resources on site or in the vicinity of the PBNP.
Socioeconomics	No significant socioeconomic impacts from EPU-related temporary increase in workforce.
Environmental Justice	No disproportionately high and adverse human health and environmental effects on minority and low-income populations in the vicinity of the PBNP.

Radiological Impacts

Radioactive Gaseous and Liquid Effluents, Direct Radiation Shine, and Solid Waste

PBNP uses waste treatment systems to collect, process, recycle, and dispose of gaseous, liquid, and solid wastes that contain radioactive material in a safe and controlled manner within NRC and EPA radiation safety standards. The licensee's evaluation of plant operation at the proposed EPU conditions shows that no physical changes would be needed to the radioactive gaseous, liquid, or solid waste systems.

Radioactive Gaseous Effluents

The gaseous waste management systems include the radioactive gaseous system, which manages radioactive gases generated during the nuclear fission process. Radioactive gaseous wastes are principally activation gases and fission product radioactive noble gases resulting from process operations, including continuous degasification of systems, gases collected during system venting, and gases generated in the radiochemistry laboratory. The licensee's evaluation determined that implementation of the proposed EPU would not significantly increase the inventory of carrier gases normally processed in the gaseous waste management system, since plant system functions are not changing and the volume inputs remain the same. The analysis also showed that the proposed EPU would result in an increase (approximately 17.6 percent for noble gases, particulates, radioiodines, and tritium) in the equilibrium radioactivity in the reactor coolant, which in turn increases the radioactivity in the waste disposal systems and radioactive gases released from the plant.

The licensee's evaluation concluded that the proposed EPU would not change the radioactive gaseous waste system's design function and reliability to safely control and process the waste. The existing equipment and plant procedures that control radioactive releases to the environment will continue to be used to maintain radioactive gaseous releases within the dose limits of 10 CFR 20.1302 and the as low as is reasonably achievable (ALARA) dose objectives in Appendix I to 10 CFR Part 50.

Radioactive Liquid Effluents

The liquid waste management system collects, processes, and prepares radioactive liquid waste for disposal. Radioactive liquid wastes include liquids from various equipment drains, floor drains, the chemical and volume control system, steam generator blowdown, chemistry laboratory drains, laundry drains, decontamination area drains and liquids used to transfer solid radioactive waste. The licensee's evaluation shows that the proposed EPU implementation would not significantly increase the inventory of liquid normally processed by the liquid waste

management system. This is because the system functions are not changing and the volume inputs remain the same. The proposed EPU would result in an increase (approximately 17.6 percent) in the equilibrium radioactivity in the reactor coolant which in turn would impact the concentrations of radioactive nuclides in the waste disposal systems.

Since the composition of the radioactive material in the waste and the volume of radioactive material processed through the system are not expected to significantly change, the current design and operation of the radioactive liquid waste system will accommodate the effects of the proposed EPU. The existing equipment and plant procedures that control radioactive releases to the environment will continue to be used to maintain radioactive liquid releases within the dose limits of 10 CFR 20.1302 and ALARA dose standards in Appendix I to 10 CFR Part 50.

Occupational Radiation Dose at EPU Conditions

The licensee stated that the in-plant radiation sources are expected to increase approximately linearly with the proposed increase in core power level. To protect the workers, the plant's radiation protection program monitors radiation levels throughout the plant to establish appropriate work controls, training, temporary shielding, and protective equipment requirements so that worker doses will remain within the dose limits of 10 CFR Part 20 and ALARA.

In addition to the work controls implemented by the radiation protection program, permanent and temporary shielding is used throughout the PBNP to protect plant personnel against radiation from the reactor and auxiliary systems containing radioactive material. The licensee determined that the current shielding design, which uses conservative analytical techniques to establish the shielding requirements, is adequate to offset the increased radiation levels that are expected to occur from the proposed EPU. The proposed EPU is not expected to significantly affect radiation levels within the plant and therefore there would not be a significant radiological impact to the workers.

Offsite Doses at EPU Conditions

The primary sources of offsite dose to members of the public from the PBNP are radioactive gaseous and liquid effluents. As discussed above, operation at the proposed EPU conditions will not change the radioactive gaseous and liquid waste management systems' abilities to perform their intended functions. Also, there would be no change to the radiation monitoring system and procedures used to control the release of radioactive effluents in accordance with NRC radiation protection standards in 10 CFR Part 20 and Appendix I to 10 CFR Part 50.

Based on the above, the offsite radiation dose to members of the public would continue to be within regulatory limits and therefore, would not be significant.

Radioactive Solid Wastes

Radioactive solid wastes include solids recovered from the reactor coolant systems, solids that come into contact with the radioactive liquids or gases, and solids used in the reactor coolant system operation. The licensee evaluated the potential effects of the proposed EPU on the solid waste management system. The largest volume of radioactive solid waste is low-level radioactive waste which includes sludge, oily waste, bead resin, spent filters, and dry active waste (DAW) that result from routine plant operation, refueling outages, and routine maintenance. DAW includes paper, plastic, wood, rubber, glass, floor sweepings, cloth, metal, and other types of waste generated during routine maintenance and outages.

As stated by the licensee, the proposed EPU would not have a significant effect on the generation of radioactive solid waste volume from the primary reactor coolant and secondary side systems since the systems functions are not changing and the volume inputs remain consistent with historical generation rates. The waste can be handled by the solid waste management system without modification. The equipment is designed and operated to process the waste into a form that minimizes potential harm to the workers and the environment. Waste processing areas are monitored for radiation and there are safety features to ensure worker doses are maintained within regulatory limits. The proposed EPU would not generate a new type of waste or create a new waste stream. Therefore, the impact from the proposed EPU on radioactive solid waste would not be significant.

Spent Nuclear Fuel

Spent fuel from the PBNP is stored in the plant's spent fuel pool and in dry casks in the Independent Spent Fuel Storage Installation. The PBNP is licensed to use uranium-dioxide fuel that has a maximum enrichment of 5 percent by weight uranium-235. The typical average enrichment is approximately 4.8 percent by weight of uranium-235. The average fuel assembly discharge burnup for the proposed EPU is expected to be approximately 52,000 megawatt days per metric ton uranium (MWd/MTU) with no fuel pins exceeding the maximum fuel rod burnup limit of 62,000 MWd/MTU. The licensee's fuel reload design goals will maintain the PBNP fuel cycles within the limits bounded by the impacts analyzed in 10 CFR Part 51, Table S–3—Table of Uranium Fuel Cycle Environmental Data, and Table S–4—Environmental Impact of Transportation of Fuel and Waste to and from One Light-Water-Cooled Nuclear Power Reactor. Therefore, there would be no significant impacts resulting from spent nuclear fuel.

Postulated Design-Basis Accident Doses

Postulated design-basis accidents are evaluated by both the licensee and the NRC staff to ensure that PBNP can withstand normal and abnormal transients and a broad spectrum of postulated accidents without undue hazard to the health and safety of the public.

On December 8, 2008, the licensee submitted License Amendment Request (LAR) number 241 (LAR 241) to the NRC, to update its design basis accident analysis. LAR 241 requests NRC approval to use a set of revised radiological consequence analyses using the guidance in NRC's Regulatory Guide 1.183, *Alternative Radiological Source Terms for Evaluating Design Basis Accidents at Nuclear Power Reactors.* The analyses for LAR 241 are applicable for the power level in the proposed EPU. The NRC staff is evaluating LAR 241 separately from the EPU to determine if it is acceptable to approve. The results of the NRC's evaluation and conclusion will be documented in a Safety Evaluation Report that will be publically available on the NRC's Agencywide Documents Access and Management System (ADAMS).

In LAR 241, the licensee reviewed the various design-basis accident (DBA) analyses performed in support of the proposed EPU for their potential radiological consequences and concludes that the analyses adequately account for the effects of the proposed EPU. The licensee states that the plant site and its dose-mitigating engineered safety features remain acceptable with respect to the radiological consequences of postulated DBAs, since the calculated doses meet the exposure guideline values specified in 10 CFR 50.67 and General Design Criteria 19 in Appendix A of 10 CFR Part 50.

The amendment is a change to a requirement with respect to installation or use of a facility component located within the restricted area as defined in 10 CFR Part 20. The Commission previously issued a proposed finding in the **Federal Register** (74 FR 17230) that the amendment involves no significant hazards consideration, and there has been no public comment on such finding. The NRC staff must determine that the amendment involves no significant increase in the amounts, and no significant changes in the types, of any effluents that may be released offsite, and that there is no significant increase in individual or cumulative occupational radiation exposure. Accordingly, the amendment will then meet the eligibility criteria for categorical exclusion as set forth in 10 CFR 51.22(c)(9). Pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared in connection with issuance of the amendment.

Radiological Impacts Summary

As discussed above, the proposed EPU would not result in any significant radiological impacts. Table 2 summarizes the radiological environmental impacts of the proposed EPU at the PBNP.

TABLE 2—SUMMARY OF RADIOLOGICAL ENVIRONMENTAL IMPACTS

Radioactive Gaseous Effluents	Amount of additional radioactive gaseous effluents generated would be handled by the existing system.
Radioactive Liquid Effluents	Amount of additional radioactive liquid effluents generated would be handled by the existing system.
Occupational Radiation Doses	Occupational doses would continue to be maintained within NRC limits.
Offsite Radiation Doses	Radiation doses to members of the public would remain below NRC and EPA radiation protection standards.
Radioactive Solid Waste	Amount of additional radioactive solid waste generated would be handled by the existing system.
Spent Nuclear Fuel	Amount of additional spent nuclear fuel would be handled by the existing system.
Postulated Design-Basis Accident Doses	Calculated doses for postulated design-basis accidents would remain within NRC limits.

Alternatives to the Proposed Action

As an alternative to the proposed action, the NRC staff considered denial of the proposed EPU (*i.e.,* the "no-action" alternative). Denial of the application would result in no change in the current environmental impacts. However, if the EPU were not approved for the PBNP, other agencies and electric power organizations may be required to pursue other means, such as fossil fuel or alternative fuel power generation, to provide electric generation capacity to offset future demand. Construction and operation of such a fossil-fueled or alternative-fueled plant may create impacts in air quality, land use, and waste management significantly greater than those identified for the proposed EPU at the PBNP. Furthermore, the proposed EPU does not involve environmental impacts that are significantly different from those originally identified in the PBNP FES and the SEIS–23.

Alternative Use of Resources

This action does not involve the use of any resources not previously considered in the FES.

Agencies and Persons Consulted

In accordance with its stated policy, on November 19, 2010, the NRC staff consulted with the State of Wisconsin official regarding the environmental impact of the proposed action. The State official had no comments.

Draft Finding of No Significant Impact

On the basis of the details provided in the draft EA, the NRC concludes that the proposed action of implementing the PBNP EPU will not have a significant effect on the quality of the human environment because no permanent changes are involved and the temporary impacts are within the capacity of the plant systems. Accordingly, the NRC has preliminarily determined not to prepare an environmental impact statement for the proposed action. A final determination to prepare an environmental impact statement or a final finding of no significant impact will not be made until the public comment period expires.

For further details with respect to the proposed action, see the licensee's application dated April 7, 2009, and supplements dated May 13, 2010, and July 15, 2010 (on environmental issues).

Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. Publicly available records will be accessible electronically from the ADAMS Public Electronic Reading Room on the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC PDR Reference staff at 1–800–397–4209, or 301–415–4737, or send an e-mail to *pdr.Resource@nrc.gov.*

DATES: The comment period expires January 8, 2011. Comments received after this date will be considered if it is practical to do so, but the Commission is only able to assure consideration of comments received on or before January 8, 2011.

ADDRESSES: Submit written comments to Chief, Rules and Directives Branch (RDB), TWB–05–B01M, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be faxed to the RDB at 301–492–3446.

SUPPLEMENTARY INFORMATION: The NRC is considering issuance of an amendment to Renewed Facility Operating License Nos. DPR–24 and DPR–27, issued to NextEra Energy Point Beach, LLC, for operation of the Point Beach Nuclear Plant, Units 1 and 2, located in Manitowoc County, Wisconsin.

FOR FURTHER INFORMATION CONTACT: Terry A. Beltz, Office of Nuclear Reactor Regulation, Mail Stop O–8H4A, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, by telephone at 301–415–3049, or by e-mail at *Terry.Beltz@nrc.gov.*

Dated at Rockville, Maryland, this 1st day of December 2010.

For the Nuclear Regulatory Commission.

Robert J. Pascarelli,

Chief, Plant Licensing Branch III–1, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2010–31085 Filed 12–9–10; 8:45 am]

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NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–443, 72–63; NRC–2010–0381]

Nextera Energy Seabrook, LLC Seabrook Station Independent Spent Fuel Storage Installation; Exemption

1.0 Background

NextEra Energy Seabrook, LLC (NextEra, the licensee) is the holder of Facility Operating License No. NPF–86, which authorizes operation of the Seabrook Station in Rockingham County, New Hampshire, pursuant to title 10 of the Code of Federal Regulations (10 CFR), part 50. The license provides, among other things, that the facility is subject to all rules, regulations, and orders of the U.S. Nuclear Regulatory Commission (NRC, the Commission) now or hereafter in effect.

Per 10 CFR part 72, subpart K, a general license is issued for the storage of spent fuel in an independent spent fuel storage installation (ISFSI) at power reactor sites to persons authorized to possess or operate nuclear power reactors under 10 CFR part 50. NextEra holds a 10 CFR part 72 general license for storage of spent fuel at the Seabrook Station ISFSI. Under the terms of the general license, NextEra is currently using the Transnuclear, Inc. (TN) NUHOMS® HD–32PTH cask model for storage of spent fuel, in accordance with Certificate of Compliance (CoC) 72–1030, Amendment No. 0.

2.0 Request/Action

10 CFR 72.212(b)(7) requires compliance with the terms and conditions of the CoC for the cask model used under the general license for storage of spent fuel at power reactor sites. The TN NUHOMS® HD–32PTH dry cask storage system (CoC 72–1030, Amendment No. 0) is currently in use at the Seabrook Station ISFSI. CoC 72–1030 provides requirements, conditions, and operating limits in Appendix A, Technical Specifications (TS).

In a letter dated July 19, 2010 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML102080256), NextEra requested an exemption from 10 CFR 72.212(b)(7). Specifically, NextEra requests exemption from the requirement in CoC 72–1030, Amendment No. 0, Appendix A, TS 5.2.5.b, to conduct a daily visual inspection of the horizontal storage module (HSM) air vents to ensure they are not blocked, as the surveillance activity to monitor HSM thermal performance. NextEra instead wishes to use a daily temperature measurement program as an alternate method of monitoring the thermal performance of the HSMs, as included in the proposed Amendment No. 1 to CoC 72–1030, which is not yet an approved amendment to a cask model in 10 CFR part 72.

On its own initiative, the NRC staff, pursuant to 10 CFR 72.7, has expanded the scope of the exemption being granted to include 10 CFR 72.212(b)(2)(i)(A) and 10 CFR 72.214, in addition to 10 CFR 72.212(b)(7). These provisions are similar in requiring that the conditions of a specific CoC be met. 10 CFR 72.212(b)(2)(i)(A) requires a general licensee to perform written evaluations, prior to use of the cask, that establish that conditions set forth in the CoC have been met. 10 CFR 72.214 sets forth the list of casks approved for storage of spent fuel under the conditions specified in their CoCs.

3.0 Discussion

Pursuant to 10 CFR 72.7, the Commission may, upon application by any interested person or upon its own initiative, grant such exemptions from the requirements of the regulations of 10 CFR part 72 as it determines are authorized by law and will not endanger life or property or the common defense and security and are otherwise in the public interest.

Authorized by Law

This exemption would allow the licensee to discontinue the daily visual inspection of the HSM air vents to ensure they are not blocked (as required by CoC 72–1030, Amendment No. 0, TS 5.2.5.b for monitoring HSM thermal performance), and instead use a daily temperature measurement program as an alternate method of monitoring HSM thermal performance. The provisions in 10 CFR part 72 that NextEra is requesting exemption from, limit the general licensee to cask models (and any amendments to cask models) approved under 10 CFR part 72 and require general licensees to comply with the terms and conditions of the CoC for the approved cask model that they use.

As stated above, 10 CFR 72.7 allows the NRC to grant exemptions from the requirements of 10 CFR part 72. The NRC staff has determined that granting of the licensee's proposed exemption will not result in a violation of the Atomic Energy Act of 1954, as amended, or the Commission's regulations. Therefore, the exemption is authorized by law.

Will Not Endanger Life or Property or the Common Defense and Security

The underlying purpose of the provisions in 10 CFR 72.212(b)(2)(i)(A), 10 CFR 72.212(b)(7), and 10 CFR 72.214, is to limit 10 CFR part 72 general licensees to use of cask models approved under the provisions of 10 CFR part 72 (which are listed in 10 CFR 72.214) and require general licensees to comply with the terms and conditions of the CoC for the approved cask model that they use.

The exemption would allow NextEra to discontinue the daily visual inspection of the HSM air vents to ensure they are not blocked (as required by CoC 72–1030, Amendment No. 0, TS 5.2.5.b), and instead use a daily temperature measurement program as an alternate method of monitoring HSM thermal performance (as proposed in Amendment No. 1 to CoC 72–1030).

TN submitted an application for Amendment No. 1 to CoC 72–1030 on November 1, 2007 (ADAMS Accession No. ML073110525), as supplemented. In the Amendment No. 1 request, TN proposed adding use of a daily temperature measurement program as an alternate method of monitoring HSM thermal performance. Under the proposed Amendment No. 1, the cask user would have the option to either implement a daily visual inspection of the HSM air vents to ensure they are not blocked (TS 5.2.5.b in the current Amendment No. 0 and the proposed Amendment No. 1) or implement a daily temperature measurement program (TS 5.2.5.c in the proposed Amendment No. 1) to monitor HSM thermal performance.

NRC staff initially completed its technical review of the proposed Amendment No. 1 to CoC 72–1030 in October 2009, and the associated proposed rule and direct final rule were published in the **Federal Register** in May 2010. However, the proposed rule and direct final rule were withdrawn in July 2010, after TN identified an issue with imprecise TS language (not related to TS 5.2.5). Since that time, the technical staff completed its review of TN's revised TS language in September 2010, and a revised rulemaking package (which includes the proposed CoC, proposed TS, and a preliminary Safety Evaluation Report (SER)) for Amendment No. 1 is currently in the rulemaking concurrence process. The

proposed rule and direct final rule for Amendment No. 1 are expected to be published for comment in the **Federal Register** in January 2011. If the NRC does not receive any significant adverse comments on the proposed rule and direct final rule during the public comment period, then the rule would be effective (and Amendment No. 1 to CoC 72–1030 approved) in April 2011.

The NUHOMS® HD–32PTH system is designed to passively remove decay heat to assure integrity of the concrete HSM and fuel cladding, and the thermal monitoring requirements for the system are based on the ability of the system to function safely if obstructions in the air inlets or outlets impair airflow through the HSM for extended periods. The intent of the HSM thermal monitoring program is to prevent conditions that could lead to exceeding the concrete and fuel cladding temperature criteria. The proposed use of a temperature measurement program to monitor HSM thermal performance (as proposed in TS 5.2.5.c in the proposed Amendment No. 1 to CoC 72–1030) includes specific requirements for the cask system user to establish: Appropriate administrative temperature limits to detect off-normal and accident blockage conditions before the HSM components and fuel cladding temperatures would exceed temperature design limits, and to ensure the HSM air vents are not blocked for more than 34 hours; temperature measurement locations; and corrective actions for potential temperature excursions.

The staff's current findings, with respect to the temperature measurement program proposed in Amendment No. 1 to CoC 72–1030 as an alternative method of monitoring HSM thermal performance, are: (1) There is reasonable assurance that a temperature measurement program provides an equivalent level of assurance as the visual surveillance, in identifying and mitigating, if necessary, the effects of potential vent blockage; and thus, (2) addition of the option to use a daily temperature measurement program to monitor the thermal performance of the HSMs, as proposed by TN in TS 5.2.5.c in Amendment No. 1 to CoC 72–1030, is appropriate. These findings are reflected in the preliminary SER that is currently in the rulemaking concurrence process. The staff's current findings would be preserved in the final rule for Amendment No. 1 to CoC 72–1030, given there are no comments during the rulemaking concurrence process or significant adverse public comments on the future proposed rule and direct final rule that require changes to the HSM thermal monitoring program in TS 5.2.5.c.

In its exemption request, NextEra states that if granted the exemption, it will implement a daily temperature measurement program consistent with the proposed TS 5.2.5.c in the proposed Amendment No. 1 to CoC 72–1030. The staff has determined that the generic analysis supporting Amendment No. 1 to CoC 72–1030 would apply to the proposed exemption at the Seabrook Station ISFSI. Therefore, the staff concludes that the exemption does not pose an increased risk to public health and safety. This conclusion is conditional on: (1) NextEra implementing TS 5.2.5.c as proposed in Amendment No. 1 to CoC 72–1030, and (2) NextEra addressing any changes to the HSM thermal monitoring program in TS 5.2.5.c that may arise as a result of comments during the rulemaking concurrence process or significant adverse public comments on the future proposed rule and direct final rule for CoC 72–1030, Amendment No. 1.

Environmental Consideration

The staff also considered in its review of this exemption request, whether there would be any significant environmental impacts associated with the exemption. For this proposed action, the staff reviewed the categorical exclusion in 10 CFR 51.22(c)(25). Section 51.22(c)(25)(vi)(C) provides a categorical exclusion for the granting of licensee exemption requests from NRC inspection or surveillance requirements. The proposed action is the approval of a licensee request for an exemption from the surveillance requirements contained in the technical specifications of the NRC issued CoC 72–1030, Amendment No. 0. The licensee proposes using a temperature measurement program in lieu of the visual surveillance required in the CoC technical specification. As a general matter, the staff has determined that there is reasonable assurance that a temperature measurement program provides an equivalent level of assurance as the visual surveillance, in identifying and mitigating, if necessary, the effects of any potential vent blockage.

In order for the 10 CFR 51.22(c)(25)(vi)(C) categorical exclusion to apply, the proposed action must meet the criteria listed in 10 CFR 51.22(c)(25)(i)–(v). An analysis of these provisions is provided below.

(a) 10 CFR 51.22(c)(25)(i)—There is no significant hazards consideration (NSHC).

The elements of a NSHC are set forth in 10 CFR 50.92(c)(1)–(3). The proposed action involves NSHC if approval of the proposed action would not: (1) Involve a significant increase in the probability or consequences of an accident previously evaluated; (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety.

Involve a significant increase in the probability or consequences of an accident previously evaluated. TS 5.2.5 in CoC 72–1030 requires a thermal monitoring program for the HSMs to prevent conditions that could lead to exceeding temperature limits for the concrete and fuel cladding. The proposed change to TS 5.2.5 in the proposed Amendment No. 1 to CoC 72–1030 provides additional flexibility to use a temperature measurement program, instead of a daily visual inspection of the HSM vents to ensure they are not blocked, as a surveillance activity to monitor HSM thermal performance. Use of the temperature measurement program in the proposed Amendment No. 1 to CoC 72–1030 will continue to meet the intent of the program to monitor thermal performance of the HSMs (to prevent conditions that could lead to exceeding the concrete and fuel cladding temperature criteria), as preliminarily determined by the NRC staff in its technical review of the proposed Amendment No. 1.

The exemption, which would change the method of monitoring thermal performance of the HSMs, would not involve any changes to the design, safety limits, or safety analysis assumptions associated with the cask system and would not create any new accident precursors. Therefore, there is no significant increase in the probability or consequences of an accident previously evaluated.

Create the possibility of a new or different kind of accident from any accident previously evaluated. The exemption, which if approved, would change the method of monitoring thermal performance of the HSMs, would not introduce any new accident initiators or create a new type of accident associated with the cask system. Therefore, the proposed exemption does not create the possibility of a new or different kind of accident from any accident previously evaluated.

Involve a significant reduction in a margin of safety. The exemption, which if approved, would change the method of monitoring thermal performance of the HSMs, would not alter the design, safety limits, and safety analysis assumptions associated with the cask system. Therefore, the proposed exemption does not involve a significant reduction in a margin of safety.

Based on the above evaluation, the NRC staff finds that the 10 CFR 51.22(c)(25)(i) provision is met.

(b) 10 CFR 51.22(c)(25)(ii)—There is no significant change in the types or significant increase in the amounts of any effluents that may be released offsite.

The proposed exemption, which would change the method of monitoring thermal performance of the HSMs, would not involve any changes to effluents. Therefore, there is no significant change in the types or increase in the amounts of effluents that may be released offsite.

(c) 10 CFR 51.22(c)(25)(iii)—There is no significant increase in individual or cumulative public or occupational radiation exposure.

The proposed exemption, which would change the method of monitoring thermal performance of the HSMs, would not involve any changes to public or occupational radiation exposures. Therefore, there is no significant increase in individual or cumulative public or occupational radiation exposure.

(d) 10 CFR 51.22(c)(25)(iv)—There is no significant construction impact.

The proposed exemption, which would change the method of monitoring thermal performance of the HSMs, would not involve any construction activities. Therefore, there is no significant construction impact.

(e) 10 CFR 51.22(c)(25)(v)—There is no significant increase in the potential for or consequences from radiological accidents.

The proposed exemption, which would change the method of monitoring thermal performance of the HSMs, would not involve any changes to the design, safety limits, or safety analysis assumptions associated with the cask system and would not create any new accident precursors. Therefore, there is no significant increase in the potential for or consequences from radiological accidents.

As this exemption request meets all of the provisions in 10 CFR 51.22(c)(25)(i)–(v), and the exemption request is of a type listed in 10 CFR 51.22(c)(25)(vi), this action meets the eligibility criteria for the categorical exclusion set forth in 10 CFR 51.22(c)(25). The NRC has found that granting exemptions that meet the provisions in 10 CFR 51.22(c)(25) is a category of actions that does not result in any significant effect, either individually or cumulatively, on the human environment.

The proposed exemption would allow NextEra to discontinue the daily visual inspection of the HSM air vents to ensure they are not blocked and instead use a daily temperature measurement program as an alternate method of monitoring HSM thermal performance. This proposed change to the method of monitoring HSM thermal performance does not involve security matters and would not impact the common defense and security of the United States.

Given the above considerations, this exemption will not endanger life or property or the common defense and security.

Otherwise in the Public Interest

In its exemption request, NextEra noted that it currently complies with TS 5.2.5.b in CoC 72–1030, Amendment No. 0, by using cameras to perform the visual surveillance of the HSM vents remotely. However, during adverse winter weather conditions, snow and ice obstruct the camera lenses and prevent viewing the HSM vents. As a result, personnel must conduct local inspections of the HSM vents and use a ladder to access the top vents for inspection, which can pose a safety hazard to the personnel conducting these inspections during adverse winter weather conditions. The licensee states that the purpose of the exemption request is to eliminate the potential for injuries that could occur to personnel when accessing the HSM vents to perform visual inspections under adverse winter weather conditions.

The exemption, by removing the requirement for the daily visual inspection of the HSM vents and thus reducing the potential for unnecessary falls or injuries to personnel conducting the inspections during adverse winter weather conditions, is consistent with NRC's mission to protect public health and safety. Therefore, the exemption is in the public interest.

4.0 Conclusion

Based on the foregoing considerations, the NRC has determined that, pursuant to 10 CFR 72.7, the exemption is authorized by law, will not endanger life or property or the common defense and security, and is otherwise in the public interest. Therefore, the NRC hereby grants NextEra an exemption from the requirements in 10 CFR 72.212(b)(2)(i)(A), 10 CFR 72.212(b)(7), and 10 CFR 72.214 for the Seabrook Station ISFSI, subject to the following conditions:

(1) The exemption pertains only to the visual inspection requirement in TS 5.2.5.b in CoC 72–1030, Amendment No. 0, and NextEra must implement the daily temperature measurement program, as proposed in TS 5.2.5.c in Amendment No. 1 to CoC 72–1030, as an alternate method of monitoring HSM thermal performance.

(2) If comments arise during the rulemaking concurrence process or if the NRC receives significant adverse comments during the public comment period for the future proposed rule and direct final rule for Amendment No. 1 to CoC 72–1030, and as a result of such comments, changes to the HSM thermal monitoring program in TS 5.2.5.c are required, NextEra will then be required to address those changes in a manner deemed satisfactory to NRC staff.

The NRC has determined that this action meets the eligibility criteria for categorical exclusion set forth in 10 CFR 51.22(c)(25)(vi)(C). Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared in connection with the granting of this exemption.

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 2nd day of December 2010.

For the Nuclear Regulatory Commission.

Douglas W. Weaver,

Deputy Director, Division of Spent Fuel Storage and Transportation, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2010–31080 Filed 12–9–10; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63431; File No. SR–C2–2010–009]

Self-Regulatory Organizations; C2 Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Related to the Penny Pilot Program

December 3, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 2, 2010, the C2 Options Exchange, Incorporated ("Exchange" or "C2") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated the proposal as a "non-controversial" proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to amend its rules relating to the Penny Pilot Program. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/legal/crclc2rulefiling.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 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 Rule 6.4—Minimum Increments for Bids and Offers to ensure that the C2 rule language regarding the Penny Pilot Program tracks that of the language of Chicago Board Options Exchange, Incorporated ("CBOE") regarding CBOE's Penny Pilot Program, as relevant to C2. CBOE recently proposed a rule change to amend its Rule 6.42 to extend CBOE's Penny Pilot Program's expiration date.[5] C2 hereby amends its Rule 6.4 to further clarify and ensure that the C2 Penny Pilot Program mirrors that of CBOE, as applicable.

CBOE's Penny Pilot Program is scheduled to expire on December 31, 2010. CBOE proposed to extend the Penny Pilot Program until December 31, 2011.[6] C2 desires to clarify that C2 also wants to include December 31, 2011 as the expiration date for the C2 Penny Pilot Program. Extending the Pilot Program will allow for further analysis of the Pilot Program and a determination of how the Pilot Program should be structured in the future.

During this extension of the Pilot Program, C2 may replace any option class which is currently included in the Pilot Program and which is delisted with the next most actively-traded, multiple-listed option class that is not yet participating in the Pilot Program ("replacement class"). Any replacement class would be determined based on national average daily volume in the preceding six months, and would be added on the second trading day following January 1, 2011 and July 1, 2011.[7] C2 will announce any replacement classes by circular.

C2 is specifically authorized to act jointly with the other options exchanges participating in the Penny Pilot Program in identifying any replacement class. C2 will submit to the SEC semi-annual reports that will analyze the impact of the Penny Pilot on market quality and systems capacity. This report will include, but is not limited to the following: (1) Data and analysis of the number of quotations generated for options included in the report; (2) an assessment of the quotation spreads for the options included in the report; (3) an assessment of the impact of the Pilot Program on its automated systems; (4) data reflecting the size and depth of markets; and (5) any capacity problems or other problems that arose related to the operation of the Pilot Program and how the Exchange addressed them.

2. Statutory Basis

The Exchange believes the rule proposal is consistent with the Securities Exchange Act of 1934 (the "Act") and the rules and regulations under the Act applicable to a national securities exchange and, in particular, the requirements of Section 6(b) of the Act.[8] Specifically, the Exchange believes that the proposed rule change is consistent with the Section 6(b)(5) Act[9] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts and, in general, to protect investors and the public interest. In particular, the proposed rule change allows for an extension of the Penny Pilot Program for the benefit of market participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

C2 does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposal.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) by its terms does not become operative for 30 days after the date of this filing, 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[10] and Rule 19b–4(f)(6) thereunder.[11]

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 e-mail to *rule-comments@sec.gov.* Please include File Number SR–C2–2010–009 on the subject line.

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* Securities Exchange Act Release No. 34–63386 (November 29, 2010).

[6] *Id.*

[7] The month immediately preceding their addition to the Pilot Program, *i.e.,* December or June, would not be used for purposes of the six month analysis. For example, a replacement class to be added on the second trading day following January 1 would be identified based on OCC volume data from June 1 through November 30.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. C2 has satisfied this requirement.

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–C2–2010–009. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site *http://www.sec.gov/rules/sro.shtml.* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–C2–2010–009 and should be submitted on or before January 3, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31049 Filed 12–9–10; 8:45 am]

BILLING CODE 8011–01–P

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63436; File No. SR–Phlx–2010–166]

Self-Regulatory Organizations; NASDAQ OMX PHLX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Options Regulatory Fee

December 6, 2010.

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 24, 2010, NASDAQ OMX PHLX, Inc. [sic] ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to increase its Options Regulatory Fee.

While changes to the Fee Schedule pursuant to this proposal are effective upon filing, the Exchange has designated these changes to be operative on January 3, 2011.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nasdaqtrader.com/micro.aspx?id=PHLXRulefilings*, at the principal office of the Exchange, at the Commission's Public Reference Room, and on the Commission's Web site at *http://www.sec.gov.*

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 purpose of the proposed rule change is to amend the Options Regulatory Fee ("ORF") to increase the current $0.0030 per contract fee to each member for all options transactions executed or cleared by the member that are cleared by The Options Clearing Corporation ("OCC") in the customer range (*i.e.*, that clear in the customer account of the member's clearing firm at OCC). The Exchange proposes instead to assess a $0.0035 per contract ORF. The Exchange monitors the amount of revenue collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed regulatory costs. The purpose of the proposed rule change is to recoup increased regulatory expenses while also ensuring that the ORF would not exceed costs.

The ORF is imposed upon all transactions executed by a member, even if such transactions do not take place on the Exchange.[3] The ORF also includes options transactions that are not executed by an Exchange member but are ultimately cleared by an Exchange member.[4] The ORF is not charged for member options transactions because members incur the costs of owning memberships and through their memberships are charged transaction fees, dues and other fees that are not applicable to non-members. The dues and fees paid by members go into the general funds of the Exchange, a portion of which is used to help pay the costs of regulation. The ORF is collected indirectly from members through their

[3] The ORF applies to all "C" account origin code orders executed by a member on the Exchange. Exchange rules require each member to record the appropriate account origin code on all orders at the time of entry in order to allow the Exchange to properly prioritize and route orders and assess transaction fees pursuant to the rules of the Exchange and report resulting transactions to the OCC. *See* Exchange Rule 1063, Responsibilities of Floor Brokers, and Options Floor Procedure Advice F–4, Orders Executed as Spreads, Straddles, Combinations or Synthetics and Other Order Ticket Marking Requirements. The Exchange represents that it has surveillances in place to verify that members mark orders with the correct account origin code.

[4] In the case where one member both executes a transaction and clears the transaction, the ORF is assessed to the member only once on the execution. In the case where one member executes a transaction and a different member clears the transaction, the ORF is assessed only to the member who executes the transaction and is not assessed to the member who clears the transaction. In the case where a non-member executes a transaction and a member clears the transaction, the ORF is assessed to the member who clears the transaction.

clearing firms by OCC on behalf of the Exchange.

The ORF is designed to recover a portion of the costs to the Exchange of the supervision and regulation of its members, including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities. The Exchange believes that revenue generated from the ORF, when combined with all of the Exchange's other regulatory fees, will cover a material portion, but not all, of the Exchange's regulatory costs. The Exchange will continue to monitor the amount of revenue collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, do not exceed regulatory costs. If the Exchange determines regulatory revenues exceed regulatory costs, the Exchange will adjust the ORF by submitting a fee change filing to the Commission.

While changes to the Fee Schedule pursuant to this proposal are effective upon filing, the Exchange has designated these changes to be operative on January 3, 2011.

2. Statutory Basis

The Exchange believes that its proposal to amend its schedule of fees is consistent with Section 6(b) of the Act[5] in general, and furthers the objectives of Section 6(b)(4) of the Act[6] in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members. The Exchange believes that the fee change is reasonable because the Exchange desires to recoup its regulatory expenses while also ensuring that the revenue collected from the ORF does not exceed regulatory costs. The Exchange believes that this fee proposal is equitable because the increase of the ORF to $0.0035 per contract would uniformly apply to all market participants who are being assessed the ORF.

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.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act[7] and paragraph (f)(2) of Rule 19b–4[8] 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.

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 e-mail to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2010–166 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2010–166. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site *http://www.sec.gov/rules/sro/shtml.* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–Phlx–2010–166 and should be submitted on or before January 3, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31096 Filed 12–9–10; 8:45 am]

BILLING CODE 8011–01–P

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(4).

[7] 15 U.S.C. 78s(b)(3)(A)(ii).

[8] 17 CFR 240.19b–4(f)(2).

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63441; File No. SR–NASDAQ–2010–152]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Fees for Direct Access to Exchange Data

December 6, 2010.

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 24, 2010, The NASDAQ Stock Market LLC ("NASDAQ" or the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the 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

NASDAQ proposes an amendment to the fee schedule to assess "direct access" fees on certain customers receiving NASDAQ data within NASDAQ's co-location facility. The rule filing also deletes outdated dated verbiage in the fee schedule to eliminate confusion regarding application of the fees. NASDAQ will implement the proposed change on December 1, 2010. The text

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

of the proposed rule change is available at *http://nasdaq.cchwallstreet.com/,* at NASDAQ's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASDAQ included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASDAQ has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

NASDAQ is amending its fee schedule to correct an anomaly that effectively exempts certain customers residing within NASDAQ's co-location facility from paying a monthly fee for direct access to NASDAQ data, while customers that receive data from an extranet and reside outside the co-location facility are assessed the fee. The inequity is a result of the definition of "direct access" in the fee schedule, which does not by its terms clearly apply to data feeds provided to customers through distributors located within the co-located facility. This rule filing will expand the definition of "direct access" and thereby operate to assess the same fee on all firms that have access to NASDAQ's raw data feeds, whether co-located or not. It will also delete terms that are obsolete or generally limiting, given the evolution of technologies and systems through which data may be accessed.

NASDAQ, like other data providers, assesses fees for its real time market data. In general, a customer that receives a data feed directly from the Exchange is assessed a "direct access" fee. If the customer then distributes the data, it is a "distributor" as defined under the fee schedule and pays an "internal" or "external" distributor fee, depending upon whether it distributes the data internally or externally. A "distributor" is broadly defined to include any entity that distributes NASDAQ's data, whether it receives the data feed directly from NASDAQ or indirectly through another entity. Distributor fees apply to distributors located within the Exchange's co-location facility as well as those outside of it.

The definition of what constitutes "direct access," however, is limited to specific types of communications connections, and does not currently include the systems by which data is delivered through distributors located within the co-location facility to their customers also located within the co-location facility. As a result, the distributor's customers in the co-location facility are not charged a direct access fee, even though they receive NASDAQ's data in its raw data format and have the same low latency data access as non-co-located extranet customers that pay the Direct Access fee.

To correct this disparity, this rule filing will include within the definition of "direct access" the receipt of NASDAQ data within the co-location facility. It will also delete terms that, while describing various means by which data is currently accessed, do not clearly or adequately describe all viable technological means of accessing data. For example, reference to "the MCI Financial Extranet" is deleted because MCI has become "Verizon," and Verizon no longer has special status among extranets as it did when the current rule was written. The terms "Nasdaq-operated Web site, system or application" are also deleted, as they are limiting terms that do not clearly encompass potential technological means of accessing NASDAQ data. Their elimination does not impact the fees of any customer currently assessed a Direct Access fee, but should preclude the need for future rule changes to the definition of direct access, as the means by which those same customers access data evolve over time.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[3] in general, and with Sections 6(b)(5) of the Act,[4] in particular. The proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The filing permits transparent, uniform fees for direct access to Exchange data for all customers, whether co-located or not.

In addition, the Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[5] in general, and with Section 6(b)(4) of the Act,[6] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which The Exchange operates or controls. In particular, the Exchange notes that the amendment corrects an anomaly that effectively exempts certain co-located customers receiving the data from paying a direct access fee.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASDAQ 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.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[7] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

[3] 15 U.S.C. 78f.

[4] 15 U.S.C. 78f(b)(5).

[5] 15 U.S.C. 78f.

[6] 15 U.S.C. 78f(b)(4).

[7] 15 U.S.C. 78s(b)(3)(a)(ii).

Electronic Comments

• Use the Commission's Internet comment form *http://www.sec.gov/rules/sro.shtml;* or

• Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2010–152 on the subject line.

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2010–152. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2010–152 and should be submitted on or before January 3, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31099 Filed 12–9–10; 8:45 am]

BILLING CODE 8011–01–P

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63444; File No. SR–NYSE–2010–74]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change To Create a Bond Trading License for Member Organizations and Establish Bonds Liquidity Providers as a New Market Class on NYSE Under a Pilot Program

December 6, 2010.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the "Act") [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on November 23, 2010, New York Stock Exchange LLC ("NYSE" or the "Exchange") 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 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 establish a twelve-month pilot program to: (1) Create a bond trading license for member organizations that desire to trade only debt securities on the Exchange; and (2) establish a new class of NYSE market participants, "Bonds Liquidity Providers" ("BLPs"). The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com.*

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.

[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

NYSE proposes a twelve-month pilot program to: (1) Adopt new Rule 87 to create a bond trading license for member organizations that desire to trade only debt securities on the NYSE; and (2) adopt new Rule 88 to establish BLPs, a new class of debt market participants, and provide them with financial incentives for bringing liquidity to the Exchange's bond market. The purpose of the proposed rule change is to encourage market participants to bring additional liquidity to the Exchange's bond marketplace.

Background on the Current NYSE Bond Trading Platform

The Exchange began trading bonds electronically in 1977 with the introduction of the Automated Bond System ("ABS"). In 2007, the Exchange retired the ABS system, moved the platform to its Archipelago technology, and replaced former Rule 86 ("Automated Bond System") with new Rule 86 ("NYSE Bonds").[4] The Exchange also filed Rules 1400 and 1401, expanding the number of debt issues that could be traded on the exchange. Bonds eligible to trade on the NYSE Bonds platform include any debt instrument that is listed on the NYSE and any corporate debt of a listed company of the Exchange.

Despite these changes, the Exchange has failed to attract meaningful trading volume. The NYSE Bonds platform executes between 0 and 20 trades per day, with an average sized trade of 20 bonds. Currently, there are no incentive programs in place to provide liquidity to NYSE Bonds. The Exchange believes that the pilot incentive programs proposed in this filing will attract providers to NYSE Bonds and create more liquidity and transparency in the retail corporate bond market.

Bond Trading License

The Exchange proposes to establish a new bonds-only trading license to encourage more member organizations to trade debt securities on the NYSE.[5] Currently, an approved member organization may obtain a trading license pursuant to Rule 300, which permits them to trade all debt and equity securities listed on the Exchange.

[4] *See* Securities Exchange Act Release No. 55496 (March 20, 2007), 72 FR 14631 (March 28, 2007) (SR–NYSE–2006–37).

[5] The NYSE intends to submit a separate fee filing to address the proposed bond trading license.

Under proposed Rule 87, a member organization that chooses to trade only bonds, or a new member organization who desires to trade only bonds, could apply for a bond trading license ("BTL") under proposed Rule 87. A BTL would be available to any approved NYSE member organization. A BTL license would not be transferable and could not, in whole or in part, be transferred, assigned, sublicensed or leased. However, the holder of the BTL could, with the prior written consent of the Exchange, transfer a BTL to a qualified and approved member organization (i) that is an affiliate or (ii) that continues substantially the same business of such BTL holder without regard to the form of the transaction used to achieve such continuation, *e.g.,* merger, sale of substantially all assets, reincorporation, reorganization or the like.

Background on BLPs

The Exchange also proposes to create a new class of market participant, BLPs, which would serve a function similar to the function served by Supplemental Liquidity Providers ("SLPs") trading equity securities in the Exchange's New Market Model.[6] The structure of the corporate bond market consists of thousands of bonds, with liquidity spread inconsistently across many issues. Under proposed Rule 88, the Exchange would provide incentives for quoting and adding liquidity to the bond market via the BLP program. Under a current pilot program, bond platform participants are only charged a graduated fee for liquidity taking transactions.[7] Proposed Rule 88 seeks to provide an additional incentive in the form of a rebate to BLPs who provide liquidity to the Exchange's bond market. The Exchange believes that the rebate would encourage the additional utilization of, and interaction with, the NYSE and improve price discovery and liquidity and encourage competitive quotes and price improvement opportunities. These incentives should encourage BLPs to make more liquid and competitive markets.

Responsibilities of BLPs

(A) Quoting Requirements

Under proposed Rule 88(a), a BLP would be required to maintain: (1) A bid at least seventy percent (70%) of the trading day for a bond; (2) an offer at least seventy percent (70%) of the trading day for a bond; and (3) a bid or offer at the Exchange's Best Bid ("BB") or Exchange's Best Offer ("BO") at least five percent (5%) of the trading day in each of its bonds in the aggregate. To create a financial incentive to serve as a BLP, proposed Rule 88(b) provides that a BLP that meets the quoting requirement for a bond as described in paragraph (a) would receive the liquidity provider rebate set forth in the Exchange's Price List. The Exchange intends to submit a separate filing that would set the liquidity provider rebate at $0.05 per bond, with a $50 rebate cap per transaction.

Currently, there are no live quote obligations in the corporate bond market.[8] The proposed live quoting obligation, combined with the additional obligation of being on the BB or BO at least five percent of the day, presents a significant market and technological change for fixed income dealers. As such, NYSE believes that the proposed rule change would strike an appropriate balance between the quoting obligations and financial incentives offered to BLPs. Nonetheless, in keeping with the pilot status of the proposed rule changes, the Exchange would monitor and evaluate this balance during the course of the pilot; as more liquidity is brought to the NYSE bond marketplace, the Exchange may consider revising the incentive and quoting structure as needed.

(B) Qualifications

To qualify as a BLP under proposed Rule 88(c), a member organization would be required to: (1) Demonstrate an ability to meet the quoting requirements of a BLP; (2) have mnemonics that identify to the Exchange BLP trading activity in assigned BLP bonds; (3) have adequate trading infrastructure and technology to support electronic trading.

Because a BLP would only be permitted to trade electronically from off the Floor of the Exchange, a member organization's off-Floor technology must be fully automated to accommodate the Exchange's trading and reporting systems that are relevant to operating as a BLP. If a member organization were unable to support the relevant electronic trading and reporting systems of the Exchange for BLP trading activity, it would not qualify as a BLP.

(C) Application Process

Under proposed Rule 88(d), to become a BLP, a member organization would be required to submit a BLP application form with all supporting documentation to the Exchange. The Exchange would determine whether an applicant was qualified to become a BLP as set forth above. After an applicant submitted a BLP application to the Exchange, with supporting documentation, the Exchange would notify the applicant member organization of its decision. If an applicant were approved by the Exchange to act as a BLP, the applicant would be required to establish connectivity with relevant Exchange systems before the applicant would be permitted to trade as a BLP on the Exchange. In the event an applicant is disapproved or disqualified under proposed Rule 88(d)(4) or (i)(2) by the Exchange, such applicant may request an appeal of such disapproval or disqualification by the Exchange as provided in proposed Rule 88(j) of the Rule, and/or reapply for BLP status three (3) months after the month in which the applicant received disapproval or disqualification notice from the Exchange.

(D) Voluntary Withdrawal of BLP Status

A BLP would be permitted to withdraw from the status of a BLP by giving notice to the Exchange. Such withdrawal would become effective when those bonds assigned to the withdrawing BLP are reassigned to another BLP. After the Exchange receives the notice of withdrawal from the withdrawing BLP, the Exchange would reassign such bonds as soon as practicable, but no later than 30 days of the date the notice was received by the Exchange. If the reassignment of bonds takes longer than the 30-day period, the withdrawing BLP would have no further obligations and would not be held responsible for any matters concerning its previously assigned BLP bonds.

(E) Calculation of Quoting Requirements

Beginning with the first month of operation as a BLP, the BLP must satisfy

[6] *See* Securities Exchange Act Release No. 58877 (October 29, 2008), 73 FR 65904 (November 5, 2008) (SR–NYSE–2008–108) (establishing SLP Pilot); Securities Exchange Act Release No. 58845 (October 24, 2008), 73 FR 64379 (October 29, 2008) (SR–NYSE–2008–46) (establishing New Market Model Pilot); Securities Exchange Act Release No. 62814 (September 1, 2010), 75 FR 54671 (September 8, 2010) (SR–NYSE–2010–61 (extending the Pilots until January 31, 2011).

[7] *See* Securities Exchange Act Release No. 62455 (July 6, 2010), 75 FR 40004 (July 13, 2010) (SR–NYSE–2010–51); *see also* Securities Exchange Act Release No. 57176 (January 18, 2008), 73 FR 4929 (January 28, 2008) (SR–NYSE–2008–04). The pilot program, which is scheduled to expire in December 31, 2010, provides for the following transaction fee schedule: (1) When the liquidity taker purchases or sells from one to 10 bonds, the Exchange charges an execution fee of $0.50 per bond; (2) when the liquidity taker purchases or sells from 11 to 25 bonds, the Exchange charges an execution fee of $0.20 per bond, and (3) when the liquidity taker purchases or sells 26 bonds or more, the Exchange charges an execution fee of $0.10 per bond. There is a $100 execution fee cap per transaction. The Exchange intends to submit a separate filing to make the pilot program permanent.

[8] The absence of such data makes it difficult to evaluate the quality of such markets.

the 70% quoting requirement for each of its assigned BLP bonds. The Exchange would determine whether a BLP met its 70% quoting requirement by determining the average percentage of time a BLP was at a bid (offer) in each of its BLP bonds during the regular trading day [9] on a daily and monthly basis. The Exchange would determine whether a BLP has met this requirement by calculating the following:

- A "Daily Bid Quoting Percentage" would be calculated by determining the percentage of time a BLP had at least 10 displayed BLP bonds at a single price level in an Exchange bid during each trading day for a calendar month;
- A "Daily Offer Quoting Percentage" would be calculated by determining the percentage of time a BLP had at least 10 displayed BLP bonds at a single price level in an Exchange offer during each trading day for a calendar month;
- A "Monthly Average Bid Quoting Percentage" would be calculated for each BLP bond by summing the bond's "Daily Bid Quoting Percentages" for each trading day in a calendar month then dividing the resulting sum by the total number of trading days in such calendar month; and
- A "Monthly Average Offer Quoting Percentage" would be calculated for each BLP bond by summing the bond's "Daily Offer Quoting Percentage" for each trading day in a calendar month then dividing the resulting sum by the total number of trading days in such calendar month.

Only displayed orders entered throughout the trading day would be used when calculating whether a BLP is in compliance with its 70% average quoting requirements.

The BLP's 5% quoting requirements would not be in effect during the first two months of operation as a BLP in order to allow the BLP time to achieve this quoting metric. The 5% quoting requirement would take effect in the third month of a BLP's operation. At that time, a BLP would be required to satisfy the 5% quoting requirement for each assigned BLP bond. The Exchange would determine whether a BLP had met its 5% quoting requirement by determining the average percentage of time a BLP was at the BB or BO in each of its assigned BLP bonds during the regular trading day on a daily and monthly basis, as follows:

- A "Daily BB Quoting Percentage" would be calculated by determining the percentage of time a BLP had at least one displayed BLP bond in an Exchange bid at the BB during each trading day for a calendar month;
- A "Daily BO Quoting Percentage" would be calculated by determining the percentage of time a BLP had at least one displayed BLP bond in an Exchange offer at the BO during each trading day for a calendar month;
- A "Daily BBO Quoting Percentage" would be calculated for each trading day by summing the "Daily BB Quoting Percentage" and the "Daily BO Quoting Percentage" in each BLP bond; and
- A "Monthly Average BBO Quoting Percentage" would be calculated for each BLP bond by summing the bond's "Daily BBO Quoting Percentages" for each trading day in a calendar month then dividing the resulting sum by the total number of trading days in such calendar month.

Only displayed orders at the BB and BO throughout the trading day would be used when calculating whether a BLP is in compliance with its 5% average quoting requirement.

(F) Matching of BLPs and Issuers

During the proposed pilot program, an issuer may be represented by only one BLP. Prior to the commencement of the pilot, the Exchange would match issuers with BLPs that have been approved under proposed Rule 88(d) in the following manner. In the first round of matching, the Exchange would match BLPs to issuers that have at least one debt issue with a current outstanding principal of $500 million or greater. BLPs would be permitted to select the issuers that they want to represent from this group; the order in which BLPs would be permitted to make their selections would be determined by lottery. Each BLP would make one selection in the random order determined by the lottery, and the process would continue until all BLPs have exhausted their selections for this group of issuers.

In the second round of matching, the Exchange would match BLPs to issuers with one of more debt issues that each has a current outstanding principal of less than $500 million. Each BLP would submit a list of the issuers and the issuer's bonds that it would be willing to represent. The BLP that is willing to represent the most bonds for a given issuer would be matched to that issuer. In event of a tie (*i.e.,* two or more issuers seeking to represent the same issuer and the same number of that issuer's bonds), the BLP with the highest lottery number from the first round would be matched with the issuer.

After the commencement of the program, matching would continue in a manner similar to the second round of matching prior to commencement of the program. On a monthly basis, BLPs would be permitted to apply for unrepresented issuers. The BLP willing to represent the most debt issuances of an issuer would be awarded status as a BLP for such issuer, with ties resolved by lottery.

A BLP must represent each debt issuance of an issuer that has an outstanding principal of $500 million or more. A BLP also may represent any issuance below such level, but would not be required to do so. If a BLP is representing a debt issuance that was above $500 million but falls below such level, or has voluntarily been representing an issuance below the $500 million level where the outstanding principal amount has since been reduced, the BLP may cease representing such issue by notifying the Exchange in writing by the 15th day of the month, in which case the BLP may cease acting as such on the 1st day of the following month.

The Exchange believes that this matching process would be fair to approved BLPs and beneficial to issuers. In light of the unique nature of the debt market, the matching process would give BLPs the opportunity to select the issuers that they want to represent and thereby take into account the BLP's expertise in particular issuers and sectors. The matching process for the largest issuers would be determined on a random basis, while the matching process for smaller issuers would be determined in favor of those BLPs willing to offer the broadest coverage to such issuers. NYSE anticipates that this process would result in the broadest coverage of issuers and sectors upon commencement of the pilot.

(G) Failure To Meet Quoting Requirements

If, in any given calendar month after the first two months a BLP acted as a BLP, a BLP fails to meet any of the quoting requirements set forth in paragraph (a) of proposed Rule 88, the BLP would no longer be eligible for the rebate for the affected bond. If a BLP's failure to meet the quoting requirements continues for three consecutive calendar months in any assigned BLP bond, the Exchange could, in its discretion, take one or more of the following actions: (i) Revoke the assignment of all of the affected issuer's bonds from the BLP; (ii) revoke the assignment of an additional unaffected issuer from a BLP; or (iii) disqualify a member organization from its status as a BLP.

[9] "Trading day" means any day on which the Exchange is scheduled to be open for business. Days on which the Exchange closes prior to 4 p.m. (Eastern Time) for any reason, which may include any regulatory halt or trading halt, are considered a trading day.

The Exchange, in its sole discretion, would determine if and when a member organization is disqualified from its status as a BLP. One calendar month prior to any such determination, the Exchange would notify a BLP of such impending disqualification in writing. When disqualification determinations are made, the Exchange would provide a disqualification notice to the member organization.

If a member organization were disapproved pursuant to paragraph (d)(2) of the proposed Rule or disqualified from its status as a BLP pursuant to paragraph (i)(1)(C) of the proposed Rule, such member organization could re-apply for BLP status three calendar months after the month in which the member organization received its disqualification notice.

(H) Appeal of Disapproval or Disqualification

In the event a member organization disputes the Exchange's decision to disapprove or disqualify it under Rule 88(d)(4) or (i)(2), such member organization ("appellant") may request, within five (5) business days of receiving notice of the decision, the Bond Liquidity Provider Panel ("BLP Panel") to review all such decisions to determine if such decisions were correct.

In the event a member organization is disqualified from its status as a BLP pursuant to proposed Rule 88(i)(2), the Exchange will not reassign the appellant's bonds to a different BLP until the BLP Panel has informed the appellant of its ruling.

The BLP Panel will consist of the NYSE's Chief Regulatory Officer ("CRO"), or a designee of the CRO, and two (2) officers of the Exchange designated by the Co-Head of U.S. Listings and Cash Execution. The BLP Panel will review the facts and render a decision within the time frame prescribed by the Exchange. The BLP Panel may overturn or modify an action taken by the Exchange and all determinations by the BLP Panel will constitute final action by the Exchange on the matter at issue.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[10] in general, and furthers the objectives of Section 6(b)(5) of the Act,[11] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to 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 the proposed rule changes are consistent with these principles in that they seek to expand the number of member organizations that can trade debt securities on the NYSE, establish a new class of market participants, BLPs, that will provide additional liquidity to the bond market, and in general promote a free and open market. The Exchange believes that investors will benefit from increased transparency, competition and liquidity in its bond marketplace.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or 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 the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form *http://www.sec.gov/rules/sro.shtml;* or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2010–74 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2010–74. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Section, 100 F Street, NE., Washington, DC 20549–1090, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing will also be available for inspection and copying at the NYSE's principal office and on its Web site at *http://www.nyse.com.* All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2010–74 and should be submitted on or before January 3, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31102 Filed 12–9–10; 8:45 am]

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[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63443; File No. SR–Phlx–2010–170]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Fees for Direct Access to Exchange Data

December 6, 2010.

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 24, 2010, NASDAQ OMX PHLX LLC ("Phlx" or the "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes an amendment to the fee schedule to assess "direct access" fees on customers receiving Exchange data within the Exchange's co-location facility. The rule filing also deletes outdated dated verbiage in the fee schedule to eliminate confusion regarding application of the fees. The Exchange will implement the proposed change on December 1, 2010. The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqomxphlx.cchwallstreet.com/NASDAQOMXPHLX/Filings/*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Phlx is amending its fee schedule to correct an anomaly that effectively exempts certain customers residing within the Exchange's co-location facility from paying a monthly fee for direct access to Exchange data, while customers that receive data from an extranet and reside outside the co-location facility are assessed the fee. The inequity is a result of the definition of "direct access" in the fee schedule, which does not by its terms clearly apply to data feeds provided to customers through distributors located within the co-located facility. This rule filing will expand the definition of "direct access" and thereby operate to assess the same fee on all firms that have access to the Exchange's raw data feeds, whether co-located or not.

The Exchange, like other data providers, assesses fees for its real time market data. In general, a customer that receives a data feed directly from the Exchange is assessed a "direct access" fee. If the customer then distributes the data, it is a "distributor" as defined under the fee schedule and pays an "internal" or "external" distributor fee, depending upon whether it distributes the data internally or externally. A "distributor" is broadly defined to include any entity that distributes the Exchange's data, whether it receives the data feed directly from the Exchange or indirectly through another entity. Distributor fees apply to distributors located within the Exchange's co-location facility as well as those outside of it.

The definition of what constitutes "direct access," however, is limited to several types of communications connections, none of which accurately describe the systems by which data is delivered through distributors located within the co-location facility to their customers also located within the co-location facility. As a result, the distributor's customers in the co-location facility are not charged a direct access fee, even though they receive the Exchange's data in its raw data format and have the same low latency data access as non-co-located extranet customers that pay the Direct Access fee.

To correct this disparity, this rule filing will include within the definition of "direct access" the receipt of Exchange data within the co-location facility. It will also delete terms that, while describing various means by which data is currently accessed, do not clearly or adequately describe all viable technological means of accessing data. More specifically, the terms "Exchange-operated Web site, system or application" are deleted, as they are limiting terms that do not clearly encompass potential technological means of accessing Exchange data. Their elimination does not impact the fees of any customer currently assessed a Direct Access fee, but should preclude the need for future rule changes to the definition of direct access, as the means by which those same customers access data evolve over time.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[3] in general, and with Sections 6(b)(5) of the Act,[4] in particular. The proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The filing permits transparent, uniform fees for direct access to Exchange data for all customers, whether co-located or not.

In addition, the Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[5] in general, and with Section 6(b)(4) of the Act,[6] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which The Exchange operates or controls. In particular, the Exchange notes that the amendment corrects an anomaly that effectively exempts certain customers receiving the data from paying a direct access fee.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act, as amended.

[3] 15 U.S.C. 78f.

[4] 15 U.S.C. 78f(b)(5).

[5] 15 U.S.C. 78f.

[6] 15 U.S.C. 78f(b)(4).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[7] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form *http://www.sec.gov/rules/sro.shtml*; or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–Phlx–2010–170 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2010–170. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2010–170 and should be submitted on or before January 3, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31101 Filed 12–9–10; 8:45 am]

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[7] 15 U.S.C. 78s(b)(3)(A)(ii).

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63442; File No. SR–BX–2010–081]

Self-Regulatory Organizations; The NASDAQ OMX BX Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Fees for Direct Access to Exchange Data

December 6, 2010.

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 24, 2010, The NASDAQ BX OMX, Inc. ("BX" or "The Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by BX. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

BX proposes an amendment to the fee schedule to assess "direct access" fees on customers receiving Exchange data within the Exchange co-location facility. The rule filing also deletes outdated verbiage in the fee schedule to eliminate confusion regarding application of the fees, and corrects a minor typographical error in the rule. BX will implement the proposed change on December 1, 2010. The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's Internet Web site at *http://nasdaqomxbx.cchwallstreet.com/NASDAQOMXBX/Filings/*.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, BX 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. BX 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

BX is amending its fee schedule to correct an anomaly that effectively exempts certain customers residing within the Exchange's co-location facility from paying a monthly fee for direct access to Exchange data, while customers that receive data from an extranet and reside outside the co-location facility are assessed the fee. The inequity is a result of the definition of "direct access" in the fee schedule, which does not by its terms clearly apply to data feeds provided to customers through distributors located within the co-located facility. This rule filing will expand the definition of "direct access" and thereby operate to assess the same fee on all firms that have access to the Exchange's raw data feeds, whether co-located or not. It will also delete terms that are obsolete or generally limiting, given the evolution of technologies and systems through which data may be accessed.

The Exchange, like other data providers, assesses fees for its real time market data. In general, a customer that receives a data feed directly from the Exchange is assessed a "direct access" fee. If the customer then distributes the data, it is a "distributor" as defined

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

under the fee schedule and pays an "internal" or "external" distributor fee, depending upon whether it distributes the data internally or externally. A "distributor" is broadly defined to include any entity that distributes the Exchange's data, whether it receives the data feed directly from the Exchange or indirectly through another entity. Distributor fees apply to distributors located within the Exchange's co-location facility as well as those outside of it.

The definition of what constitutes "direct access," however, is limited to several types of communications connections, none of which accurately describe the systems by which data is delivered through distributors located within the co-location facility to their customers also located within the co-location facility. As a result, the distributor's customers in the co-location facility are not charged a direct access fee, even though they receive the Exchange's data in its raw data format and have the same low latency data access as non-co-located extranet customers that pay the Direct Access fee.

To correct this disparity, this rule filing will include within the definition of "direct access" the receipt of Exchange data within the co-location facility. It will also delete terms that, while describing various means by which data is currently accessed, do not clearly or adequately describe all viable technological means of accessing data. More specifically, the terms "Exchange-operated Web site, system or application" are deleted, as they are limiting terms that do not clearly encompass potential technological means of accessing Exchange data. Their elimination does not impact the fees of any customer currently assessed a Direct Access fee, but should preclude the need for future rule changes to the definition of direct access, as the means by which those same customers access data evolve over time.

The filing also corrects minor typographical errors in the fee schedule, in the interest of clarity and consistency.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[3] in general, and with Sections 6(b)(5) of the Act,[4] in particular. The proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The filing permits transparent, uniform fees for direct access to Exchange data for all customers, whether co-located or not.

In addition, the Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[5] in general, and with Section 6(b)(4) of the Act,[6] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which The Exchange operates or controls. In particular, the Exchange notes that the amendment corrects an anomaly that effectively exempts certain customers receiving the data from paying a direct access fee.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[7] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, 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 e-mail to rule-comments@sec.gov. Please include File Number SR–BX–2010–081 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BX–2010–081. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site *http://www.sec.gov/rules/sro.shtml.* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BX–2010–081, and should be submitted on or before January 3, 2011.

[3] 15 U.S.C. 78f.

[4] 15 U.S.C. 78f(b)(5).

[5] 15 U.S.C. 78f.

[6] 15 U.S.C. 78f(b)(4).

[7] 15 U.S.C. 78s(b)(3)(a)(ii).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31100 Filed 12–9–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63440; File No. SR–NYSEArca-2010–112]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending NYSE Arca Equities Rules 7.31(k) and 7.23(a)(1) To Modify Certain Characteristics of the Q Order and Clarify the Interest Eligible for Satisfaction of a Market Maker's Two-Sided Obligation

December 6, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") [1], and Rule 19b–4 [2] thereunder, notice is hereby given that on December 3, 2010, NYSE Arca, Inc. ("NYSE Arca" or "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE Arca Equities Rules 7.31(k) and 7.23(a)(1) to modify certain characteristics of the Q Order and clarify the interest eligible for satisfaction of a Market Maker's Two-Sided Obligation, respectively. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend NYSE Arca Equities Rules 7.31(k) and 7.23(a)(1) to modify certain characteristics of the Q Order and clarify the interest eligible for satisfaction of a Market Maker's Two-Sided Obligation, respectively.

A Market Maker is currently able to satisfy its Two-Sided Obligation [3] by instructing the NYSE Arca Marketplace to enter a Q Order on its behalf either (1) at the last price and size entered by the Market Maker during the previous trading day, including or excluding reserve size, or (2) at a specified percentage from the best bid or offer.[4] Currently, upon execution, a Q Order entered with reserve size pursuant to NYSE Arca Equities Rule 7.31(k)(1)(A)(1) will automatically repost with the original display size and $10 below (above) the original bid (offer).[5] This particular automatic reposting could result in a Q Order with a price that is significantly worse than the published National Best Bid or Offer ("NBBO"). Moreover, depending on the price of the security at issue, the automatic reposting could result in a Market Maker posting a Q Order at a price that is not in compliance with the new Market Maker pricing obligations set forth in amended NYSE Arca Equities Rule 7.23(a)(1)(B), which are to be implemented on December 6, 2010.

Accordingly, the Exchange proposes to delete the text of NYSE Arca Equities Rule 7.31(k)(1)(B)(1) in its entirety [6] and delete the text "entered without reserve size" from NYSE Arca Equities Rule 7.31(k)(1)(B)(2) to provide that a Market Maker, upon execution of its Q Order entered with reserve size, would be responsible for immediately posting a new Q order, rather than the Q order automatically reposting $10 below (above) the original bid (offer). The Exchange notes that Market Makers are currently required to post a new Q order upon execution of Q orders entered without reserve size. Requiring the same of Q orders originally entered with reserve size would encourage Q order prices that bear a closer relationship to the NBBO than the current $10 above/below reposting price, thus promoting fair and orderly markets and the protection of investors and reducing the risk of executions at illogical prices.

The Exchange previously represented to the Commission, in filing SR–NYSEArca–2010–83, that it would submit a filing with the changes proposed herein, including a proposed implementation date of Monday, December 6, 2010, consistent with the implementation date for the new Market Maker pricing obligations.[7]

The Exchange further proposes clarifying revisions to recently amended Rule 7.23(a)(1). In filing SR–NYSEArca–2010–83, the Exchange noted that Market Makers would use Q orders to meet the new Two-Sided Obligation under Rule 7.23(a)(1).[8] The Exchange proposes to amend Rule 7.23(a)(1) to delete the requirement that Market Makers exclusively use Q orders to meet their Two-Sided Obligation. Rule 7.23(a)(1) would continue to require that Market Makers identify to the Exchange the interest that is being used to satisfy the Two-Sided Obligation. While Market Makers may continue to use Q orders to satisfy the Two-Sided Obligation, the Exchange believes that Market Makers should be permitted to use other types of interest to satisfy this obligation, provided that the interest is displayed and identified to the Exchange. The proposed revision to Rule 7.23(a)(1) is consistent with the rules adopted by other exchanges.[9]

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the "Act"),[10] in general, and furthers the objectives of Section 6(b)(5) of the Act,[11] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to 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. Specifically, the Exchange believes that the change

[8] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* NYSE Arca Equities Rule 7.23(a)(1).

[4] See NYSE Arca Equities 7.31(k)(1)(A)(1)–(2).

[5] *See* NYSE Arca Equities Rule 7.31(k)(1)(B)(1). If the Market Maker specifies a reserve size for the Q Order, it will not automatically repost once the reserve size is exhausted.

[6] The Exchange proposes the place NYSE Arca Equities Rule 7.31(k)(1)(B)(1) in 'Reserve' for possible use at a later date.

[7] *See* Securities Exchange Act Release No. 63255 (November 5, 2010), 75 FR 69484 (November 12, 2010) (SR–NYSEArca–2010–83).

[8] *Id.*

[9] *See, e.g.,* Nasdaq Rule 4613.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

proposed herein would encourage Market Maker Q order prices that bear a closer relationship to the NBBO, thus promoting fair and orderly markets and the protection of investors and reducing the risk of executions at illogical prices. The Exchange also believes that the change propose herein would provide Market Makers with a more appropriate level of flexibility with which to satisfy their Two-Sided Obligation by permitting interest other than Q order interest to be identified to the Exchange as meeting such obligation.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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: (1) Significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, 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) normally may not become operative prior to 30 days after the date of filing.[14] However, Rule 19b–4(f)(6)[15] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. NYSE Arca has requested that the Commission waive the 30-day operative delay.

The Commission has considered NYSE Arca's request to waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will enable the Exchange to implement the proposed change consistent with the implementation date for the new market maker pricing obligations.[16]

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 e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2010–112 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2010–112. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site *http://www.sec.gov/rules/sro.shtml.* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2010–112 and should be submitted on or before January 3, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31097 Filed 12–9–10; 8:45 am]

BILLING CODE 8011–01–P

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6). When filing a proposed rule change pursuant to Rule 19b–4(f)(6) under the Act, an exchange is required 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 Commission notes that the Exchange has satisfied this requirement.

[14] 17 CFR 240.19b–4(f)(6)(iii).

[15] *Id.*

[16] For the purposes only of waiving the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63437; File No. SR–ISE–2010–116]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Penny Pilot Program

December 6, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 2, 2010, the International Securities Exchange, LLC (the "Exchange" or the "ISE") filed with the Securities and Exchange 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 ISE proposes to amend its rules relating to a pilot program to quote and

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

to trade certain options in pennies ("Penny Pilot Program"). The text of the proposed rule change is as follows, with deletions in [brackets] and additions italicized:

Rule 710. Minimum Trading Increments

(a) The Board may establish minimum trading increments for options traded on the Exchange. Such changes by the Board will be designated as a stated policy, practice, or interpretation with respect to the administration of this Rule 710 within the meaning of subparagraph (3)(A) of Section 19(b) of the Exchange Act and will be filed with the SEC as a rule change for effectiveness upon filing. Until such time as the Board makes a change in the increments, the following principles shall apply:

(1) If the options contract is trading at less than $3.00 per option, $.05; and

(2) If the options contract is trading at $3.00 per option or higher, $.10.

(b) Minimum trading increments for dealings in options contracts other than those specified in paragraph (a) may be fixed by the Exchange from time to time for options contracts of a particular series.

(c) Notwithstanding the above, the Exchange may trade in the minimum variation of the primary market in the underlying security.

Supplementary Material to Rule 710

.01 Notwithstanding any other provision of this Rule 710, the Exchange will operate a pilot program to permit options classes to be quoted and traded in increments as low as $.01. The Exchange will specify which options trade in such pilot, and in what increments, in Regulatory Information Circulars filed with the Commission pursuant to Rule 19b–4 under the Exchange Act and distributed to Members.

The Exchange may replace, on a semi-annual basis, any penny pilot issues that have been delisted with the next most actively traded multiply listed options classes that are not yet included in the penny pilot, based on trading activity in the previous six months. The replacement issues may be added to the penny pilot on the second trading day following January 1, *2011* [2010] and July 1, *2011* [2010].

.02 No Change.

* * * * *

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 these statements may be examined at the places specified in Item IV below. The self-regulatory organization 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

Under the Penny Pilot Program, the minimum price variation for all participating options classes, except for the Nasdaq-100 Index Tracking Stock ("QQQQ"), the SPDR S&P 500 Exchange Traded Fund ("SPY") and the iShares Russell 2000 Index Fund ("IWM"), is $0.01 for all quotations in options series that are quoted at less than $3 per contract and $0.05 for all quotations in options series that are quoted at $3 per contract or greater. QQQQ, SPY and IWM are quoted in $0.01 increments for all options series. The Penny Pilot Program is currently scheduled to expire on December 31, 2010.[3] The Exchange proposes to extend the time period of the Penny Pilot Program through December 31, 2011, and to provide revised dates for adding replacement issues to the Penny Pilot program. The Exchange proposes that the semi-annual dates to replace issues that have been delisted be revised to the second trading day following January 1, 2011 and July 1, 2011. The Exchange notes that the replacement issues will be selected based on trading activity for the six month period beginning June 1, 2010 and ending November 30, 2010 for the January 2011 replacement, and the six month period beginning December 1, 2010 and ending May 31, 2011 for the July 2011 replacements. This filing does not propose any substantive changes to the Penny Pilot Program: all classes currently participating will remain the same and all minimum increments will remain unchanged. The Exchange believes the benefits to public customers and other market participants who will be able to express their true prices to buy and sell options have been demonstrated to outweigh the increase in quote traffic.

The Exchange agrees to submit reports to the Commission that will analyze the impact of the Penny Pilot Program on market quality and options systems capacity. These reports will include, but are not limited to: (1) Data and analysis on the number of quotations generated for options included in the report; (2) an assessment of the quotation spreads for the options included in the report; (3) an assessment of the impact of the Penny Pilot Program on the capacity of the ISE's automated systems; (4) data reflecting the size and depth of markets; and (5) any capacity problems or other problems that arose related to the operation of the Penny Pilot Program and how the Exchange addressed them.

2. Statutory Basis

The basis under the Securities Exchange Act of 1934 (the "Exchange Act") for this proposed rule change is found in Section 6(b)(5), in that the proposed rule change is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest. In particular, the proposed rule change, which extends the Penny Pilot Program for an additional one year, will enable public customers and other market participants to express their true prices to buy and sell options for the benefit of all market participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

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

Because the foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) by its terms does not become operative for 30 days after the date of

[3] *See* Exchange Act Release No. 60865 (October 22, 2009), 74 FR 55880 (October 29, 2009).

this filing, 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[4] and Rule 19b–4(f)(6) thereunder.[5]

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 e-mail to *rule-comments@sec.gov.* Please include File Number SR–ISE–2010–116 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ISE–2010–116. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ISE–2010–116 and should be submitted on or before January 3, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31050 Filed 12–9–10; 8:45 am]

BILLING CODE 8011–01–P

[4] 15 U.S.C. 78s(b)(3)(A).

[5] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. ISE has satisfied this requirement.

[6] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63439; File No. SR–NASDAQ–2010–158]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Clarify Market Maker Quote Management Procedures

December 6, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4[2] thereunder, notice is hereby given that on December 3, 2010, The NASDAQ Stock Market LLC ("Nasdaq" or "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing with the Commission a proposed rule change to clarify market maker quote management procedures.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

The text of the proposed rule change is below. Proposed new language is italicized and proposed deletions are in brackets.[3]

* * * * *

4613. Market Maker Obligations

A member registered as a Market Maker shall engage in a course of dealings for its own account to assist in the maintenance, insofar as reasonably practicable, of fair and orderly markets in accordance with this Rule.

(a) Quotation Requirements and Obligations

(1) No Change.

(2) Pricing Obligations. For NMS stocks (as defined in Rule 600 under Regulation NMS) a Market Maker shall adhere to the pricing obligations established by this Rule during Regular Market Hours.

(A)–(E) No Change.

(F) Quotation Creation and Adjustment. For each Issue in which a Market Maker is registered, the System shall*, in the absence of a quotation that complies with this Rule entered by that Market Maker,* automatically create a quotation for display to comply with this Rule. System-created compliant displayed quotations will thereafter be allowed to rest and not be further adjusted by the System unless the relationship between the quotation and its related National Best Bid or National Best Offer, as appropriate, shrinks to the greater of: (a) 4 percentage points, or, (b) one-quarter the applicable percentage necessary to trigger an individual stock trading pause as described in NASDAQ Rule 4120(a)(11), or expands to within that same percentage less 0.5%, whereupon the System will immediately re-adjust and display the Market Maker's quote to the appropriate Designated Percentage set forth in section (D) above. [As the System allows for multiple attributable quotations by a Market Maker in an issue,] [q]*Q*uotations originally entered by Market Makers *which have not been modified by the System upon entry or after resting on the book* shall be allowed to move freely towards [or away from] the National Best Bid or National Best Offer, as appropriate, for potential execution.

(G)–(K) No Change.

(b)–(e) No Change.

* * * * *

4752. Opening Process

(a) No Change.

[3] Changes are marked to the rule text that appears in the electronic manual of NASDAQ found at *http://nasdaqomx.cchwallstreet.com.*

(b) Trading Prior To Normal Market Hours. The system shall process all eligible Quotes/Orders at 7 a.m.:

(1) No Change.

(2) [At] *No earlier than between* 9:25 a.m. *and 9:30 a.m.,* the system shall open all remaining unopened Quotes in accordance with each firm's instructions.

(3)–(4) No Change.

(c)–(d) No Change.

* * * * *

(b) Not applicable.

(c) Not applicable.

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

Recently, the Exchange adopted rules enhancing market maker quotation obligations. In connection with the implementation with these new standards, the Exchange proposes to clarify its quote management procedures when market makers fail to enter quotations in compliance with these new rules. In short, should a market maker fail to enter, or appropriately update, their quotations so as to remain in compliance with the new standards, the Exchange will create or adjust such quotations to prices that will ensure compliance.

In addition, the Exchange proposes to adjust the current fixed time of 9:25 a.m. for opening previously unopened quotations so as to allow the opening of such quotations at time periods closer to the 9:30 a.m. commencement of normal market trading.

The Exchange believes that these proposals both enhance compliance with the new market maker quotation standards and recognize the increased liquidity being provided by marker makers in the minutes before market open.

2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[4] in general, and with Sections 6(b)(5) of the Act,[5] in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes that the proposed rule meets these requirements in that it enhances compliance with the new market maker quotation standards and recognizes the increased liquidity being provided by marker makers in the minutes before market open.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (1) Significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act[6] and Rule 19b–4(f)(6) thereunder.[7]

A proposed rule change filed under Rule 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing.[8] However, Rule 19b–4(f)(6)[9] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. Nasdaq has requested that the Commission waive the 30-day operative delay.

The Commission has considered Nasdaq's request to waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will enable the Exchange to implement the proposed change consistent with the implementation date for the new market maker pricing obligations.[10]

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 e-mail to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2010–158 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2010–158. This file number should be included on the

[4] 15 U.S.C. 78f.

[5] 15 U.S.C. 78f(b)(5).

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(6). When filing a proposed rule change pursuant to Rule 19b–4(f)(6) under the Act, an exchange is required 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 Commission notes that the Exchange has satisfied this requirement.

[8] 17 CFR 240.19b–4(f)(6)(iii).

[9] *Id.*

[10] For the purposes only of waiving the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2010–158 and should be submitted on or before January 3, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31051 Filed 12–9–10; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63448; File No. SR–BX–2010–059]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Order Instituting Proceedings To Determine Whether To Disapprove Proposed Rule Change, as Modified by Amendment No. 1, To Create a Listing Market on the Exchange

December 7, 2010.

I. Introduction

On August 20, 2010, NASDAQ OMX BX ("BX" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act" or "Exchange Act")[1] and Rule 19b–4 thereunder,[2] a proposed rule change to create a new listing market. The proposed rule change was published for comment in the **Federal Register** on September 8, 2010.[3] The Commission received three comments on the proposal.[4] The Commission subsequently extended the time period in which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change, to December 7, 2010.[5] On December 6, 2010, BX submitted Amendment No. 1 to the proposed rule change.[6] This order institutes proceedings to determine whether to disapprove the proposed rule change, as modified by Amendment No. 1. Institution of disapproval proceedings, however, does not indicate that the Commission has formulated any conclusions with respect to any of the issues involved.

II. Description of the Proposal[7]

The Exchange proposes to create a new listing market, to be called the "BX Venture Market."[8] The Exchange has stated that it expects that the securities listed on BX would not be classified as national market system ("NMS") securities.[9] As a result, BX-listed securities would not be subject to an NMS plan and would not be subject to Regulation NMS under the Act.[10] BX-listed securities would trade on the Exchange and also could trade over-the-counter ("OTC").[11] Further, BX-listed securities would be considered penny stocks under Exchange Act Rule 3a51–1, unless they qualify for an exemption from the definition of a penny stock.[12] No "blue sky" exemption would be available under Section 18 of the Securities Act of 1933 or the rule adopted thereunder,[13] so companies would be required to satisfy state law registration requirements and other state laws that regulate the sale and offering of securities. In addition, BX would not list any company that meets the quantitative (*e.g.,* financial) requirements for listing on The NASDAQ Stock Market LLC ("Nasdaq").

To qualify for initial listing on BX, a company must be registered under Section 12(b) of the Act[14] and be current in its periodic filings with the Commission. The company would also be required to have a fully independent audit committee comprised of at least three members and comply with the requirements of Rule 10A–3 under the Exchange Act.[15] The company would be required to have its independent directors make compensation decisions for executive officers (either by having the independent directors meet in executive session or by having them sit on a compensation committee), and independent directors would be required to meet on a regular basis in executive sessions.[16] The company's

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 62818 (September 1, 2010), 75 FR 54665 ("Notice").

[4] *See* Letters to Elizabeth M. Murphy, Secretary, Commission, from Tom A. Alberg, Managing Director and Founder, Madrona Venture Group, dated December 1, 2010 ("Madrona Letter"); Michael R. Trocchio, Bingham McCutchen LLP, dated October 3, 2010 ("Pink OTC Markets Letter"); and William F. Galvin, Secretary of the Commonwealth, Commonwealth of Massachusetts, dated September 28, 2010 ("MSD Letter").

[5] *See* Securities Exchange Act Release No. 63105 (October 14, 2010), 75 FR 64772 (October 20, 2010).

[6] *See infra* Section II for a description of Amendment No. 1.

[7] This description does not review every rule proposed by BX that has been filed as part of its proposed rule change; rather, it focuses on the most prominent rules considered in review of the BX's proposal. *See* Notice, *supra* note 3, for a description of the proposed rule change. *See also* Exhibit 5 to the Form 19b–4 for all the rules proposed by BX, available at *http://www.sec.gov/rules/sro/bx/2010/34-62818-ex5.pdf.*

[8] *See* Amendment No. 1. As originally proposed, the proposed rule change provided that a BX-listed company should refer to its listing as on the "BX."

[9] *See* Notice, *supra* note 3.

[10] *See* 17 CFR 242.600 *et seq.*

[11] OTC trades of BX-listed securities would be reported to the Financial Industry Regulatory Authority ("FINRA") OTC Reporting Facility. *See* Notice, *supra* note 3.

[12] *See* 17 CFR 240.3a51–1.

[13] 15 U.S.C. 77r; Securities Act Rule 146. In addition, some state laws and regulations may provide an exemption from certain registration or "blue sky" requirements for companies listed on the Boston Stock Exchange, based on the higher listing standards previously applied by the former Boston Stock Exchange. The proposed listing rules would provide that the Exchange will take action to delist any company listed on BX that attempts to rely on such an exemption. Companies would also agree not to rely on any such exemption as a provision of the BX Listing Agreement.

[14] 15 U.S.C. 78*l*(b).

[15] 17 CFR 240.10A–3. Certain companies listing on BX will be permitted to phase in compliance with the audit committee and compensation committee requirements following their listing. With respect to the audit committee requirements, a company listing in connection with its initial public offering would be required to have one independent director on the committee at the time of listing; a majority of independent members within 90 days of the date of effectiveness of the company's registration statement; and all independent members within one year of the date of effectiveness of the company's registration statement.

[16] With respect to the compensation committee requirement, a company listing in connection with its initial public offering, upon emerging from bankruptcy, or that otherwise was not subject to a substantially similar requirement prior to listing (such as a company only traded in the OTC market) would be required to have one independent director on the committee at the time of listing; a majority of independent members within 90 days of listing; and all independent members within one year of listing.

[11] 17 CFR 200.30–3(a)(12).

audit committee would be required to have a charter setting out its responsibilities. The audit committee, or another independent body of the board, would also be required to conduct appropriate review and oversight of any related party transactions.

BX has proposed the following quantitative listing standards for the initial listing of securities that were not previously listed on a national securities exchange: (1) $1 million of stockholders' equity or $5 million total assets; (2) 200,000 publicly held shares; (3) 200 public shareholders, at least 100 of which must be round lot holders; (4) $2 million market value of listed securities; (5) $1.00 minimum bid price per share; (6) one year operating history; and (7) two registered and active market makers. In addition, the company would also be required to demonstrate that it has a plan to maintain sufficient working capital for its planned business for at least twelve months after the first day of listing.

BX has proposed the following quantitative listing standards for the initial listing of securities that have previously been listed on a national securities exchange: (1) 200,000 publicly held shares; (2) 200 public shareholders, at least 100 of which must be round lot holders; (3) $2 million market value of listed securities; (4) $0.25 minimum bid price per share; and (5) two registered and active market makers. A company would be considered to have been previously listed on another national securities exchange if it was listed on such exchange at any time during the three months before its listing on BX, or, until September 30, 2011, if the company was listed on another national securities exchange at any time between January 1, 2008 and September 30, 2011.[17]

The Exchange would have the discretionary authority to deny listing to any otherwise qualified security when it is necessary to preserve and strengthen the quality of, and public confidence in, its market.[18] The Exchange would conduct a public interest review of the company and significant persons associated with it.[19] In that regard, the Exchange stated that it intends to conduct background investigations of officers and directors and other significant people associated with a company in connection with its review of applications for initial listing.[20] In addition, the Exchange would not approve for listing or allow the continued listing of "shell" companies.

For continued listing on BX, a security would be required to satisfy the following listing standards: (1) At least 200,000 publicly held shares; (2) at least 200 public shareholders; (3) market value of listed securities of at least $1 million; (4) minimum bid price of at least $0.25 [21] per share; and (5) at least two registered and active market makers. If the security does not maintain the minimum $0.25 per share bid price for twenty consecutive trading days,[22] Exchange staff would issue a Staff Delisting Determination and the security would be suspended from trading on BX. A company could appeal that determination to a Hearings Panel; however, such an appeal would not stay the suspension of the security. During the Hearings Panel process, the security could regain compliance by achieving a $0.25 [23] per share minimum bid price while trading on another venue, such as the OTC market, for ten consecutive days. However, if the company has received three or more Staff Delisting Determinations for failure to comply with the minimum bid price requirement in the prior twelve months, the company could only regain compliance by achieving a closing bid price of $0.25 per share or more for at least twenty consecutive trading days.[24]

Description of Amendment No. 1

Amendment No. 1 makes the following modifications to the proposed rule change:

- Renames the market from "BX" to "BX Venture Market" to distinguish the BX Venture Market from Nasdaq, provides that the Exchange will monitor press releases issued by BX-listed companies and annually review their Web sites to determine how a company is referring to its listing, and provides that the Exchange will include information on its Web site describing the differences between the BX Venture Market and other national securities exchanges, including Nasdaq;
- Provides that BX will disseminate quotation and transaction information about BX-listed securities and that this information will include a market center identifier;
- Provides that BX will require data vendors to identify when the BX Venture Market is the listing market for a security and clearly differentiate those securities from securities listed on Nasdaq or other exchanges or traded OTC when displaying information to external users on their single security quotation screens;
- States that listings and delistings will be processed by the staff in Nasdaq's Listing Qualifications Department, who, according to the Exchange, are extremely experienced in regulatory analysis; states that BX will hire additional staff if the workload from the new BX Venture Market proves "sufficiently high"; and notes that the staff within the Listing Qualifications Department is now, and will continue to be, reviewed regularly by Nasdaq's Chief Regulatory Officer and Regulatory Oversight Committee, and will also be reviewed by BX's Regulatory Oversight Committee;
- Prohibits the initial or continued listing of a company if any executive officer or director was involved in any event that occurred during the prior five years that is required to be disclosed under Items 401(f)(2)–(8) of Regulation S–K and that, in the case of a listed company, the company would be provided 30 days to remove the executive officer or director or be issued a delisting notification;
- Provides that the Exchange would use its discretionary authority, where appropriate, to deny initial or continued listing in cases where: (1) An executive officer or director has reported misconduct that occurred between five and ten years before the disclosure or misconduct not required to be disclosed under Item 401 of Regulation S–K; or (2) an individual who is not an executive officer or director, but who has significant influence or importance to the company such as a control person or significant shareholder, has a history of regulatory misconduct;

[17] *See* Amendment No. 1. As originally proposed, a company would be considered to have been previously listed on another national securities exchange if it was listed on such exchange at any time during the three months before its listing on BX, or until March 31, 2011, if the company was listed on another national securities exchange at any time between January 1, 2008 and March 31, 2011.

[18] *See infra* Section II for examples of circumstances under which the Exchange would exercise such discretionary authority, as set out in Amendment No. 1.

[19] *See infra* Section II for a more detailed discussion of public interest reviews, as set out in Amendment No. 1.

[20] *See id.*

[21] *See* Amendment No. 1. As originally proposed, a BX-listed company would have been required to maintain a minimum bid price of at least $0.05 per share.

[22] *See* Amendment No. 1. As originally proposed, if a BX-listed security does not maintain a minimum bid price of $0.05 per share for ten consecutive trading days, Exchange staff would issue a Staff Delisting Determination and the security would be suspended from trading on BX.

[23] *See* Amendment No. 1. As originally proposed, a BX-listed company could regain compliance by achieving a $0.05 per share minimum bid price while trading on another venue for ten consecutive trading days.

[24] *See* Amendment No. 1. As originally proposed, a BX-listed company could only regain compliance by achieving a closing bid price of $0.25 per share for at least ten consecutive trading days.

• Indicates that in connection with initial listing applications and when a new executive officer or director becomes associated with a BX-listed company, BX will conduct background investigations of executive officers, directors, and other significant associated people using public databases, and will retain outside firms to assist it in its review as needed, including investigative, accounting, and law firms, and provides that BX's listing application will solicit information about certain legal or administrative proceedings against the company and its officers, directors, and 10% or greater shareholders;

• Provides that the head of the Exchange's Listing Department will be involved in all decisions concerning whether to permit or deny listing to a company based on a public interest concern and that the Exchange's Chief Regulatory Officer will be required to approve the initial or continued listing of any company that has disclosed information about an executive officer, director, or control person under Items 401(f)(2)–(8) of Regulation S–K that does not trigger the automatic bar described above;

• Increases the continued listing price from $0.05 to $0.25 per share and provides that the Exchange will issue a Staff Delisting Determination and suspend a BX-listed security from trading on the Exchange if such security does not maintain the minimum continued listing price of $0.25 per share for twenty consecutive trading days, rather than for the originally proposed ten consecutive trading days;

• Shortens the periods that a non-compliant company may remain listed by, for example, providing that a Hearings Panel would only be permitted to grant 90 calendar days for a company to regain compliance with a listing standard, instead of the 180 calendar days available on Nasdaq and providing that a company that falls below the market value of listed securities requirement would be provided a 90 calendar day compliance period, instead of the 180 days available to a Nasdaq-listed company;

• Undertakes to provide the Commission with: (1) Monthly reports describing developments on the BX Venture Exchange, including a list of companies added or removed from the market; and (2) quarterly reports from the Exchange's Chief Regulatory Officer describing the listing and surveillance activities of the Exchange;

• Requires listed companies to provide the Exchange with copies of any "blue sky memoranda" prepared in connection with the issuance of shares, provides that BX will review these memoranda to assure that the company is not inappropriately relying on such a state blue sky exemption, agrees to take action to delist any BX-listed company that attempts to rely on such an exemption, and provides that companies will agree to not rely on any such exemption as a provision of the BX listing agreement;

• Represents that FINRA will regulate market activity on the BX and that FINRA will enhance its review process by calibrating its surveillance patterns to detect potential issues that may arise in low priced stocks, noting that FINRA's review will include the trading of BX-listed securities on the OTC market and that FINRA will review activity of its member firms quoting on the BX when conducting reviews of these firms, which will include "focused exams" concentrated on sales practices and firm oversight;

• States that the SMARTS Group, a Nasdaq OMX company, will create a new suite of quoting and trading patterns to detect suspicious activity in low priced and less widely traded securities; and

• Provides that BX will disseminate quotation and transaction information about BX-listed securities via several market data products to ensure broad dissemination of quotation and last sale information, and states that it is committed to ensuring that quotations and transaction information from BX are consolidated with similar information from OTC quotation and trading supervised by FINRA.

III. Comment Letters

The Commission received three comment letters on the proposal. The Massachusetts Securities Division ("MSD") noted in its letter that, although BX proposes qualitative listing standards that resemble those of Nasdaq, the proposed quantitative listing standards will be far lower.[25] MSD then noted that the laws of Massachusetts and 11 other states exempt securities listed on the "Boston Stock Exchange" from their securities laws registration requirements.[26] MSD stated its belief that these exemptions were predicated on exchange-listed companies having met certain minimum quality criteria.[27] MSD noted that the proposed rule change states that the BX market is not among the national securities exchanges enumerated in Section 18(b) of the Securities Act of 1933 and that the securities listed on BX will not be preempted securities under that section.[28] MSD also noted that the Exchange will require its listed companies to agree not to claim any state's exchange-listing exemption for their securities and will delist securities of companies that claim such exemption.[29] However, MSD expressed concern that these requirements will not prevent unscrupulous penny stock promoters or boiler room brokerages from asserting that the securities they are offering and selling are exempt from state registration because the securities are listed on the Exchange.[30] MSD expressed further concern that because the Exchange is owned by and is under the supervision of the parent company of Nasdaq, the BX listing market will inappropriately borrow some of the prestige of Nasdaq, despite the steps that Nasdaq may take to promote BX as a separate listing market.[31]

Pink OTC Markets Inc. ("Pink OTC") noted that there may be investor confusion with respect to the differences between Nasdaq-listed securities and BX-listed securities.[32] Pink OTC further stated its belief that it is important that market data relative to BX-listed securities be disseminated in a manner that makes clear that BX-listed securities are not NMS securities, nor do they meet the normally higher listing standards for exchange-listed securities, including those of Nasdaq.[33] To alleviate investor confusion, Pink OTC suggested that ticker symbols for BX-listed securities should differentiate such securities from other securities that meet the higher listing standards typically associated with listing on a national securities exchange.[34]

Pink OTC also stated its belief that quotation and transaction reports for BX-listed securities should not be disseminated under any NMS plan, nor commingled with NMS data by an NMS plan processor.[35] In particular, Pink OTC stated its belief that Nasdaq should not be permitted to disseminate BX-listed securities market data commingled with the Nasdaq market data it disseminates under the Nasdaq UTP Plan.[36]

With respect to the BX's proposed listing standards, Pink OTC argued that BX should not be permitted to allow phase-in compliance with the independent director requirements of

[25] *See* MSD Letter, *supra* note 4, at p. 2.
[26] *See id.*
[27] *See id.*
[28] *See id.*
[29] *See id.*
[30] *See id.*
[31] *See id.* at p. 3.
[32] *See* Pink OTC Letter, *supra* note 4.
[33] *See id.* at p. 2.
[34] *See id.*
[35] *See id.* at p. 3.
[36] *See id.*

the audit and compensation committees for certain companies.[37] Finally, Pink OTC recommended that the Commission consider requiring BX to conduct background checks and other similar reviews of potential listed companies and not merely rely on the documents presented by an issuer during the listing process.[38]

On the other hand, Madrona Venture Group noted that the BX listing market will have listing requirements and costs that are tailored to the economic reality of smaller companies, and that this market would be extremely helpful to young, high growth emerging companies by offering an alternative listing market for companies that wish to make an initial public offering, but do not meet the initial quantitative listing standards of the other national securities exchanges.[39] Madrona Venture Group also stated its belief that the BX listing market could bolster capital markets and provide opportunities for small companies to transition from private to public ownership, to expand their financial resources, and to raise the capital they need for continued growth.[40] Additionally, Madrona Venture Group stated its belief that the BX listing market would attract companies and capital that would otherwise be drawn to foreign markets, where regulatory costs and litigation risks are lower.[41]

IV. Proceedings To Determine Whether To Disapprove SR–BX–2010–059 and Grounds for Disapproval Under Consideration

The Exchange's proposal is presented as providing a transparent, well-regulated marketplace for the listing of companies that are being delisted from another national securities exchange for failure to meet quantitative listing standards (including price or other market value measures) and for companies with smaller market capitalization contemplating an initial exchange listing. The Exchange believes that a BX listing could help such companies raise capital, and in turn promote job creation within the United States. The Exchange also believes that there are benefits from exchange trading and surveillance.

For example, the Exchange believes that a BX listing would allow the securities of companies that are being delisted from another national securities exchange for failure to meet that exchange's quantitative listing requirements to continue to trade on a national securities exchange. This may enable some institutional investors to continue their ownership stake in those companies, which in turn could provide greater stability to the companies' shareholder base.[42] In addition, the Exchange believes that companies currently traded OTC could view the BX Venture Market as an aspirational step towards a listing on another national securities exchange and that the agreement of such companies to comply with the Exchange's corporate governance standards along with the application of the Exchange's public interest authority will provide additional protections to their investors. Finally, the Exchange believes that the BX Venture Market will be a more attractive alternative for domestic companies that might otherwise have considered a listing on non-U.S. junior markets which, according to the Exchange, generally have less vigorous listing requirements.

The proposed BX listing standards discussed above, however, are significantly lower than the listing standards for other exchange-listed securities.[43] These lower listing standards on BX may raise issues as to whether the proposed rule change is consistent with the Act. Among other things, listing standards must be designed to assure that there is sufficient liquidity for trading on an exchange and to reduce the likelihood of manipulation and fraud.[44] The Commission believes that the development and enforcement of adequate standards governing the initial and continued listing of securities on an exchange are activities of critical importance to the financial markets and the investing public.[45] Listing standards serve as a means for an exchange to screen issuers and to provide listed status only to bona fide companies that have, or in the case of an initial public offering will have, sufficient public float, investor base, and trading interest to provide the depth and liquidity necessary to promote fair and orderly markets.[46] Adequate standards are especially important given the expectations of investors regarding exchange trading and the imprimatur of listing on a particular market.[47] Once a security has been approved for initial listing, continued listing standards allow an exchange to monitor the status and trading characteristics of that security to ensure that it continues to meet the exchange's standards for market depth and liquidity so that fair and orderly markets can be maintained, and so that only companies suitable for listing remain listed on a national securities exchange.

The Commission notes that the Exchange has submitted Amendment No. 1 in an effort to address certain potential concerns with the proposed rule change. However, at this time and for the reasons noted below, the Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act[48] to determine whether the proposed rule change should be disapproved. Institution of such proceedings appears appropriate at this time in view of the legal and policy issues raised by the proposal. Institution of the proceedings, however, does not indicate that the Commission has formulated any conclusions with respect to any of the issues involved. Rather, as described in greater detail below, the Commission seeks and encourages interested persons to comment on the proposed rule change.

The section of the Act applicable to the proposed rule change that provides the grounds for the disapproval (or approval) under consideration is Section 6(b)(5),[49] which requires that the rules of an exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. Specifically, the

[37] *See id.* at p. 6.

[38] *See id.* at p. 6–7.

[39] *See* Madrona Letter, *supra* note 4, at p. 1.

[40] *See id.*

[41] *See id.* at p. 1–2.

[42] According to the Exchange, many institutional investors have investment policies that limit their ownership to securities listed on a national securities exchange, or that prohibit the ownership of securities that only are traded in the OTC market. *See* Notice, *supra* note 3.

[43] For example, BX would require a BX-listed company to have only 200,000 publicly held shares, which is significantly lower than the number of publicly held shares required by exchanges with active listing programs today. *See, e.g.,* NYSE Amex Company Guide Section 102(a) (requiring a minimum public distribution of 500,000 shares and 800 public shareholders, or a minimum public distribution of 1 million shares and 400 public shareholders); NASDAQ Stock Market Rule 5505(a)(2) (requiring a minimum of 1 million publicly held shares); and NYSE Listed Company Manual Section 102.01A (requiring a minimum of 1.1 million publicly held shares). Even "Tier II" listing standards require listed companies to have at least 250,000 publicly held shares. *See, e.g.,* CBOE Rule 31.6(3) (requiring at least 1 million publicly held shares for initial listing of research and development type issuers).

[44] *See, e.g.,* Exchange Act Section 6(b)(5).

[45] *See, e.g.,* Securities Exchange Act Release No. 61912 (April 15, 2010), 75 FR 21094, 21094 (April 22, 2010) (SR–NYSE–2010–15).

[46] *See id.*

[47] *See id.*

[48] 15 U.S.C. 78s(b)(2)(B).

[49] 15 U.S.C. 78f(b)(5).

Exchange is proposing initial and continued listing standards that are significantly lower than those of other exchanges with active listing markets.[50] Among other things, this raises issues as to whether BX-listed securities could be more prone to manipulation by an individual or a few shareholders who acquire a dominant interest in the publicly-held shares compared to other exchange-listed securities. This issue is particularly pronounced with smaller company stocks, which historically have been the targets of manipulative schemes.[51]

The proposed rule change also raises issues as to whether investors will understand that BX-listed securities are very different from other exchange-listed securities, and could pose substantially more investment risk than those listed on other markets due, for example, to their size, financial condition, or limited operational history. This potential for investor confusion may be compounded because, as exchange-listed securities, other exchanges could trade them on an unlisted trading privileges ("UTP") basis.[52] Because the smaller BX-listed securities may be traded UTP on the same platform as larger companies listed by the primary listings markets, this raises issues as to whether investors could have even more difficulty distinguishing between BX-listed securities and other exchange-listed securities.

At the same time, as noted above, the Commission acknowledges that the BX listing market would be an alternative to the OTC market and could provide important benefits to this market segment, including enhanced regulation and increased price transparency. In particular, BX's proposed listing standards would be higher than the requirements for quoting on the OTC Bulletin Board, which does not have any listing requirements per se, but only requires issuers to remain current in their filings with the Commission or other applicable regulatory authorities. For example, as the Exchange notes, the agreement of BX-listed companies to comply with the Exchange's corporate governance standards and the application of the Exchange's public interest authority could provide additional protections to investors than the protections available at their present trading venue. The Commission also notes that trading in BX-listed securities would be subject to regulation through BX's trading rules and surveillance authority. Additionally, the BX listing market could make it easier for companies with smaller market capitalization to raise capital, thereby promoting job creation. Finally, permitting companies with smaller market capitalization to list on BX could provide them with a viable alternative for U.S. listing to listing on non-U.S. markets that may be equivalent to the proposed BX market.

V. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data and arguments with respect to the issues identified above, as well as any others they may have identified with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule change is inconsistent with Section 6(b)(5) or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.[53]

Interested persons are invited to submit written data, views and arguments regarding whether the proposed rule change should be disapproved by January 24, 2011. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by February 8, 2011.

The Commission is asking that commenters address the merit of BX's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change. Specifically, the Commission is requesting comment on the following:

- Do commenters agree with BX's belief that the proposed BX listing market will provide a transparent, well-regulated marketplace for companies with smaller market capitalization contemplating an initial exchange listing and companies delisted from another national securities exchange for failure to meet quantitative listing standards? Why or why not?
- Is the proposed vetting and due diligence process of prospective issuers on the BX listing market sufficient to prevent companies that might erode investor confidence (due to potential fraud) in the market from listing? Why or why not?
- Given that BX-listed companies are likely to be smaller than listed companies on other exchanges, should BX undertake any additional measures (including additional surveillances) to reduce the risk of fraudulent and manipulative behavior with respect to the listing and/or trading of BX-listed securities? Why or why not?
- Do commenters believe there is any likelihood of investor confusion regarding the BX listing market? Would investors be inclined to believe that a BX-listed company is listed on Nasdaq? Are the Exchange's proposed actions to reduce or avoid investor confusion sufficient? Why or why not? If not, what additional measures should the Exchange undertake?
- Do the proposed initial and continued listing standards for the BX listing market assure sufficient liquidity in listed securities? Why or why not? Are there other listing criteria that commenters would suggest to better assure sufficient liquidity in listed securities?
- Are the proposed initial and continued listing standards for the BX listing market sufficiently designed to reduce the risk that an individual or small group of shareholders will be in a position to manipulate the listed security? Why or why not?
- Are the proposed initial and continued listing standards and the delisting process for the BX listing market sufficiently designed to prevent stocks that are of a type that historically have been prone to fraudulent schemes from being listed? Why or why not?
- Do commenters believe that the proposed delisting and appeals procedures and timeframes are sufficient and appropriate? Are the timeframes too long or too short? Why or why not?
- Are the proposed corporate governance standards for the BX listing market sufficiently designed to assure

[50] *See supra* note 43.

[51] *See, e.g.,* Securities Act Release No. 8878 (December 19, 2007), 72 FR 73534, 73536 (December 27, 2007) (S7–10–07) (stating that "[i]t has been observed that the securities of smaller public companies are comparatively more vulnerable to price manipulation than the securities of larger public companies").

[52] Under Exchange Act Section 12(f)(1)(A) and Rule 12f–5 thereunder, a national securities exchange may trade exchange-listed securities on a UTP basis. *See* 15 U.S.C. 78*l*(f)(1)(A) and 17 CFR 240.12f–5. Accordingly, other national securities exchanges would be able to trade BX-listed securities, without obtaining additional Commission approval.

[53] Section 19(b)(2) of the Act, as amended by the Securities Acts Amendments of 1975, Public Law 94–29, 89 Stat. 97 (1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

an appropriate level of corporate governance? Why or why not?

• Do commenters agree with the Exchange's belief that a BX listing could help companies raise capital and thus promote job creation within the United States? Why or why not?

• Has BX sufficiently addressed how quotations and transactions reports relating to BX-listed securities will be disseminated? Will this result in fragmentation of pricing information relating to these securities? Will this undermine the ability of investors to receive best execution? Why or why not?

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 e-mail to *rule-comments@sec.gov.* Please include File Number SR–BX–2010–059 on the subject line.

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BX–2010–059. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–BX–2010–059 and should be submitted on or before January 24, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[54]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–31078 Filed 12–9–10; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF STATE

[Public Notice: 7251]

60-Day Notice of Proposed Information Collections: Two Information Collections

ACTION: Notice of request for public comments.

SUMMARY: The Department of State is seeking Office of Management and Budget (OMB) approval for the information collections described below. The purpose of this notice is to allow 60 days for public comment in the **Federal Register** preceding submission to OMB. We are conducting this process in accordance with the Paperwork Reduction Act of 1995.

• *Title of Information Collection:* Brokering Prior Approval (License).

• *OMB Control Number:* 1405–0142.

• *Type of Request:* Extension of Currently Approved Collection.

• *Originating Office:* Bureau of Political-Military Affairs, Directorate of Defense Trade Controls, PM/DDTC.

• *Form Number:* None.

• *Respondents:* Business and Nonprofit Organizations.

• *Estimated Number of Respondents:* 1,515.

• *Estimated Number of Responses:* 150.

• *Average Hours per Response:* 2 hours.

• *Total Estimated Burden:* 300 hours.

• *Frequency:* On Occasion.

• *Obligation to Respond:* Required to Obtain Benefits.

• *Title of Information Collection:* Annual Brokering Report.

• *OMB Control Number:* 1405–0141.

• *Type of Request:* Extension of Currently Approved Collection.

• *Originating Office:* Bureau of Political-Military Affairs, Directorate of Defense Trade Controls, PM/DDTC.

• *Form Number:* None.

• *Respondents:* Business and Nonprofit Organizations.

• *Estimated Number of Respondents:* 1,515.

• *Estimated Number of Responses:* 1,515.

• *Average Hours Per Response:* 2 hours.

• *Total Estimated Burden:* 3,030 hours.

• *Frequency:* On Occasion.

• *Obligation to Respond:* Mandatory.

DATES: The Department will accept comments from the public up to 60 days from December 10, 2010.

ADDRESSES: Comments and questions should be directed to Nicholas Memos, Office of Defense Trade Controls Policy, Department of State, who may be reached via the following methods:

• *E-mail: memosni@state.gov.*

• *Mail:* Nicholas Memos, SA–1, 12th Floor, Directorate of Defense Trade Controls, Bureau of Political-Military Affairs, U.S. Department of State, Washington, DC 20522–0112.

• *Fax:* 202–261–8199.

You must include the information collection title in the subject lines of your message/letter.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the information collection and supporting documents, to Nicholas Memos, PM/DDTC, SA–1, 12th Floor, Directorate of Defense Trade Controls, Bureau of Political-Military Affairs, U.S. Department of State, Washington, DC, 20522–0112, who may be reached via phone at (202) 663–2804, or via e-mail at *memosni@state.gov*.

SUPPLEMENTARY INFORMATION: We are soliciting public comments to permit the Department to:

• Evaluate whether the proposed collection of information is necessary for the proper performance of our functions.

• Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.

• Enhance the quality, utility, and clarity of the information to be collected.

• Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of technology.

Abstract of proposed collection: The export, temporary import, temporary export and brokering of defense articles, defense services and related technical data are licensed by the Directorate of Defense Trade Controls in accordance with the International Traffic in Arms Regulations (22 CFR parts 120–130) and Section 38 of the Arms Export Control Act. Those of the public who manufacture or export defense articles,

[54] 17 CFR 200.30–3(a)(57).

defense services, and related technical data, or the brokering thereof, must register with the Department of State. Persons desiring to engage in brokering activities must submit an application or written request to conduct the transaction to the Department to obtain a decision whether it is in the interests of U.S. foreign policy and national security to approve the transaction. Also, registered brokers must submit annual reports regarding all brokering activity that was transacted, and registered manufacturers and exporter must maintain records of defense trade activities for five years.

Methodology: These forms/information collections may be sent to the Directorate of Defense Trade Controls via the following methods: electronically, mail, personal delivery, and/or fax.

Dated: December 2, 2010.

Robert S. Kovac,

Managing Director of Defense Trade Controls, Bureau of Political-Military Affairs, U.S. Department of State.

[FR Doc. 2010–31106 Filed 12–9–10; 8:45 am]

BILLING CODE 4710–25–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Determination of Trade Surplus in Certain Sugar and Syrup Goods and Sugar Containing Products of Chile, Morocco, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, and Peru

AGENCY: Office of the United States Trade Representative.

ACTION: Notice.

SUMMARY: In accordance with relevant provisions of the Harmonized Tariff Schedule of the United States (HTS), the Office of the United States Trade Representative (USTR) is providing notice of its determination of the trade surplus in certain sugar and syrup goods and sugar-containing products of Chile, Morocco, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, and Peru. As described below, the level of a country's trade surplus in these goods relates to the quantity of sugar and syrup goods and sugar-containing products for which the United States grants preferential tariff treatment under (i) the United States—Chile Free Trade Agreement (Chile FTA), in the case of Chile; (ii) the United States—Morocco Free Trade Agreement (Morocco FTA), in the case of Morocco; (iii) the Dominican Republic—Central America—United States Free Trade Agreement (CAFTA–DR), in the case of Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua, and (iv) the United States—Peru Trade Promotion Agreement (Peru TPA), in the case of Peru.

DATES: *Effective Date:* December 10, 2010.

ADDRESSES: Inquiries may be mailed or delivered to Tanya Menchi, Director of Agricultural Affairs, Office of Agricultural Affairs, Office of the United States Trade Representative, 600 17th Street, NW., Washington, DC 20508.

FOR FURTHER INFORMATION CONTACT: Tanya Menchi, Office of Agricultural Affairs, telephone: 202–395–6127 or facsimile: 202–395–4579.

SUPPLEMENTARY INFORMATION:

Chile: Pursuant to section 201 of the United States—Chile Free Trade Agreement Implementation Act (Pub. L. 108–77; 19 U.S.C. 3805 note), Presidential Proclamation No. 7746 of December 30, 2003 (68 FR 75789) implemented the Chile FTA on behalf of the United States and modified the HTS to reflect the tariff treatment provided for in the Chile FTA.

U.S. Note 12(a) to subchapter XI of HTS chapter 99 provides that USTR is required to publish annually in the **Federal Register** a determination of the amount of Chile's trade surplus, by volume, with all sources for goods in Harmonized System (HS) subheadings 1701.11, 1701.12, 1701.91, 1701.99, 1702.20, 1702.30, 1702.40, 1702.60, 1702.90, 1806.10, 2101.12, 2101.20, and 2106.90, except that Chile's imports of U.S. goods classified under HS subheadings 1702.40 and 1702.60 that qualify for preferential tariff treatment under the Chile FTA are not included in the calculation of Chile's trade surplus.

U.S. Note 12(b) to subchapter XI of HTS chapter 99 provides duty-free treatment for certain sugar and syrup goods and sugar-containing products of Chile entered under subheading 9911.17.05 in an amount equal to the lesser of Chile's trade surplus or the specific quantity set out in that note for that calendar year.

U.S. Note 12(c) to subchapter XI of HTS chapter 99 provides preferential tariff treatment for certain sugar and syrup goods and sugar-containing products of Chile entered under subheading 9911.17.10 through 9911.17.85 in an amount equal to the amount by which Chile's trade surplus exceeds the specific quantity set out in that note for that calendar year.

During calendar year (CY) 2009, the most recent year for which data is available, Chile's imports of sugar and syrup goods and sugar-containing products described above exceeded its exports of those goods by 584,029 metric tons according to data published by its customs authority, the *Banco Central de Chile.* Based on this data, USTR determines that Chile's trade surplus is negative. Therefore, in accordance with U.S. Note 12(b) and U.S. Note 12(c) to subchapter XI of HTS chapter 99, goods of Chile are not eligible to enter the United States duty-free under subheading 9911.17.05 or at preferential tariff rates under subheading 9911.17.10 through 9911.17.85 in CY2011.

Morocco: Pursuant to section 201 of the United States—Morocco Free Trade Agreement Implementation Act (Pub. L. 108–302; 19 U.S.C. 3805 note), Presidential Proclamation No. 7971 of December 22, 2005 (70 FR 76651) implemented the Morocco FTA on behalf of the United States and modified the HTS to reflect the tariff treatment provided for in the Morocco FTA.

U.S. Note 12(a) to subchapter XII of HTS chapter 99 provides that USTR is required to publish annually in the **Federal Register** a determination of the amount of Morocco's trade surplus, by volume, with all sources for goods in HS subheadings 1701.11, 1701.12, 1701.91, 1701.99, 1702.40, and 1702.60, except that Morocco's imports of U.S. goods classified under HS subheadings 1702.40 and 1702.60 that qualify for preferential tariff treatment under the Morocco FTA are not included in the calculation of Morocco's trade surplus.

U.S. Note 12(b) to subchapter XII of HTS chapter 99 provides duty-free treatment for certain sugar and syrup goods and sugar-containing products of Morocco entered under subheading 9912.17.05 in an amount equal to the lesser of Morocco's trade surplus or the specific quantity set out in that note for that calendar year.

U.S. Note 12(c) to subchapter XII of HTS chapter 99 provides preferential tariff treatment for certain sugar and syrup goods and sugar-containing products of Morocco entered under subheading 9912.17.10 through 9912.17.85 in an amount equal to the amount by which Morocco's trade surplus exceeds the specific quantity set out in that note for that calendar year.

During CY2009, the most recent year for which data is available, Morocco's imports of the sugar and syrup goods and sugar-containing products described above exceeded its exports of those goods by 975,826 metric tons according to data published by its customs authority, the *Office des Changes.* Based on this data, USTR determines that Morocco's trade surplus is negative. Therefore, in accordance

with U.S. Note 12(b) and U.S. Note 12(c) to subchapter XII of HTS chapter 99, goods of Morocco are not eligible to enter the United States duty-free under subheading 9912.17.05 or at preferential tariff rates under subheading 9912.17.10 through 9912.17.85 in CY2011.

CAFTA–DR: Pursuant to section 201 of the Dominican Republic—Central America—United States Free Trade Agreement Implementation Act (Pub. L. 109–53; 19 U.S.C. 4031), Presidential Proclamation No. 7987 of February 28, 2006 (71 FR 10827), Presidential Proclamation No. 7991 of March 24, 2006 (71 FR 16009), Presidential Proclamation No. 7996 of March 31, 2006 (71 FR 16971), Presidential Proclamation No. 8034 of June 30, 2006 (71 FR 38509), Presidential Proclamation No. 8111 of February 28, 2007 (72 FR 10025), Presidential Proclamation No. 8331 of December 23, 2008 (73 FR 79585), and Presidential Proclamation No. 8536 of June 12, 2010 (75 FR 34311) implemented the CAFTA–DR on behalf of the United States and modified the HTS to reflect the tariff treatment provided for in the CAFTA–DR.

U.S. Note 25(b)(i) to subchapter XXII of HTS chapter 98 provides that USTR is required to publish annually in the **Federal Register** a determination of the amount of each CAFTA–DR country's trade surplus, by volume, with all sources for goods in HS subheadings 1701.11, 1701.12, 1701.91, 1701.99, 1702.40, and 1702.60, except that each CAFTA–DR country's exports to the United States of goods classified under HS subheadings 1701.11, 1701.12, 1701.91, and 1701.99 and its imports of U.S. goods classified under HS subheadings 1702.40 and 1702.60 that qualify for preferential tariff treatment under the CAFTA–DR are not included in the calculation of that country's trade surplus.

U.S. Note 25(b)(ii) to subchapter XXII of HTS chapter 98 provides duty-free treatment for certain sugar and syrup goods and sugar-containing products of each CAFTA–DR country entered under subheading 9822.05.20 in an amount equal to the lesser of that country's trade surplus or the specific quantity set out in that note for that country and that calendar year.

During CY2009, the most recent year for which data is available, Costa Rica's exports of the sugar and syrup goods and sugar-containing products described above exceeded its imports of those goods by 25,725 metric tons according to data published by the *Promotora del Comercio Exterior de Costa Rica.* Based on this data, USTR determines that Costa Rica's trade surplus is 25,725 metric tons. The specific quantity set out in U.S. Note 25(b)(ii) to subchapter XXII of HTS chapter 98 for Costa Rica for CY2011 is 12,100 metric tons. Therefore, in accordance with that note, the aggregate quantity of goods of Costa Rica that may be entered duty-free under subheading 9822.05.20 in CY2011 is 12,100 metric tons (*i.e.,* the amount that is the lesser of Costa Rica's trade surplus and the specific quantity set out in that note for Costa Rica for CY2011).

During CY2009, the most recent year for which data is available, the Dominican Republic's exports of the sugar and syrup goods and sugar-containing products described above exceeded its imports of those goods by 20,277 metric tons according to data published by the *Instituto Azucarero Dominicano.* Based on this data, USTR determines that the Dominican Republic's trade surplus is 20,277 metric tons. The specific quantity set out in U.S. Note 25(b)(ii) to subchapter XXII of HTS chapter 98 for the Dominican Republic for CY2011 is 11,000 metric tons. Therefore, in accordance with that note, the aggregate quantity of goods of the Dominican Republic that may be entered duty-free under subheading 9822.05.20 in CY2011 is 11,000 metric tons (*i.e.,* the amount that is the lesser of the Dominican Republic's trade surplus and the specific quantity set out in that note for the Dominican Republic for CY2011).

During CY2009, the most recent year for which data is available, El Salvador's exports of the sugar and syrup goods and sugar-containing products described above exceeded its imports of those goods by 160,248 metric tons according to data published by the *Banco Central de Reserva de El Salvador.* Based on this data, USTR determines that El Salvador's trade surplus is 160,248 metric tons. The specific quantity set out in U.S. Note 25(b)(ii) to subchapter XXII of HTS chapter 98 for El Salvador for CY2011 is 29,120 metric tons. Therefore, in accordance with that note, the aggregate quantity of goods of El Salvador that may be entered duty-free under subheading 9822.05.20 in CY2011 is 29,120 metric tons (*i.e.,* the amount that is the lesser of El Salvador's trade surplus and the specific quantity set out in that note for El Salvador for CY2011).

During CY2009, the most recent year for which data is available, Guatemala's exports of the sugar and syrup goods and sugar-containing products described above exceeded its imports of those goods by 1,490,696 metric tons according to data published by the *Asociación de Azucareros de Guatemala.* Based on this data, USTR determines that Guatemala's trade surplus is 1,490,696 metric tons. The specific quantity set out in U.S. Note 25(b)(ii) to subchapter XXII of HTS chapter 98 for Guatemala for CY2011 is 38,480 metric tons. Therefore, in accordance with that note, the aggregate quantity of goods of Guatemala that may be entered duty-free under subheading 9822.05.20 in CY2011 is 38,480 metric tons (*i.e.,* the amount that is the lesser of Guatemala's trade surplus and the specific quantity set out in that note for Guatemala for CY2011).

During CY2009, the most recent year for which data is available, Honduras' exports of the sugar and syrup goods and sugar-containing products described above exceeded its imports of those goods by 40,230 metric tons according to data published by the *Banco Central de Honduras.* Based on this data, USTR determines that Honduras' trade surplus is 40,230 metric tons. The specific quantity set out in U.S. Note 25(b)(ii) to subchapter XXII of HTS chapter 98 for Honduras for CY2011 is 8,800 metric tons. Therefore, in accordance with that note, the aggregate quantity of goods of Honduras that may be entered duty-free under subheading 9822.05.20 in CY2011 is 8,800 metric tons (*i.e.,* the amount that is the lesser of Honduras' trade surplus and the specific quantity set out in that note for Honduras for CY2011).

During CY2009, the most recent year for which data is available, Nicaragua's exports of the sugar and syrup goods and sugar-containing products described above exceeded its imports of those goods by 60,487 metric tons according to data published by the *Ministerio de Fomento, Industria, y Comercio.* Based on this data, USTR determines that Nicaragua's trade surplus is 60,487 metric tons. The specific quantity set out in U.S. Note 25(b)(ii) to subchapter XXII of HTS chapter 98 for Nicaragua for CY2011 is 24,200 metric tons. Therefore, in accordance with that note, the aggregate quantity of goods of Nicaragua that may be entered duty-free under subheading 9822.05.20 in CY2011 is 24,200 metric tons (*i.e.,* the amount that is the lesser of Nicaragua's trade surplus and the specific quantity set out in that note for Nicaragua for CY2011).

Peru: Pursuant to section 201 of the United States—Peru Trade Promotion Agreement Implementation Act (Pub. L. 110–138; 19 U.S.C. 3805 note), Presidential Proclamation No. 8341 of January 16, 2009 (74 FR 4105) implemented the Peru TPA on behalf of the United States and modified the HTS

to reflect the tariff treatment provided for in the Peru TPA.

U.S. Note 28(c) to subchapter XXII of HTS chapter 98 provides that USTR is required to publish annually in the **Federal Register** a determination of the amount of Peru's trade surplus, by volume, with all sources for goods in HS subheadings 1701.11, 1701.12, 1701.91, 1701.99, 1702.20, 1702.40, and 1702.60, except that Peru's imports of U.S. goods classified under HS subheadings 1702.40 and 1702.60 that are originating goods under the Peru TPA and Peru's exports to the United States of goods classified under HS subheadings 1701.11, 1701.12, 1701.91, and 1701.99 are not included in the calculation of Peru's trade surplus.

U.S. Note 28(d) to subchapter XXII of HTS chapter 98 provides duty-free treatment for certain sugar goods of Peru entered under subheading 9822.06.10 in an amount equal to the lesser of Peru's trade surplus or the specific quantity set out in that note for that calendar year.

During CY2009, the most recent year for which data is available, Peru's imports of the sugar goods described above exceeded its exports of those goods by 64,026 metric tons according to data published by its customs authority, the *Superintendencia Nacional de Administration Tributaria.* Based on this data, USTR determines that Peru's trade surplus is negative. Therefore, in accordance with U.S. Note 28(d) to subchapter XXII of HTS chapter 98, goods of Peru are not eligible to enter the United States duty-free under subheading 9822.06.10 in CY2011.

Islam A. Siddiqui,

Chief Agricultural Negotiator, Office of the U.S. Trade Representative.

[FR Doc. 2010–31055 Filed 12–9–10; 8:45 am]

BILLING CODE 3190–W1–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35447]

Temple & Central Texas Railway, Inc.—Operation Exemption—City of Temple, TX.

Temple & Central Texas Railway, Inc. (TCTR),[1] a Class III carrier, has filed a verified notice of exemption under 49 CFR 1150.41 to operate, pursuant to a Railroad License and Operating Agreement with the City of Temple, Tex. (Temple), an approximately 6.277-mile line of railroad, between milepost 0.0, near Belton, and milepost 6.277, at Smith, in Bell County, Tex. (the line), and the trackage rights granted to the Georgetown Railroad Company (Georgetown) to operate over the line.[2]

TCTR certifies that the projected annual revenues as a result of the proposed transaction will not exceed those that would qualify it as a Class III carrier and will not exceed $5 million.

TCTR states that it expects the transaction to be consummated by February 10, 2011. The earliest this transaction can be consummated is December 24, 2010, the effective date of the exemption (30 days after the exemption was filed).

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Stay petitions must be filed no later than December 17, 2010 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 35447, must be filed with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Louis E. Gitomer, Law Offices of Louis E. Gitomer, 600 Baltimore Avenue, Suite 301, Towson, MD 21204.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: December 7, 2010.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Andrea Pope-Matheson,

Clearance Clerk.

[FR Doc. 2010–31081 Filed 12–9–10; 8:45 am]

BILLING CODE 4915–01–P

[1] TCTR has also concurrently filed a motion for protective order pursuant to 49 CFR 1104.14(b) to allow TCTR to file the unredacted Railroad License and Operating Agreement under seal. That motion will be addressed in a separate decision.

[2] Temple is not a carrier. TCTR states that Temple is filing a petition with the Board to acquire the line from Georgetown.

DEPARTMENT OF THE TREASURY

Financial Management Service; Privacy Act of 1974, as Amended; System of Records

AGENCY: Financial Management Service, Treasury.

ACTION: Withdrawal of a Privacy Act Notice.

SUMMARY: The Department of the Treasury is withdrawing the proposed system of records notice published on behalf of the Financial Management Service.

DATES: December 10, 2010.

FOR FURTHER INFORMATION CONTACT: Dale Underwood, Privacy Act officer, Department of the Treasury, (202) 622–0874.

SUPPLEMENTARY INFORMATION: The Department of the Treasury is withdrawing the proposed system of records notice, "Treasury/FMS .008–Mailing List Records" (Document Number 2010–30297), published on December 3, 2010, at 75 FR 75546. The document will be revised and reissued with additional details and a new 30-day comment period. However, any comments received on the withdrawn notice will also be considered.

Dated: December 6, 2010.

Melissa Hartman,

Deputy Assistant Secretary for Privacy, Transparency, and Records.

[FR Doc. 2010–31083 Filed 12–9–10; 8:45 am]

BILLING CODE 4810–35–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Blocking of Specially Designated National Pursuant to Executive Order 13413

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control ("OFAC") is publishing the names of four individuals whose property and interests in property have been blocked pursuant to Executive Order 13413 of October 27, 2006, "Blocking Property of Certain Persons Contributing to the Conflict in the Democratic Republic of Congo."

DATES: The designation by the Director of OFAC of the four individuals identified in this notice, pursuant to Executive Order 13413 of October 27, 2006, is effective on December 2, 2010.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, *tel.:* 202/622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's Web site (*http://www.treas.gov/ofac*) and via

facsimile through a 24-hour fax-on-demand service, *tel.:* (202) 622–0077.

Background

On October 27, 2006, the President signed Executive Order 13413 (the "Order" or "E.O. 13413") pursuant to, inter alia, the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA), section 5 of the United Nations Participation Act, as amended (22 U.S.C. 287c) (UNPA), and section 301 of title 3, United States Code. In the Order, the President found that the situation in the Democratic Republic of the Congo constitutes an unusual and extraordinary threat and imposed sanctions to address it. The President identified seven individuals in the Annex to the Order as subject to these economic sanctions.

Section 1 of the Order blocks, with certain exceptions, all property and interests in property that are in, or thereafter come within, the United States, or within the possession or control of United States persons, of the persons identified by the President in the Annex to the Order, as well as those persons determined by the Secretary of the Treasury, after consultation with the Secretary of State, to meet any of the criteria set forth in subparagraphs (a)(i)–(a)(ii)(G) of Section 1.

On December 2, 2010, the Director of OFAC exercised the Secretary of the Treasury's authority to designate, pursuant to one or more of the criteria set forth in Section 1 of the Order, the individuals listed below, whose property and interests in property therefore are blocked pursuant to E.O. 13413.

The listing of the blocked individuals appears as follows:

1. NSANZUBUKIRE, Felicien (a.k.a. IRAKEZA, Fred); DOB 1967; POB Murama, Kinyinya, Rubungo, Kigali, Rwanda; nationality Rwanda; Lt. Col. (individual) [DRCONGO]

2. ZIMURINDA, Innocent; DOB 1 Sep 1972; alt. DOB 1975; POB Ngungu, Masisi Territory, North Kivu province, Democratic Republic of the Congo; Lt. Col. (individual) [DRCONGO]

3. IYAMUREMYE, Gaston (a.k.a. BYIRINGIRO, Michel; a.k.a. RUMULI; a.k.a. RUMULI, Byiringiro Victor; a.k.a. RUMULI, Michel; a.k.a. RUMURI, Victor), Kibua, North Kivu, Congo, Democratic Republic of the; DOB 1948; POB Musanze District (Northern Province), Rwanda; alt. POB Nyakinama, Ruhengeri, Rwanda; FDLR President; FDLR 2nd Vice President; Brigadier General (individual) [DRCONGO]

4. MUGARAGU, Leodomir (a.k.a. LEON, Manzi; a.k.a. MANZI, Leo), Katoyi, North Kivu, Congo, Democratic Republic of the; DOB 1954; alt. DOB 1953; POB Kigali, Rwanda; alt. POB Rushashi (Northern Province), Rwanda; FDLR/FOCA Chief of Staff; Brigadier General (individual) [DRCONGO]

Dated: December 2, 2010.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. 2010–31082 Filed 12–9–10; 8:45 am]

BILLING CODE 4811–45–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Notice 2005–62

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Notice 2005–62, Modification of Notice 2005–04; Biodiesel and Aviation-Grade Kerosene.

DATES: Written comments should be received on or before February 8, 2011 to be assured of consideration.

ADDRESSES: Direct all written comments to Allan Hopkins, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Joel Goldberger at Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 927–9368, or through the Internet at *Joel.P.Goldberger@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Modification of Notice 2005–04; Biodiesel and Aviation-Grade Kerosene.

OMB Number: 1545–1915.

Notice Number: Notice 2005–62.

Abstract: This notice modifies Notice 2005–4, 2005–2 I.R.B. 289, as modified by Notice 2005–24, 2005–12 I.R.B. 757, by revising the guidance relating to the Certificate for Biodiesel, which is required as a condition for claiming a credit or payment under §§ 6426(c), 6427(e), and 40A of the Internal Revenue Code. This notice also provides guidance on issues related to the biodiesel credit or payment that are not addressed in Notice 2005–4. This notice further modifies Notice 2005–4 relating to the Certificate of Person Buying Aviation-Grade Kerosene for Commercial Aviation or Nontaxable Use, which is required to notify a position holder of certain transactions under §§ 4081 and 4082. Notice 2005–04 provides guidance on certain excise tax Code provisions that were added or effected by the American Jobs Creation Act of 2004. The information will be used by the IRS to verify that the proper amount of tax is reported, excluded, refunded, or credited.

Current Actions: There are no changes being made to the notice at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, not-for-profit institutions, farms, Federal, state, local or tribal governments.

Estimated Number of Respondents: 20,263.

Estimated Time per Respondent: 3 hours, 46 minutes.

Estimated Total Annual Burden Hours: 76,190.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital

or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: November 30, 2010.

Allan Hopkins,

IRS Reports Clearance Officer.

[FR Doc. 2010–31026 Filed 12–9–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8941

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8941, Credit for Small Employer Health Insurance Premiums.

DATES: Written comments should be received on or before February 8, 2011 to be assured of consideration.

ADDRESSES: Direct all written comments to Allan Hopkins, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to R. Joseph Durbala, (202) 622–3634, at Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet at *RJoseph.Durbala@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Credit for Small Employer Health Insurance Premiums.

OMB Number: 1545–2198.

Form Number: Form 8941.

Abstract: Section 1421 of the Patient Protection and Affordable Care Act, Public Law 111–148, allows qualified small employers to elect, beginning in 2010, a tax credit for 50% of their employee health care coverage expenses. Form 8941, Credit for Small Employer Health Insurance Premiums, has been developed to help employers compute the tax credit.

Current Actions: There were no changes made to the document that resulted in any change to the burden previously reported to OMB. We are making this submission to renew the OMB approval.

Type of Review: Extension of previously approved collection.

Affected Public: Individuals or households, Business or other for-profit groups, Not-for-profit institutions, Farms, Federal Government, State, Local, or Tribal Governments.

Estimated Number of Responses: 3,046,964.

Estimated Time per Respondent: 16 hours 59 minutes.

Estimated Total Annual Burden Hours: 40,189,456.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: December 1, 2010.

Allan Hopkins,

IRS Reports Clearance Officer.

[FR Doc. 2010–31023 Filed 12–9–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8886

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8886, Reportable Transaction Disclosure Statement.

DATES: Written comments should be received on or before February 8, 2011 to be assured of consideration.

ADDRESSES: Direct all written comments to Allan M. Hopkins, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Ralph M. Terry, 202–622–8144, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet at *Ralph.M.Terry@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Reportable Transaction Disclosure Statement.

OMB Number: 1545–1800.

Form Number: 8886.

Abstract: Regulation section 1.6011–4 requires certain taxpayers to disclose reportable transactions in which they directly or indirectly participated.

Current Actions: There are no changes to the form however, there has been a reduction in the burden computation by 680 total hours due to a corrected tabulation of the previously approved collection.

Type of Review: Revision of a currently approved collection.

Affected Public: Business or other for-profit organizations, and individuals.

Estimated Number of Respondents: 400.

Estimated Time per Respondent: 20 hours, 34 minutes.

Estimated Total Annual Burden Hours: 8,904.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: November 30, 2010.

Allan M. Hopkins,

IRS Reports Clearance Officer.

[FR Doc. 2010–31024 Filed 12–9–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

Operating Subsidiary

AGENCY: Office of Thrift Supervision (OTS), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The proposed information collection request (ICR) described below has been submitted to the Office of Management and Budget (OMB) for review and approval, as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3507. OTS is soliciting public comments on the proposal.

DATES: Submit written comments on or before January 10, 2011. A copy of this ICR, with applicable supporting documentation, can be obtained from RegInfo.gov at *http://www.reginfo.gov/public/do/PRAMain.*

ADDRESSES: Send comments, referring to the collection by title of the proposal or by OMB approval number, to OMB and OTS at these addresses: Office of Information and Regulatory Affairs, *Attention:* Desk Officer for OTS, U.S. Office of Management and Budget, 725 17th Street, NW., Room 10235,Washington, DC 20503, or by fax to (202) 393–6974; and Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, by fax to (202) 906–6518, or by e-mail to *infocollection.comments@ots.treas.gov.* OTS will post comments and the related index on the OTS Internet Site at *http://www.ots.treas.gov.* In addition, interested persons may inspect comments at the Public Reading Room, 1700 G Street, NW., Washington, DC 20552 by appointment. To make an appointment, call (202) 906–5922, send an e-mail to *public.info@ots.treas.gov,* or send a facsimile transmission to (202) 906–7755.

FOR FURTHER INFORMATION CONTACT: For further information or to obtain a copy of the submission to OMB, please contact Ira L. Mills at, *ira.mills@ots.treas.gov,* or on (202) 906–6531, or facsimile number (202) 906–6518, Regulations and Legislation Division, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: OTS may not conduct or sponsor an information collection, and respondents are not required to respond to an information collection, unless the information collection displays a currently valid OMB control number. As part of the approval process, we invite comments on the following information collection.

Title of Proposal: Operating Subsidiary.

OMB Number: 1550–0077.

Form Number: N/A.

Description: 12 CFR part 559 permits federally chartered savings associations to establish and acquire operating subsidiaries. The savings association requesting to establish or acquire an operating subsidiary must provide the OTS with prior notification through either an application or a notice. OTS reviews the information to determine whether the savings association's request is in accordance with existing statutory and regulatory criteria.

OTS analyzes the information contained in the notice or application to determine if the savings association is in compliance with applicable statutes, regulations and policies.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 43.

Estimated Frequency of Response: On occasion.

Estimated Total Burden: 602 hours.

Clearance Officer: Ira L. Mills, (202) 906–6531, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

Dated: December 6, 2010.

Ira L. Mills,

Paperwork Clearance Officer, Office of Chief Counsel, Office of Thrift Supervision.

[FR Doc. 2010–31043 Filed 12–9–10; 8:45 am]

BILLING CODE 6720–01–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

Statement on Sound Practices Concerning Elevated Risk Complex Structured Finance Activities

AGENCY: Office of Thrift Supervision (OTS), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The proposed information collection request (ICR) described below has been submitted to the Office of Management and Budget (OMB) for review and approval, as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3705. OTS is soliciting public comments on the proposal.

DATES: Submit written comments on or before January 10, 2011. A copy of this ICR, with applicable supporting documentation, can be obtained from RegInfo.gov at *http://www.reginfo.gov/public/do/PRAMain.*

ADDRESSES: Send comments, referring to the collection by title of the proposal or by OMB approval number, to OMB and OTS at these addresses: Office of Information and Regulatory Affairs, *Attention:* Desk Officer for OTS, U.S. Office of Management and Budget, 725 17th Street, NW., Room 10235, Washington, DC 20503, or by fax to (202) 393–6974; and Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, by fax to (202) 906–6518, or by e-mail to *infocollection.comments@ots.treas.gov.* OTS will post comments and the related index on the OTS Internet Site at *http://www.ots.treas.gov.* In addition, interested persons may inspect

comments at the Public Reading Room, 1700 G Street, NW., Washington, DC 20552 by appointment. To make an appointment, call (202) 906–5922, send an e-mail to *public.info@ots.treas.gov,* or send a facsimile transmission to (202) 906–7755.

FOR FURTHER INFORMATION CONTACT: For further information or to obtain a copy of the submission to OMB, please contact Ira L. Mills at, *ira.mills@ots.treas.gov,* or call (202) 906–6531, or facsimile number (202) 906–6518, Regulations and Legislation Division, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: OTS may not conduct or sponsor an information collection, and respondents are not required to respond to an information collection, unless the information collection displays a currently valid OMB control number. As part of the approval process, we invite comments on the following information collection.

Title of Proposal: Statement on Sound Practices Concerning Elevated Risk Complex Structured Finance Activities.

OMB Number: 1550–0111.

Form Number: N/A.

Description: Statement on Sound Practices Concerning Elevated Risk Complex Structured Finance Activities describes the types of internal controls and risk management procedures that the OTS believes are particularly effective in assisting financial institutions to identify and address the reputational, legal, and other risks associated with complex structured finance activities.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 1.

Estimated Frequency of Response: On occasion.

Estimated Total Burden: 25 hours.

Clearance Officer: Ira L. Mills, (202) 906–6531, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

Dated: December 6, 2010.

Ira L. Mills,

Paperwork Clearance Officer, Office of Chief Counsel, Office of Thrift Supervision.

[FR Doc. 2010–31044 Filed 12–9–10; 8:45 am]

BILLING CODE 6720–01–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

Fair Credit Reporting Affiliate Marketing Regulations

AGENCY: Office of Thrift Supervision (OTS), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The proposed information collection request (ICR) described below has been submitted to the Office of Management and Budget (OMB) for review and approval, as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3507. OTS is soliciting public comments on the proposal.

DATES: Submit written comments on or before January 10, 2011. A copy of this ICR, with applicable supporting documentation, can be obtained from RegInfo.gov at *http://www.reginfo.gov/public/do/PRAMain.*

ADDRESSES: Send comments, referring to the collection by title of the proposal or by OMB approval number, to OMB and OTS at these addresses: Office of Information and Regulatory Affairs, *Attention:* Desk Officer for OTS, U.S. Office of Management and Budget, 725 17th Street, NW., Room 10235, Washington, DC 20503, or by fax to (202) 393–6974; and Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, by fax to (202) 906–6518, or by e-mail to *infocollection.comments@ots.treas.gov.* OTS will post comments and the related index on the OTS Internet Site at *http://www.ots.treas.gov.* In addition, interested persons may inspect comments at the Public Reading Room, 1700 G Street, NW., Washington, DC 20552 by appointment. To make an appointment, call (202) 906–5922, send an e-mail to *public.info@ots.treas.gov,* or send a facsimile transmission to (202) 906–7755.

FOR FURTHER INFORMATION CONTACT: For further information or to obtain a copy of the submission to OMB, please contact Ira L. Mills at, *ira.mills@ots.treas.gov,* or call (202) 906–6531, or facsimile number (202) 906–6518, Regulations and Legislation Division, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: OTS may not conduct or sponsor an information collection, and respondents are not required to respond to an information collection, unless the information collection displays a currently valid OMB control number. As part of the approval process, we invite comments on the following information collection.

Title of Proposal: Fair Credit Reporting Affiliate Marketing Regulations.

OMB Number: 1550–0112.

Form Number: N/A.

Description: Section 214 of the Fair and Accurate Credit Transactions Act of 2003, which added new section 624 to the Fair Credit Reporting Act, generally prohibits a person from using certain information received from an affiliate to make a solicitation for marketing purposes to the consumer, unless the consumer is given notice and an opportunity and simple method to opt out of making such solicitations. Section 214 also required the OTS, the Securities and Exchange Commission, and the Federal Trade Commission, in consultation and coordination with each other, to issue regulations implementing section 214 that, to the extent possible, are consistent and comparable.

Consumers will use the information in the disclosures to decide whether to opt out of their institutions' affiliate marketing practices. Respondent entities will use the opt out notices to manage their affiliate marketing practices appropriately.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 193,479.

Estimated Frequency of Response: On occasion.

Estimated Total Burden: 25,834 hours.

Clearance Officer: Ira L. Mills, (202) 906–6531, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

Dated: December 6, 2010.

Ira L. Mills,

Paperwork Clearance Officer, Office of Chief Counsel, Office of Thrift Supervision.

[FR Doc. 2010–31041 Filed 12–9–10; 8:45 am]

BILLING CODE 6720–01–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

[Docket ID OTS–2010–0033]

Mutual Savings Association Advisory Committee

AGENCY: Department of the Treasury, Office of Thrift Supervision.

ACTION: Notice.

SUMMARY: The Acting Director of the Office of Thrift Supervision has determined that the renewal of the

Charter of the OTS Mutual Savings Association Advisory Committee is necessary and in the public interest in order to study the needs of and challenges facing mutual savings associations.

DATES: The Charter of the OTS Mutual Savings Association Advisory Committee will renew for a two-year period beginning November 23, 2010.

FOR FURTHER INFORMATION CONTACT: Charlotte M. Bahin, Designated Federal Official, (202) 906–6452, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: Notice is hereby given under Section 10(a)(2) of the Federal Committee Act, 5 U.S.C. App. (1988), and with the approval of the Secretary of the Treasury, of the announcement of the renewal of the OTS Mutual Savings Association Advisory Committee (MSAAC) . The Acting Director of the Office of Thrift Supervision (OTS) has determined that the renewal of the Charter of the OTS Mutual Savings Association Advisory Committee is necessary and in the public interest. The Committee will advise OTS on ways to meet the goals established by section 5(a) of the Home Owners Loan Act (HOLA), 12 U.S.C. 1464. The MSAAC will advise the Acting Director with regard to mutual associations on means to: (1) Provide for the organization, incorporation, examination, operation and regulation of associations to be known as Federal savings associations (including Federal savings banks); and (2) issue charters therefore, giving primary consideration of the best practices of thrift institutions in the United States. The Mutual Savings Association Advisory Committee will help meet those goals by providing OTS with informed advice and recommendations regarding the current and future circumstances and needs of mutual savings associations.

Dated: December 3, 2010.

By the Office of Thrift Supervision.

Deborah Dakin,

Acting Chief Counsel.

[FR Doc. 2010–31021 Filed 12–9–10; 8:45 am]

BILLING CODE 6720–01–P

Federal Register

Friday,

December 10, 2010

Part II

Securities and Exchange Commission

31 Parts 275 and 279

Rules Implementing Amendments to the Investment Advisers Act of 1940; Proposed Rules

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 275 and 279

[Release No. IA–3110; File No. S7–36–10]

RIN 3235–AK82

Rules Implementing Amendments to the Investment Advisers Act of 1940

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission is proposing new rules and rule amendments under the Investment Advisers Act of 1940 to implement provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act. These rules and rule amendments are designed to give effect to provisions of Title IV of the Dodd-Frank Act that, among other things, increase the statutory threshold for registration by investment advisers with the Commission, require advisers to hedge funds and other private funds to register with the Commission, and require reporting by certain investment advisers that are exempt from registration. In addition, we are proposing rule amendments, including amendments to the Commission's pay-to-play rule, that address a number of other changes to the Advisers Act made by the Dodd-Frank Act.

DATES: Comments must be received on or before January 24, 2011.

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 e-mail to *rule-comments@sec.gov.* Please include File Number S7–36–10 on the subject line; or
- Use the Federal Rulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–36–10. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Web site (*http://www.sec.gov/rules/proposed.shtml*). Comments are also available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Jennifer R. Porter, Attorney-Adviser, Daniele Marchesani, Senior Counsel, Melissa A. Roverts, Senior Counsel, Devin F. Sullivan, Senior Counsel, Matthew N. Goldin, Branch Chief, Daniel S. Kahl, Branch Chief, or Sarah A. Bessin, Assistant Director, at (202) 551–6787 or *IArules@sec.gov,* Office of Investment Adviser Regulation, Division of Investment Management, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–8549.

SUPPLEMENTARY INFORMATION: The Commission is proposing rules 203A–5 and 204–4 [17 CFR 275.203A–5 and 275.204–4] under the Investment Advisers Act of 1940 [15 U.S.C. 80b] ("Advisers Act" or "Act"),[1] amendments to rules 0–7, 203A–1, 203A–2, 203A–3, 204–1, 204–2, 206(4)–5, 222–1, and 222–2 [17 CFR 275.0–7, 275.203A–1, 275.203A–2, 275.203A–3, 275.204–1, 275.204–2, 275.206(4)–5, 275. 222–1, and 275.222–2] under the Advisers Act, and amendments to Form ADV, Form ADV–H, and Form ADV–NR [17 CFR 279.1, 279.3, and 279.4] under the Advisers Act. The Commission is also proposing to rescind rule 203A–4 [17 CFR 275.203A–4] under the Advisers Act.

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[1] 15 U.S.C. 80b. Unless otherwise noted, when we refer to the Advisers Act, or any paragraph of the Advisers Act, we are referring to 15 U.S.C. 80b of the United States Code, at which the Advisers Act is codified, and when we refer to rule 0–7, rule 202(a)(11)–1, rule 203(b)(3)–1, rule 203(b)(3)–2, rule 203A–1, rule 203A–2, rule 203A–3, rule 203A–4, rule 203A–5, rule 204–1, rule 204–2, rule 204–4, rule 206(4)–5, rule 222–1, or rule 222–2, or any paragraph of these rules, we are referring to 17 CFR 275.0–7, 17 CFR 275.202(a)(11)–1, 17 CFR 275.203(b)(3)–1, 17 CFR 275.203(b)(3)–2, 17 CFR 275.203A–1, 17 CFR 275.203A–2, 17 CFR 275.203A–3, 17 CFR 275.203A–4, 17 CFR 275.203A–5, 17 CFR 275.204–1, 17 CFR 275.204–2, 17 CFR 275.204–4, 17 CFR 275.206(4)–5, 17 CFR 275.222–1, or 17 CFR 275.222–2, respectively, of the Code of Federal Regulations, in which these rules are published, or would be published, if adopted.

APPENDIX B: Form ADV: Instructions for Part 1A
APPENDIX C: Form ADV: Glossary of Terms
APPENDIX D: Form ADV, Part 1A
APPENDIX E: Form ADV Execution Pages
APPENDIX F: Form ADV–H
APPENDIX G: Form ADV–NR

I. Background

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") which, among other things, amends certain provisions of the Advisers Act.[2] Title IV of the Dodd-Frank Act includes most of the amendments to the Advisers Act. These amendments include provisions that reallocate responsibility for oversight of investment advisers by delegating generally to the states responsibility over certain mid-sized advisers, *i.e.,* those that have between $25 and $100 million of assets under management.[3] This provision will require a significant number of advisers currently registered with the Commission to withdraw their registrations with the Commission and to switch to registration with one or more State securities authorities. In addition, Title IV repeals the "private adviser exemption" contained in section 203(b)(3) of the Advisers Act under which advisers, including those to many hedge funds, private equity funds and venture capital funds, had relied in order to avoid registration under the Act and our oversight.[4] In eliminating this provision, Congress created, or directed us to adopt other, in some ways narrower, exemptions for advisers to certain types of private funds—*e.g.,* venture capital funds—which provide that the Commission shall require such advisers to submit reports "as the Commission determines necessary or appropriate in the public interest."[5] These provisions in Title IV of the Dodd-Frank Act will be effective on July 21, 2011.[6]

We are proposing to adopt new rules and amend existing rules and forms to give effect to these provisions. In addition, we are proposing rule amendments, including amendments to the Commission's "pay to play" rule, that address a number of other changes to the Advisers Act made by the Dodd-Frank Act. Also, in light of our increased responsibility for oversight of private funds, we are proposing to require advisers to those funds to provide us with additional information about the operation of those funds. As discussed in more detail below, this information would permit us to provide better oversight of these advisers by focusing our examination and enforcement resources on those advisers to private funds that appear to present greater compliance risks. Finally, we are proposing additional changes to Form ADV that we believe would enhance our oversight of advisers and also will enable us to identify advisers that are subject to the Dodd-Frank Act's requirements concerning certain incentive-based compensation arrangements.[7]

II. Discussion

A. Eligibility for Registration With the Commission: Section 410

Section 203A of the Advisers Act generally prohibits an investment adviser regulated by the State in which it maintains its principal office and place of business from registering with the Commission unless it has at least $25 million of assets under management,[8] and preempts certain State laws regulating advisers that are registered with the Commission.[9] This provision, enacted in 1996 as part of the National Securities Markets Improvement Act ("NSMIA"), eliminated the duplicative regulation of advisers by the Commission and State securities authorities, making the states the primary regulators of smaller advisers and the Commission the primary regulator of larger advisers.[10]

Section 410 of the Dodd-Frank Act creates a new group of "mid-sized advisers" and shifts primary responsibility for their regulatory oversight to the State securities authorities. It does this by prohibiting from registering with the Commission an investment adviser that is registered as an investment adviser in the State in which it maintains its principal office and place of business and that has assets under management between $25 million and $100 million.[11] Unlike a small adviser, a mid-sized adviser is not prohibited from registering with the Commission: (i) If the adviser is not required to be registered as an

[2] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

[3] *See* section 410 of the Dodd-Frank Act; Advisers Act section 203A. *See also* National Securities Markets Improvement Act of 1996, Public Law 104–290, 110 Stat. 3416, § 303 (1996) ("NSMIA") (allocating to states responsibility for small investment advisers with less than $25 million in assets under management).

[4] *See* section 403 of the Dodd-Frank Act. Section 203(b)(3) exempts from registration any investment adviser who during the course of the preceding twelve months has had fewer than fifteen clients and who neither holds himself out generally to the public as an investment adviser nor acts as an investment adviser to any investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1) ("Investment Company Act"), or a company which has elected to be a business development company pursuant to section 54 of the Investment Company Act (15 U.S.C. 80a–54). Section 403 of the Dodd-Frank Act eliminates this "private adviser" exemption from section 203(b)(3) and replaces it with a new exemption for "foreign private advisers." We are proposing a rule to clarify the definition of a "foreign private adviser" in a separate release. *Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers,* Investment Advisers Act Release No. 3111, published elsewhere in this issue of the **Federal Register** ("Exemptions Release"). Commenters wishing to address issues related to foreign private advisers should submit comments on the Exemptions Release.

[5] *See* sections 407 and 408 of the Dodd-Frank Act ("The Commission shall require [such advisers to] provide to the Commission such annual or other reports as the Commission determines necessary or appropriate in the public interest or for the protection of investors"). Section 407 of the Dodd-Frank Act, which adds section 203(l) to the Advisers Act, exempts advisers solely to one or more venture capital funds. Section 408, which added section 203(m) to the Advisers Act, exempts advisers solely to private funds with assets under management in the United States of less than $150 million.

[6] *See* section 419 of the Dodd-Frank Act. For purposes of this Release, when we refer to the effective date of the Dodd-Frank Act, we are referring to the effective date of Title IV, which is July 21, 2011, unless we indicate otherwise.

[7] *See* section 956 of the Dodd-Frank Act.

[8] Advisers Act section 203A(a)(1). The prohibition does not apply if the investment adviser is an adviser to an investment company registered under the Investment Company Act, or the adviser is eligible for one of six exemptions the Commission has adopted. *See id.;* rule 203A–2; *infra* section II.A.5. of this Release. Section 403 of the Dodd-Frank Act also added exemptions to Section 203 of the Advisers Act for: (i) Any investment adviser that is registered with the Commodity Futures Trading Commission as a commodity trading advisor and advises a private fund; and (ii) any investment adviser, other than a business development company, that solely advises certain small business investment companies.

[9] An investment adviser must register with the Commission unless it is prohibited from registering under section 203A of the Advisers Act or is exempt from registration under section 203(b). Advisers Act section 203(a). Investment advisers that are prohibited from registering with the Commission are subject to regulation by the states, but the anti-fraud provisions of the Advisers Act continue to apply to them. *See* Advisers Act sections 203A(b), 206. For SEC-registered investment advisers, State laws requiring registration, licensing and qualification are preempted, but states may investigate and bring enforcement actions alleging fraud or deceit, may require notice filings of documents filed with the Commission, and may require investment advisers to pay State notice filing fees. *See* Advisers Act section 203A(b); NSMIA, *supra* note 3, at sections 307(a) and (b). The Dodd-Frank Act did not amend sections 203A(a)(1) or 203(a) of the Advisers Act. *See* section 410 of the Dodd-Frank Act.

[10] *See* S. Rep. No. 104–293, at 4 (1996). *See also Rules Implementing Amendments to the Investment Advisers Act of 1940,* Investment Advisers Act Release No. 1633, section I (May 15, 1997) [62 FR 28112 (May 22, 1997)] ("NSMIA Adopting Release").

[11] *See* section 410 of the Dodd-Frank Act. This amendment increases the threshold above which all investment advisers must register with the Commission from $25 million to $100 million. *See* S. Rep. No. 111–176, at 76 (2010) ("Senate Committee Report").

investment adviser with the securities commissioner (or any agency or office performing like functions) of the State in which it maintains its principal office and place of business; (ii) if registered, the adviser would not be subject to examination as an investment adviser by that securities commissioner; or (iii) if the adviser is required to register in 15 or more states.[12] Section 203A(c) of the Advisers Act, which was not amended by the Dodd-Frank Act, permits the Commission to exempt advisers from the prohibition on Commission registration, including small and mid-sized advisers, if the application of the prohibition from registration would be "unfair, a burden on interstate commerce, or otherwise inconsistent with the purposes" of section 203A.[13] Under this authority, we have adopted six exemptions from the prohibition on registration.[14]

As a consequence of section 410 of the Dodd-Frank Act, we estimate that approximately 4,100 SEC-registered advisers will be required to withdraw their registrations and register with one or more State securities authorities.[15] We are working closely with the State securities authorities to assure an orderly transition of investment adviser registrants to State regulation. In addition, we are today proposing rules and rule amendments that would provide us a means of identifying advisers that must transition to State regulation, clarify the application of new statutory provisions, and modify certain of the exemptions from the prohibition on registration that we have adopted under section 203A of the Act.

1. Transition to State Registration

We are proposing a new rule, rule 203A–5, which would require *each* investment adviser registered with us on July 21, 2011 to file an amendment to its Form ADV no later than August 20, 2011, 30 days after the July 21, 2011 effective date of the amendments to section 203A, and to report the market value of its assets under management determined within 30 days of the filing.[16] This filing would be the first step by which an adviser no longer eligible for Commission registration would transition to State registration. It would require each investment adviser to determine whether it meets the revised eligibility criteria for Commission registration, and would provide the Commission and the State regulatory authorities with information necessary to identify those advisers required to transition to State registration and to understand the reason for the transition or basis for continued Commission registration.[17] An adviser no longer eligible for Commission registration would have to withdraw its Commission registration by filing Form ADV–W no later than October 19, 2011 (60 days after the required refiling of Form ADV).[18] We would expect to cancel the registration of advisers that fail to file an amendment or withdraw their registrations in accordance with the rule.[19] Finally, the proposed rule would permit us to postpone the effectiveness of, and impose additional terms and conditions on, an adviser's withdrawal from SEC registration if we institute certain proceedings before the adviser files Form ADV–W.[20]

We propose to use our exemptive authority under section 203A(c)[21] to provide for a transitional process with two "grace periods," the first providing 30 days from the July 21, 2011 effective date of the Dodd-Frank Act for an adviser to determine whether it is eligible for Commission registration and to file an amended Form ADV, and the second providing an additional 60 days (following the end of the first 30-day period) for an adviser to register in the states and to arrange for its associated persons to qualify for investment adviser representative registration, which may include preparing for and passing an examination, before withdrawing from Commission registration.[22] We are proposing a 90-day transition process, which is shorter than the 180-day transition period that our rules currently provide for advisers switching from SEC to State registration, in order to promptly implement this Congressional mandate and accommodate the processing of renewals and fees for State registration and licensing via the IARD system, while allowing for an orderly transition.[23]

We request comment on proposed rule 203A–5. Specifically, we request comment on the proposed transition process, including the amount of time we propose for advisers to transition to State registration by filing an amended

[12] *See* section 410 of the Dodd-Frank Act. A mid-sized adviser also will be required to register with the Commission if it is an adviser to a registered investment company or business development company under the Investment Company Act. *Id.* As a result, mid-sized advisers to registered investment companies and business development companies will not have to withdraw their Commission registrations. *Compare* section 410 of the Dodd-Frank Act *with* Advisers Act section 203A(a)(1).

[13] The Commission's exercise of this authority would not only permit registration with the Commission, but would result in the preemption of State law with respect to the advisers that register with us as a result of the exemption. *See* Advisers Act sections 203(a), 203A(b) and (c).

[14] *See* rule 203A–2 (permitting the following types of advisers to register with the Commission: (i) Nationally recognized statistical rating organizations ("NRSROs"); (ii) pension consultants; (iii) investment advisers affiliated with an adviser registered with the Commission; (iv) investment advisers expecting to be eligible for Commission registration within 120 days of filing Form ADV; (v) multi-State investment advisers; and (vi) internet advisers).

[15] According to data from the Investment Adviser Registration Depository ("IARD") as of September 1, 2010, 4,136 SEC-registered advisers either: (i) Had assets under management between $25 million and $100 million and did not indicate on Form ADV Part 1A that they are relying on an exemption from the prohibition on Commission registration; or (ii) were permitted to register with us because they rely on the registration of an SEC-registered affiliate that has assets under management between $25 million and $100 million and are not relying on an exemption.

[16] Proposed rule 203A–5(a). We propose to give advisers 30 days from the effective date of the Dodd-Frank Act to prepare and submit the amended Form ADV. This approach would avoid requiring an adviser to respond to items about its eligibility to register with the Commission *before* the statutory changes affecting that eligibility will be effective on July 21, 2011. The additional 30 days would provide an adviser with the opportunity to evaluate the effect of the legislation (and our rules) on its eligibility and seek the advice of legal counsel, if necessary, before submitting an amendment. By permitting a 30-day period we also seek to avoid a large volume of filings on a single day (*i.e.,* July 21).

[17] Proposed amended Item 2.A. of Form ADV, Part 1A would reflect the requirements of the Advisers Act (as amended by the Dodd-Frank Act) and the related rules, and would require an investment adviser to mark Item 2.A.(13) if the adviser is no longer eligible to remain registered with the Commission. For a discussion of the proposed rules, see *infra* sections II.A.5. and II.A.7. of this Release, and for a discussion of Item 2.A, see *infra* section II.A.2. of this Release.

[18] Proposed rule 203A–5(b).

[19] *See* Advisers Act section 203(h). As provided in the Advisers Act, an adviser would be given appropriate notice and opportunity for hearing to show why its registration should not be cancelled. Advisers Act section 211(c).

[20] Proposed rule 203A–5(c) ("If, prior to the effective date of the withdrawal from registration of an investment adviser on Form ADV–W, the Commission has instituted a proceeding pursuant to section 203(e) * * * to suspend or revoke registration, or pursuant to section 203(h) * * * to impose terms or conditions upon withdrawal, the withdrawal from registration shall not become effective except at such time and upon such terms and conditions as the Commission deems necessary or appropriate in the public interest or for the protection of investors."). This language largely is consistent with rule 203A–5 adopted after NSMIA. *See* NSMIA Adopting Release, *supra* note 10.

[21] *See supra* note 13 and accompanying text.

[22] Proposed rule 203A–5. We would also amend the instructions on Form ADV to explain this process. *See* proposed Form ADV: General Instructions (special one-time instruction for Dodd-Frank transition filing for SEC-registered advisers).

[23] Our current rule provides an SEC-registered adviser that has to switch to State registration a period of 180 days after its fiscal year end to file an annual amendment to Form ADV and to withdraw its SEC registration after reporting to us that it is no longer eligible to remain registered with us. *See* rule 203A–1(b)(2); *cf.* rule 204–1(a) (requiring an adviser to file an annual amendment 90 days after its fiscal year end).

Form ADV within 30 days after July 21, 2011 and withdrawing from Commission registration within 60 days after the required Form ADV filing. We request comment on whether a transition process is necessary (*e.g.,* whether we should require advisers that do not meet the new eligibility requirements to withdraw from Commission registration as of July 21, 2011), whether two grace periods are necessary (*e.g.,* whether we should require the Form ADV filing and withdrawal of an adviser's registration to occur within the same period), or whether we should provide for a longer period (*e.g.,* whether we should provide 180 days to parallel our current switching rule).[24] Further, should the rule permit us to postpone the effectiveness of, and impose additional terms and conditions on, an adviser's withdrawal from SEC registration?

Our ability to effect the timely transition to State regulation of advisers no longer eligible to register with the Commission may also be affected by our need to re-program the IARD system, through which advisers will file their amendments to Form ADV. We are working closely with the Financial Industry Regulatory Authority ("FINRA"), our IARD contractor, to make the needed modifications, but the programming may not be completed until after we adopt these rules. If IARD is unable to accept filings of Form ADV, including the proposed revisions discussed below to Item 2 of Part 1A, we may need to use our exemptive authority to further delay implementation of the increased threshold for mid-sized adviser registration until the system can accept electronic filing of the revised form. Should we instead require an alternative procedure, such as a paper filing, for advisers to indicate their eligibility for registration or lack thereof? [25]

Since the enactment of the Dodd-Frank Act, our staff has received inquiries from State-registered advisers and advisers registering for the first time expressing concern that they might be required to register with the Commission (because their assets under management are more than $30 million) only to have to withdraw their registration next year when we implement section 410 of the Dodd-Frank Act (raising the threshold for Commission registration to $100 million of assets under management). To avoid such regulatory burdens, we will not object if any State-registered or newly registering adviser is not registered with us if, on or after January 1, 2011 until the end of the transition process (which would be October 19, 2011 under proposed rule 203A–5), the adviser reports on its Form ADV that it has between $30 million and $100 million of assets under management, provided that the adviser is registered as an investment adviser in the State in which it maintains its principal office and place of business, and it has a reasonable belief that it is required to be registered with, and is subject to examination as an investment adviser by, that State.[26] Such advisers should remain registered with, or in the case of a newly registering adviser, apply for registration with, the State securities authorities.[27]

2. Amendments to Form ADV

Item 2 of Part 1A of Form ADV requires each investment adviser applying for registration to indicate its basis for registration with the Commission and to report annually whether it is eligible to remain registered. Item 2 reflects the current statutory threshold for registration with the Commission as well as our current rules. We propose to revise Item 2 to reflect the new statutory threshold and the revisions we propose to make to related rules as a result of the Dodd-Frank Act.[28] More specifically, we propose to amend Item 2 to require each adviser registered with us (and each applicant for registration) to identify whether, under section 203A, as amended, it is eligible to register with the Commission because it: (i) Is a large adviser (having $100 million or more of regulatory assets under management); [29] (ii) is a mid-sized adviser that does not meet the criteria for State registration and examination; [30] (iii) has its principal office and place of business in Wyoming (which does not regulate advisers) or outside the United States; [31] (iv) meets the requirements for one or more of the exemptive rules under section 203A of the Act (as we propose to amend and discuss below); [32] (v) is an adviser (or subadviser) to a registered investment company; [33] (vi) is an adviser to a business development company and has at least $25 million of regulatory assets under management; [34] or (vii) has some other basis for registering with the Commission.[35] We also expect to modify IARD to prevent an applicant from registering with us, and an adviser from continuing to be registered with us, unless it represents that it meets the eligibility criteria set forth in the Advisers Act and our rules.[36] We request comment on each of the changes we propose to make to Item 2. Are the requirements clearly stated? Do the proposed changes fairly reflect the new eligibility requirements under the Dodd-Frank Act and the amendments we are proposing to make to our rules?

3. Assets Under Management

In most cases, the amount of assets an adviser has under management will determine whether the adviser must be registered with the Commission or the states. Section 203A(a)(2) of the Act defines "assets under management" as the "securities portfolios" with respect to which an adviser provides "continuous and regular supervisory or

[24] *See* rule 203A–1(b)(2); *cf.* 204–1(a).

[25] *See Custody of Funds or Securities of Clients by Investment Advisers*, Investment Advisers Act Release No. 2968, n. 53 (Dec. 30, 2009) [75 FR 1456 (Jan. 11, 2010)] (requiring paper filing of Form ADV–E until IARD was upgraded to accept the form electronically); NSMIA Adopting Release at section II.A. (requiring advisers to file a separate paper form (Form ADV–T) to indicate whether they were eligible for SEC registration).

[26] For a discussion of these requirements, see *infra* section II.A.7. of this Release.

[27] As discussed above, the Dodd-Frank Act amendments to Advisers Act section 203A(a) will not be effective until July 21, 2011. *See supra* note 6 and accompanying text. Until that date, section 203A continues to apply, and all investment advisers registered with the Commission that remain eligible for registration under the current requirements must maintain their registrations and comply with the Advisers Act.

[28] We also propose to revise the terms used in the rules and Form ADV to refer to the securities authorities in each State with a single defined term, "State securities authority." *Compare* proposed rules 203A–1, 203A–2(c) and (d), 203A–3(e); proposed Form ADV: Glossary *with* rules 203A–1(b)(1), 203A–2(e)(1), 203A–4; Form ADV: Glossary. *See generally* section 410 of the Dodd-Frank Act.

[29] Proposed Form ADV, Part 1A, Item 2.A.(1). We are proposing to revise Form ADV to use the term "regulatory assets under management" instead of "assets under management." For a discussion of regulatory assets under management, see *infra* section II.A.3. of this Release.

[30] Proposed Form ADV, Part 1A, Item 2.A.(2). For a discussion of the criteria for State registration and examination for mid-sized advisers, see *infra* section II.A.7. of this Release.

[31] Proposed Form ADV, Part 1A, Items 2.A.(3), 2.A.(4).

[32] Proposed Form ADV, Part 1A, Items 2.A.(7)–2.A.(11). For a discussion of the exemptive rules, see *infra* section II.A.5. of this Release.

[33] Proposed Form ADV, Part 1A, Item 2.A.(5).

[34] Proposed Form ADV, Part 1A, Item 2.A.(6).

[35] Proposed Form ADV, Part 1A, Item 2.A.(12). We also propose to delete current Item 2.A.(5) for NRSROs. For a discussion of NRSROs, see *infra* section II.A.5.a. of this Release.

[36] We would also amend Item 2.A and the related items in Schedule D to reflect proposed revisions to rule 203A–2, which provides exemptions from the prohibition on registration with the Commission. *See* proposed Form ADV Items 2.A.(7), (10) and Section 2.A.(10) of proposed Schedule D; *infra* section II.A.5. of this Release. Additionally, we propose to make conforming changes to the instructions for Form ADV. *See* proposed Form ADV: Instructions for Part 1A, instr. 2.

management services."[37] Instructions to Form ADV provide advisers with guidance in applying this provision, including a list of certain types of assets that advisers may (but are not required to) include.[38] Today, we are proposing revisions to these instructions in order to implement a uniform method to calculate assets under management that can be used under the Act for purposes in addition to assessing whether an adviser is eligible to register with the Commission.[39] We also propose to amend rule 203A–3 to continue to require that the calculation of "assets under management" for purposes of Section 203A be the calculation of the securities portfolios with respect to which an investment adviser provides continuous and regular supervisory or management services, as reported on the investment adviser's Form ADV.[40]

We provided the current instructions on calculating assets under management in 1997 as part of our implementation of the $25 million of assets threshold for registering with the Commission provided for in NSMIA.[41] In that limited context, we provided some options for advisers in determining what assets must be included, and which are not mandated by the Advisers Act. In light of the additional uses of the term "assets under management" by the Dodd-Frank Act[42] and any new regulatory requirements related to systemic risk that might be triggered by registration with the Commission,[43] we are proposing to eliminate the choices we have given advisers in the Form ADV instructions.[44] Our proposed change would eliminate an adviser's ability to opt into or out of State or Federal regulation (by including or excluding a class of assets such as proprietary assets) and any such regulatory requirements. We also would provide additional guidance to advisers on how to count assets managed through private funds.[45] Finally, we propose to alter the terminology we use in Part 1A of Form ADV to refer to an adviser's "regulatory assets under management" in order to acknowledge the distinction from the amount of assets under management the adviser discloses to clients in Part 2 of Form ADV, which need not necessarily meet the requirements of section 203A.[46]

More specifically, we propose to require all advisers to include in their regulatory assets under management securities portfolios for which they provide continuous and regular supervisory or management services, regardless of whether these assets are proprietary assets, assets managed without receiving compensation, or assets of foreign clients, all of which an adviser currently may (but is not required to) exclude.[47] In addition, we would not allow an adviser to subtract outstanding indebtedness and other accrued but unpaid liabilities, which remain in a client's account and are managed by the adviser.[48]

We are proposing these changes in order to preclude some advisers from excluding certain assets from their calculation and thus remaining below the new assets threshold for registration with the Commission. The changes would result in some advisers reporting greater assets under management than they do today, but the assets we would require advisers to include in their assets under management are, in fact, assets managed by the adviser and allowing advisers to exclude such assets may have substantially more significant regulatory consequences than in 1997. The management of such assets, for example, may suggest that the adviser's activities are of national concern or have implications regarding the reporting for the assessment of systemic risk, a matter Congress considered important in enacting amendments to the Advisers Act in the Dodd-Frank Act.[49] The Commission, moreover, is proposing that advisers be required to include these assets so that the calculations would be more consistent among advisers. The Commission also believes that requiring that these assets be included in the calculation would better achieve the objective of the Dodd-Frank Act regarding which advisers must register with the Commission, which advisers must register with the states, and which advisers are exempt from Commission registration.

We also propose, as discussed below, to provide guidance regarding how an adviser that advises private funds determines the amount of assets it has under management. Form ADV currently provides no specific instructions applicable to this circumstance. We have designed our proposed instructions both to provide advisers with greater certainty in their calculation of regulatory assets under management, which they would also use as a basis to determine their eligibility for certain exemptions that we are proposing today in the Exemptions Release,[50] as well as to prevent advisers from understating those assets to avoid registration. First, we would require an adviser to include in its regulatory assets under management the value of any private fund over which it exercises continuous and regular supervisory or management services, regardless of the nature of the assets held by the fund.[51] As would be required for any other securities portfolio, a sub-adviser to a private fund would include in its assets under management only that portion of the

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[37] Advisers Act section 203A(a)(2). The Dodd-Frank Act renumbered current paragraph 203A(a)(2) as 203A(a)(3), but did not amend this definition. *See* section 410 of the Dodd-Frank Act.

[38] *See* Form ADV: Instructions for Part 1A, instr. 5.b. These assets include proprietary assets, assets an adviser manages without receiving compensation, and assets of foreign clients.

[39] *Compare* Form ADV: Instructions for Part 1A, instr. 5.b *with* proposed Form ADV: Instructions for Part 1A, instr. 5.b.

[40] *See* proposed rule 203A–3(d).

[41] *See* NSMIA Adopting Release at section II.B.

[42] *See* sections 402(a) and 408 of the Dodd-Frank Act (adding section 202(a)(30) of the Act defining a foreign private adviser as having "assets under management" attributable to U.S. clients and private fund investors of less than $25 million, and section 203(m) directing the Commission to provide for an exemption for advisers solely to private funds with assets under management in the United States of less than $150 million).

[43] Section 404 of the Dodd-Frank Act gives the Commission authority to impose on investment advisers registered with the Commission reporting and recordkeeping requirements for systemic risk assessment purposes. The Commission could require registered advisers that meet a certain threshold of assets under management to submit systemic risk data pursuant to our authority in section 404 of the Dodd-Frank Act. *See also* section 203(n) of the Advisers Act, as amended by section 408 of the Dodd-Frank Act ("In prescribing regulations to carry out the requirements of [Section 203 of the Act] with respect to investment advisers acting as investment advisers to mid-sized private funds, the Commission shall take into account the size * * * of such funds to determine whether they pose systemic risk, and shall provide for registration and examination procedures with respect to the investment advisers of such funds which reflect the level of systemic risk posed by such funds.").

[44] *See* proposed Form ADV: Instructions for Part 1A, instr. 5.b.(1).

[45] *See* proposed Form ADV: Instructions for Part 1A, instr. 5.b.(1), (4). *See also* section 402 of the Dodd-Frank Act (defining private fund as "an issuer that would be an investment company, as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3), but for section 3(c)(1) or 3(c)(7) of that Act"); Exemptions Release at section II.A.8. (discussing when a fund qualifies as a private fund) and at section II (providing additional descriptions of the proposed rules and their application for purposes of the new exemptions available to private fund advisers).

[46] *See* proposed Form ADV: Instructions for Part 1A, instr. 5.b.; *Amendments to Form ADV,* Investment Advisers Act Release No. 3060 (July 28, 2010) [75 FR 49234 (Aug. 12, 2010)] ("Part 2 Release").

[47] *See* proposed Form ADV: Instructions for Part 1A, instr. 5.b.(1).

[48] *See* proposed Form ADV: Instructions for Part 1A, instr. 5.b.(2). Accordingly, an adviser would not be able to deduct accrued fees, expenses, or the amount of any borrowing.

[49] *See supra* note 43. Congress did not address these systemic risk implications when it adopted NSMIA.

[50] *See* Exemptions Release at sections II.B.2. and II.C.5.

[51] *See* proposed Form ADV: Instructions for Part 1A, instr. 5.b.(1).

value of the portfolio for which it provides sub-advisory services.

Second, we propose to require such adviser to include in its calculation of regulatory assets under management the amount of any uncalled capital commitments made to the fund.[52] Private funds, such as venture capital and private equity funds, typically make investments following capital calls on their investors, who are contractually obligated to fund their committed capital amounts.[53] Advisers to these types of private funds provide supervisory or management services to the funds in anticipation of all investors fully funding their capital commitments, describe the size of their funds on the basis of these capital commitments and, in the early years of a fund's life, typically earn fees based on the total amount of capital committed.[54]

Third, we propose to add an instruction to require advisers to use the fair value of private fund assets in order to ensure that advisers value private fund assets on a more meaningful and consistent basis.[55] Use of the cost basis (*i.e.,* the value at which the assets were originally acquired), for example, could under certain circumstances grossly understate the value of appreciated assets, and thus result in advisers avoiding registration with the Commission. Use of the fair valuation method by all advisers, moreover, would result in more consistent asset calculations and reporting across the industry and, therefore, in a more coherent application of the Act's regulatory requirements and of our staff's risk assessment program. We understand that many, but not all, private funds value assets based on their fair value in accordance with U.S. generally accepted accounting principles ("GAAP") or other international accounting standards.[56] We acknowledge some private funds do not use fair value methodologies, which may be more difficult to apply when the fund holds illiquid or other types of assets that are not traded on organized markets.[57] We believe, however, that for the reasons stated above it is important for all advisers to use the fair valuation method to calculate their private fund assets under management.

Advisers, as discussed below, would apply this revised method to calculate assets under management for various purposes under the Advisers Act. As they do today, advisers would calculate their assets under management for purposes of assessing whether they are eligible to register with the Commission. As a result of the proposed amendments to rule 203A–1, which would remove the requirement that an adviser determine its eligibility for registration by the assets under management reported on Form ADV, we are proposing a new provision, rule 203A–3(d), to retain the requirement that the calculation of "assets under management" under section 203A and the related rules be made in accordance with the Form ADV calculation.[58] Advisers would also apply the method for purposes of the new exemptions for foreign private advisers and with respect to certain private fund advisers, which we address in the Exemptions Release. For purposes of calculating the assets under management relevant under the exemptions, our proposed rules cross-reference the method for calculating "regulatory assets under management" under Form ADV.[59] A uniform method of calculating assets under management for purposes of determining eligibility for SEC registration, reporting assets under management on Form ADV, and the new exemptions from registration under the Advisers Act would result in a more coherent application of the Act's regulatory requirements and more consistent reporting across the industry.

We request comment on our proposed changes to the instructions relating to the calculation of "regulatory assets under management." Are changes to the rule and instructions necessary? Should we instead consider different changes? If so, in what way should we amend them? In particular, is our understanding that most private funds prepare financial statements using fair value accounting correct? Would the proposed approach result in advisers valuing their private fund assets in a generally uniform manner and in comparability of the valuations? We are not proposing to require advisers to determine fair value in accordance with GAAP. Should we adopt such a requirement? If not, should we specify that advisers may only determine the fair value of private fund assets in accordance with a body of accounting principles used in preparing financial statements? We understand that GAAP does not require some funds to fair value certain investments. Should we provide for an exception from the proposed fair valuation requirement with respect to any of those investments?

[52] *Id.* A capital commitment is a contractual obligation of an investor to acquire an interest in, or provide the total commitment amount over time to, a private fund, when called by the fund.

[53] *See, e.g.,* James Schell, Private Equity Funds: Business Structure and Operations § 1.01 (2010) ("Schell") (typical private equity fund partnership agreement requires investors to commit to make capital contributions to the fund, which would be paid as needed rather than upfront and would be used to pay expenses and make investments); Stephanie Breslow & Phyllis Schwartz, Private Equity Funds, Formation and Operation 2010, at § 2:5.6 (discussing the various remedies that may be imposed in the event an investor fails to fund its contractual capital commitment, including, but not limited to, "the ability to draw additional capital from non-defaulting investors;" "the right to force a sale of the defaulting partner's interests at a price determined by the general partner;" and "the right to take any other action permitted at law or in equity").

[54] *See, e.g.,* Schell, *supra* note 53 at § 1.01 (noting that capital contributions made by the investors are used to "make investments in a manner consistent with the investment strategy or guidelines for the Fund.") and at § 1.03 ("Management fees in a Venture Capital Fund are usually an annual amount equal to a fixed percentage of total Capital Commitments.").

[55] *See* proposed Form ADV: Instructions for Part 1A, instr. 5.b.(4). A fund's governing documents may provide for a specific process for calculating fair value (*e.g.,* that the general partner, rather than the board of directors, determines the fair value of the fund's assets). An adviser would be able to rely on such a process also for purposes of calculating its "regulatory assets under management."

[56] *See, e.g.,* Comment Letter of National Venture Capital Association, dated July 28, 2009, at 2, commenting on the Commission's proposed custody rule (Investment Advisers Act Release No. 2876) (the "vast majority of venture capital funds provide their LPs [*i.e.,* investors] quarterly and audited annual financial reports. These reports are prepared under generally accepted accounting principles, or GAAP, and audited under the standards established for all investment companies, including the largest mutual fund complexes."); Comment Letter of Managed Funds Association, dated July 28, 2009, at 3 (a "substantial proportion of hedge fund managers, whether or not they are registered with the Commission, provide independently audited financial statements of the [hedge] fund to investors."). Furthermore, advisers to private funds that prepare and distribute financial statements prepared in accordance with GAAP may be deemed to satisfy certain requirements of our custody rule. *See* rule 206(4)–2(b)(4) under the Advisers Act.

[57] Those assets include, for example, "distressed debt" (such as securities of companies or government entities that are either already in default, under bankruptcy protection, or in distress and heading toward such a condition) or certain types of emerging market securities that are not readily marketable. *See* Gerald T. Lins et al., Hedge Funds and Other Private Funds: Reg and Comp § 5:22 (2009) ("At any given time, some portion of a hedge fund's portfolio holdings may be illiquid and/or difficult to value. This is particularly the case for certain types of hedge funds, such as those focusing on distressed securities, activist investing, etc.").

[58] *See* proposed rule 203A–3(d) (requiring advisers to determine "assets under management" by calculating the securities portfolios with respect to which an investment adviser provides continuous and regular supervisory or management services as reported on the investment adviser's Form ADV). This new provision reflects the current requirement in subsection (a) of rule 203A–1 that we propose to eliminate to remove the $5 million buffer, which also requires advisers to determine their eligibility to register with the Commission based on the amount of assets under management reported on Form ADV. *See* rule 203A–1(a).

[59] *See* Exemptions Release at sections II.B.2. and II.C.5.; proposed rules 202(a)(30)–1 (definitions of foreign private adviser exemption terms) and 203(m)–1 (private fund adviser exemption).

Should we adopt a different approach altogether and allow advisers to use a method other than fair value? Are there other methods that would not understate the value of fund assets? Should the instructions permit advisers to rely on the method set forth in a fund's governing documents, or the method used to report the value of assets to investors or to calculate fees (or other compensation) for investment advisory services? What method should apply if a fund uses different methods for different purposes? Should we modify the proposed rule to require that the valuation be derived from audited financial statements or be subject to review by auditors or another independent third party?

Advisers are currently only required to update their assets under management reported on Form ADV annually.[60] Should we require more frequent updating? For instance, should we require an adviser to update its regulatory assets under management quarterly or any time the adviser files an other-than-annual amendment?[61]

4. Switching Between State and Commission Registration

Rule 203A–1 currently contains two means of preventing an adviser from having to switch frequently between State and Commission registration as a result of changes in the value of its assets under management or the departure of one or more clients.[62] First, the rule provides for a $5 million buffer that permits an investment adviser having between $25 million and $30 million of assets under management to remain registered with the states and does not subject the adviser to cancellation of its Commission registration until its assets under management fall below $25 million.[63] Second, the rule permits an adviser to rely on the firm's assets under management reported annually in the firm's annual updating amendments for purposes of determining its eligibility to register with the Commission, allowing an adviser to avoid the need to change registration status based upon fluctuations that occur during the course of the year.[64] If an adviser is no longer eligible for Commission registration, the rule provides a 180-day grace period from the adviser's fiscal year end to allow it to switch to State registration.[65]

We propose to amend rule 203A–1 to eliminate the $5 million buffer for advisers having between $25 million and $30 million of assets under management, but to retain the ability of an adviser to avoid the need to change registration status based upon intra-year fluctuations in its assets under management for purposes of determining its eligibility to register with the Commission.[66] The current buffer seems unnecessary in light of Congress's determination generally to require most advisers having between $30 million and $100 million of assets under management to be registered with the states.[67] Moreover, at this time, we believe it is not necessary to increase the $100 million threshold in order to provide a similar buffer for advisers crossing that threshold and becoming registered with the Commission under the amended statutory provisions. We believe that the requirement that advisers only assess their eligibility for registration annually and the grace periods provided to switch to and from State registration will be sufficient to address the concern that an investment adviser with assets under management approaching $100 million or affected by changes in other eligibility requirements will frequently have to switch between State and Federal registration.[68]

We request comment on our proposed elimination of the $5 million buffer. Do many advisers currently use this buffer? Should we retain the buffer given the new provisions regarding mid-sized advisers? Should we adopt a similar buffer for the new $100 million dollar threshold in amended section 203A? If so, what should be the amount of the buffer? Should it be $5 million, or higher or lower, and why? Do Item 2.A of Form ADV, Part 1A and the related instructions provide sufficient information to advisers about their eligibility to register with the Commission, or is additional guidance necessary?

5. Exemptions From the Prohibition on Registration With the Commission

Section 203A(c) of the Advisers Act provides the Commission with the authority to permit investment advisers to register with the Commission even though they would be prohibited from doing so otherwise.[69] As also noted above, under this authority, we have adopted six exemptions in rule 203A–2 from the prohibition on registration.[70] Our authority under this provision was unchanged by the Dodd-Frank Act and therefore extends to the new mid-sized adviser category in section 203A(a)(2) of the Act, as amended.[71] As a result, as currently drafted, each of these exemptions would, by its terms, apply to mid-sized advisers–exempting them from the prohibition on registering with the Commission if they meet the requirements of rule 203A–2. We are proposing amendments to three of the

[60] *See* General Instruction 4 to Form ADV.

[61] *See, e.g.,* Exemptions Release at section II.B.2. (proposed rule 203(m)–1 would require quarterly evaluation of private fund assets); Part 2 Release, *supra* note 46, at nn.46–48 and accompanying text (requiring advisers to update the amount of assets under management reported in Part 2 annually and when there are material changes if the adviser files an interim amendment for a separate reason).

[62] *See* rule 203A–1(a), (b); NSMIA Adopting Release, *supra* note 10, at section II.C.; *Rules Implementing Amendments to the Investment Advisers Act of 1940,* Investment Advisers Act Release No. 1601, section II.C. (Dec. 20, 1996) [61 FR 68480 (Dec. 27, 1996)] ("NSMIA Proposing Release").

[63] Rule 203A–1(a).

[64] Rule 203A–1(b). *See also* rule 204–1(a) (requiring annual amendment to Form ADV within 90 days of fiscal year end); General Instruction 4 (annual amendment to Form ADV must update amount of assets under management reported). Other criteria to determine an adviser's eligibility to register with the Commission must also be determined annually. *See* rule 203A–1(b)(2).

[65] Rule 203A–1(b)(2).

[66] *See* proposed rule 203A–1. In addition, the proposed rule would permit an adviser to rely on an affirmation of other criteria reported in its annual updating amendments for purposes of determining its eligibility to register with the Commission. *See* proposed rule 203A–1(b) (continuing to require an adviser filing an annual updating amendment to its Form ADV reporting that it is not eligible for Commission registration to withdraw its registration within 180 days of its fiscal year end).

[67] *See* H.R. Rep. No. 111–517, at 867 (2010) ("Conference Committee Report") (discussing fact that legislation "raise[d] the assets threshold for Federal regulation of investment advisers from $30 million to $100 million.").

[68] If during the 180-day grace period to switch to State registration an adviser's assets under management increase, making the adviser eligible for Commission registration again, the adviser could amend its Form ADV to indicate the new amount of assets under management and continue to remain registered with the Commission. *See* proposed rule 203A–1(b) (adviser must withdraw from SEC registration within 180 days of its fiscal year end unless it then is eligible for registration).

[69] *See* Advisers Act section 203A(c). An investment adviser exempted from the prohibition on registration must register with the Commission, unless it otherwise qualifies for an exemption from registration under section 203(b) of the Advisers Act. Advisers Act section 203(a).

[70] *See supra* note 14 and accompanying text. The Commission has permitted six types of investment advisers to register with the Commission under rule 203A–2: (i) NRSROs; (ii) pension consultants; (iii) investment advisers affiliated with an adviser registered with the Commission; (iv) investment advisers expecting to be eligible for Commission registration within 120 days of filing Form ADV; (v) multi-State investment advisers; and (vi) internet advisers.

[71] Today, rule 203A–2 provides that advisers meeting the criteria for a category of advisers under the rule will not be prohibited from registering with us by Advisers Act section 203A(a). *See* rule 203A–2; NSMIA Adopting Release at section II.D. We are not proposing to amend this part of rule 203A–2. The new prohibition on mid-sized advisers registering with the Commission also is established under Advisers Act section 203A(a); therefore, mid-sized advisers meeting the requirements for a category of exempt advisers under rule 203A–2 would be eligible to register with us. *See* section 410 of the Dodd-Frank Act; proposed rule 203A–2.

exemptions to reflect developments since their adoption, including the enactment of the Dodd-Frank Act. We request comment on whether we should amend the rules so that some, or all, of the exemptions should not be available to mid-sized advisers.[72]

a. NRSROs

We propose an amendment to eliminate the exemption in rule 203A–2(a) from the prohibition on Commission registration for nationally recognized statistical rating organizations ("NRSROs"). Since we adopted this exemption, Congress amended the Act to exclude NRSROs from the Act[73] and provided for a separate regulatory regime for NRSROs under the Securities Exchange Act of 1934 ("Exchange Act").[74] Only one NRSRO remains registered as an investment adviser under the Act and reports that it has more than $100 million of assets under management and thus would not rely on the exemption.[75] Should we retain this exemption? If so, why?

b. Pension Consultants

We propose to amend the exemption available to pension consultants in rule 203A–2(b) to increase the minimum value of plan assets from $50 million to $200 million.[76] Pension consultants typically do not have "assets under management," but we have required these advisers to register with us because their activities have a direct effect on the management of large amounts of pension plan assets.[77] We had set the threshold at $50 million of plan assets for these advisers to ensure that, in order to register with us, a pension consultant's activities are significant enough to have an effect on national markets.[78] We propose to increase this threshold to $200 million in light of Congress's determination to increase from $25 million to $100 million the amount of "assets under management" that requires all advisers to register with the Commission.[79] This threshold would maintain a ratio to the statutory threshold that is the same as the ratio of the $50 million plan asset threshold and $25 million assets under management threshold currently in place. As a result, advisers currently relying on the pension consultant exemption advising plan assets of less than $200 million may be required to register with one or more states.[80]

We request comment on our proposed amendment. Does an adviser advising plan assets of $200 million or more have an impact on national markets? Should we use another amount instead? Does an adviser advising a smaller amount of plan assets also have an impact on national markets? Should we instead increase the threshold by the same amount that Congress increased the statutory threshold of assets under management, which would be $125 million of plan assets?

c. Multi-State Advisers

We propose to amend the multi-state adviser exemption to align the rule with the multi-State exemption Congress built into the mid-sized adviser provision under section 410 of the Dodd-Frank Act.[81] Under rule 203A–2(e), the prohibition on registration with the Commission does not apply to an investment adviser that is required to register in 30 or more states. Once registered with the Commission, the adviser remains eligible for Commission registration as long as it would be obligated, absent the exemption, to register in at least 25 states.[82] The Dodd-Frank Act provides that a mid-sized adviser that otherwise would be prohibited may register with the Commission if it would be required to register with 15 or more states.[83]

We believe that this provision of the Dodd-Frank Act reflects a Congressional view on the number of states with which an adviser must be required to be registered before the regulatory burdens associated with such regulation warrant registration solely with the Commission and application of the preemption provision.[84] Thus, we are reconsidering the threshold of our multi-State exemption, and propose to amend rule 203A–2(e) to permit all investment advisers required to register as an investment adviser with 15 or more states to register with the Commission.[85] We also propose to eliminate the provision in the rule that permits advisers to remain registered until the number of states in which they must register falls below 25 states, and we are not proposing a similar cushion for the 15–State threshold.[86] The Dodd-Frank Act contains no such cushion for mid-sized advisers.[87] We also believe that the requirement that advisers only assess their eligibility for registration annually and the grace periods provided

[72] We are also renumbering and making minor conforming changes to, rule 203A–2(c), (d) and (f) regarding investment advisers affiliated with an SEC-registered adviser, newly formed advisers expecting to be eligible for Commission registration within 120 days, and internet advisers. *See* proposed rule 203A–2(b), (c) and (e).

[73] Credit Rating Agency Reform Act of 2006, Public Law 109–291, 120 Stat. 1327, § 4(b)(3)(B) (2006) ("Credit Rating Agency Reform Act"). *See also* Advisers Act section 202(a)(11)(F) (excluding an NRSRO from the definition of investment adviser unless it issues recommendations about purchasing, selling, or holding securities or engages in managing assets that include securities).

[74] Credit Rating Agency Reform Act, *supra* note 73, at sections 4(a), 5.

[75] Based on IARD data as of September 1, 2010.

[76] *See* proposed rule 203A–2(a).

[77] *See* NSMIA Adopting Release at section II.D.2.; NSMIA Proposing Release at section II.D.2. Pension consultants provide services to pension and employee benefit plans and their fiduciaries, including assisting them to select investment advisers that manage plan assets. *See* rule 203A–2(b)(2), (3); NSMIA Adopting Release at section II.D.2. The exemption does not apply to pension consultants that solely provide services to plan participants. *See* NSMIA Adopting Release at section II.D.2.

[78] *See* NSMIA Adopting Release at n. 60 (the $50 million "higher threshold is necessary to demonstrate that a pension consultant's activities have an effect on national markets."). The higher asset requirement also reflects that a pension consultant has substantially less control over client assets than an adviser that has "assets under management." *Id.* To determine the aggregate value of plan assets, a pension consultant may only include the portion of the plan's assets for which the consultant provided investment advice. Rule 203A–2(b)(3).

[79] *See* section 410 of the Dodd-Frank Act.

[80] We note, however, that a pension consultant required to register in 15 or more states would be eligible to register with the SEC pursuant to proposed rule 203A–2(d). *See infra* section II.A.5.c. of this Release.

[81] *See* proposed rule 203A–2(d).

[82] Rule 203A–2(e)(1). An investment adviser relying on this exemption also must: (i) include a representation on Schedule D of Form ADV that the investment adviser has concluded that it must register as an investment adviser with the required number of states; (ii) undertake to withdraw from registration with the Commission if the adviser indicates on an annual updating amendment to Form ADV that it would be required by the laws of fewer than 25 states to register as an investment adviser with the State; and (iii) maintain a record of the states in which the investment adviser has determined it would, but for the exemption, be required to register. Rule 203A–2(e)(2)–(4). Advisers relying on rule 203A–2(e) may not include in the number of states those in which they are not required to register because of applicable State laws or the national *de minimis* standard of section 222(d) of the Advisers Act. *See Exemption for Investment Advisers Operating in Multiple States; Revisions to Rules Implementing Amendments to the Investment Advisers Act of 1940; Investment Advisers with Principal Offices and Places of Business in Colorado or Iowa,* Investment Advisers Act Release No. 1733, n. 17 (July 17, 1998) [63 FR 39708 (July 24, 1998)] ("Multi-State Adviser Adopting Release").

[83] *See* section 410 of the Dodd-Frank Act ("* * * if by effect of this paragraph an investment adviser would be required to register with 15 or more States, then the adviser may register under section 203."). Section 203A(a)(1) of the Advisers Act does not include a similar exemption from the prohibition on Commission registration for small advisers required to register in a particular number of states.

[84] *See* Conference Committee Report, *supra* note 67, at 867 (bill "raises the assets threshold for Federal regulation of investment advisers from $30 million to $100 million. Those advisers who qualify to register with their home State must register with the SEC should the adviser operate in more than 15 states.").

[85] *See* proposed rule 203A–2(d)(1).

[86] *See* proposed rule 203A–2(d).

[87] *See* section 410 of the Dodd-Frank Act.

to switch to and from State registration may be sufficient to address the concern that an investment adviser required to register in 15 states would frequently have to switch between State and Federal registration.[88]

We request comment on whether the 15–State threshold should be applied to small advisers as well as mid-sized advisers. If not, should the threshold of 30 or more states continue to apply to small advisers? Should we, as proposed, eliminate the "cushion" that permits advisers to remain registered with us even if they are no longer registered in five of the states in which they were initially registered? Should we retain that provision or, alternatively, include a different number of states? Does the grace period currently provided in rule 203A–1 prevent the transient registration problems that the five-State cushion was designed to address? [89]

6. Elimination of Safe Harbor

Rule 203A–4 provides a safe harbor from Commission registration for an investment adviser that is registered with the State securities authority of the State in which it has its principal office and place of business, based on a reasonable belief that it is prohibited from registering with the Commission because it does not have sufficient assets under management.[90] Advisers have not, in our experience, asserted, as a defense, the availability of this safe harbor, which protects only against enforcement actions by us and not any private actions, and we are not proposing to extend it to the higher threshold established by the Dodd-Frank Act. This rule was designed for smaller advisory businesses with assets under management of less than $30 million,[91] which may not employ the same tools or otherwise have a need to calculate assets as precisely as advisers with greater assets under management. We view it as unlikely that an adviser would be reasonably unaware that it has more than $100 million of regulatory assets under management when it is required to report its regulatory assets under management on Form ADV.[92] Commenters are requested to address whether advisers do, in fact, rely on this safe harbor today. We also request comment on whether we should, as we propose, rescind this safe harbor or, alternatively, extend its availability to the higher registration threshold of the Dodd-Frank Act.

7. Mid-Sized Advisers

As discussed above, section 203A(a)(2) of the Advisers Act, as amended by the Dodd-Frank Act, will prohibit mid-sized advisers from registering with the Commission, but only if: (i) the adviser is required to be registered as an investment adviser with the securities commissioner (or any agency or office performing like functions) of the State in which it maintains its principal office and place of business; and (ii) if registered, the adviser would be subject to examination as an investment adviser by such commissioner, agency, or office.[93] The Dodd-Frank Act does not explain how to determine whether a mid-sized adviser is "required to be registered" or is "subject to examination" by a particular State securities authority.[94] We propose to incorporate into Form ADV an explanation of how we construe these provisions.[95]

a. Required To Be Registered

Under section 203A(a)(1) of the Act, an adviser that is not regulated or required to be regulated as an investment adviser in the State in which it has its principal office and place of business must register with the Commission regardless of the amount of assets it has under management.[96] We have interpreted "regulated or required to be regulated" to mean that a State has enacted an investment adviser statute, regardless of whether the adviser is actually registered in that State.[97] This interpretation has two relevant consequences. First, advisers with a principal office and place of business in Wyoming, or in foreign countries, must register with the Commission regardless of whether they have assets under management and would not otherwise be eligible for one of our exemptive rules.[98] Second, some smaller advisers exempt from State registration are not subject to registration with either the Commission or any of the states.[99]

We believe that Congress was concerned with the latter consequence when it passed this provision of the Dodd-Frank Act. The bills originally introduced and passed in the House and Senate increased up to $100 million the threshold for Commission registration under the "regulated or required to be regulated" standard that is used today in section 203A(a)(1).[100] Accordingly, some advisers with a significant amount (more than $25 million) of assets under management could have escaped oversight by either the Commission or any of the states by taking advantage of State registration exemptions. Perhaps to avoid this possibility, the Conference Committee included a provision to prohibit a mid-sized adviser from registering with the Commission if, among other things, it is "required to be registered" as an adviser with the State securities authority where it maintains its principal office and place of business.[101] A mid-sized adviser that can and does rely on an exemption under the law of the State in which it

[88] *See supra* notes 66–68 and related text. We also note that proposed rule 203A–2(d) would permit an adviser to choose to maintain its State registrations and not switch to SEC registration. *See* proposed rule 203A–2(d)(2) (adviser elects to rely on the exemption by making the required representations on Form ADV).

[89] *See* proposed rule 203A–1; *supra* notes 66–68 and related text; Multi-State Adviser Adopting Release at section II.A. (five-State provision creates a cushion to prevent an adviser from having to de-register and then re-register with the Commission frequently as a result of a change in registration obligations in one or a few states).

[90] Rule 203A–4.

[91] *See* rule 203A–4; NSMIA Adopting Release at section II.B.3.

[92] We believe that whether an adviser has $100 million of assets under management is unlikely to be determined by whether non-discretionary assets could be treated as assets under management or whether the adviser provides continuous and regular supervisory or management services with respect to certain assets, which was the basis for the safe harbor. *See* NSMIA Adopting Release at section II.B.3.; NSMIA Proposing Release at section II.B.4.

[93] *See* section 410 of the Dodd-Frank Act.

[94] The Advisers Act defines the term "State" to include any U.S. State, the District of Columbia, Puerto Rico, the Virgin Islands, or any other possession of the United States. Advisers Act section 202(a)(19). For purposes of section 203A of the Advisers Act and the rules thereunder, rule 203A–3(c) defines "principal office and place of business" to mean the executive office of the investment adviser from which its officers, partners, or managers direct, control, and coordinate its activities. We are not proposing changes to this definition. *See* rule 203A–3(c). For a discussion of amendments we propose to make to the calculation of assets under management, see *supra* section II.A.3. of this Release.

[95] *See* proposed Form ADV: Instructions for Part 1A, instr. 2.b.

[96] Advisers Act section 203A(a)(1). *See also* Advisers Act section 203(a).

[97] *See* NSMIA Adopting Release at section II.E.1.

[98] *See* NSMIA Adopting Release at section II.E.; NSMIA Proposing Release at section II.E. Currently, all U.S. states except Wyoming require certain investment advisers to register. *See Transition Rule for Ohio Investment Advisers,* Investment Advisers Act Release No. 1794, n. 4 (Mar. 25, 1999) [64 FR 15680 (Apr. 1, 1999)].

[99] *See, e.g.,* Advisers Act section 203A(a)(1); Uniform Securities Act §§ 102(15), 403(b) (2002) ("Uniform Securities Act") (defining "investment adviser" and providing exemptions from State registration as an investment adviser).

[100] *See* The Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. § 7418 (2009) (requiring an adviser with between $25 million and $100 million of assets under management that "is regulated and examined, or required to be regulated and examined, by a State" to register with and be subject to examination by such State); Restoring American Financial Stability Act of 2010, S. 3217, 111th Cong. § 410 (2010) (prohibiting an investment adviser with assets under management of less than $100 million from registering with the Commission if the adviser "is regulated or required to be regulated as an investment adviser" in the State where it maintains its principal office and place of business).

[101] *See* section 410 of the Dodd-Frank Act.

has its principal office and place of business such that it is "not required to be registered" with the State securities authority [102] must register with the Commission, unless an exemption from registration with the Commission otherwise is available.[103] An adviser not registered under a State adviser statute in contravention of the statute, however, would not be eligible for registration with the Commission.

We are proposing changes to Form ADV to require a mid-sized adviser filing with us to affirm, upon application and annually thereafter, that it is not required to be registered as an adviser with the State securities authority in the State where it maintains its principal office and place of business.[104] An adviser reporting that it is no longer able to make such an affirmation thereafter would have 180 days from its fiscal year end to withdraw from Commission registration.[105] Thus, the rule would operate to permit an adviser to rely on this affirmation reported in its annual updating amendments for purposes of determining its eligibility to register with the Commission.[106] Should these requirements apply to mid-sized advisers? Are there alternative interpretations of "required to be registered" that we should consider and why?

b. Subject to Examination

Not all State securities authorities conduct compliance examinations of advisers registered with them.[107] Congress therefore determined to require a mid-sized adviser to register with the Commission if the adviser is not subject to examination as an investment adviser by the State in which the adviser has its principal office and place of business.[108]

The Commission does not intend either to review or evaluate each State's investment adviser examination program.[109] Instead, we will correspond with each State securities commissioner (or official with similar authority) and request that each advise us whether an investment adviser registered in the State would be subject to examination as an investment adviser by that State's securities commissioner (or agency or office with similar authority).[110] We believe that the states, being most familiar with their own circumstances, are in the best position to determine whether advisers in their State are subject to examination. Using the responses that we receive, we will identify for advisers filing on IARD the states in which the securities commissioner did not certify that advisers are subject to examination and incorporate that list into IARD to ensure that only mid-sized advisers with their principal office and place of business in one of those states (or, as discussed above, mid-sized advisers that are not registered with the states where they maintain their principal office and place of business) will register with the Commission.[111] We request comment on whether the Commission should take additional steps to determine whether an investment adviser would be subject to examination in a State, as well as any alternatives the Commission may adopt. We also request comment on the steps the Commission should take if a State determines not to respond to our request.

B. Exempt Reporting Advisers: Sections 407 and 408

As discussed above, the Dodd-Frank Act, effective July 21, 2011, also repealed the "private adviser exemption" contained in section 203(b)(3) of the Advisers Act on which advisers to many hedge funds and other pooled investment vehicles had relied in order to avoid registration under the Act.[112] In eliminating this provision, Congress amended the Act to create, or direct us to adopt, other, in many ways narrower, exemptions for advisers to certain types of "private funds." Both section 203(l) of the Advisers Act (which provides an exemption for an adviser that advises solely one or more "venture capital funds") and section 203(m) of the Advisers Act (which instructs the Commission to exempt any adviser that acts solely as an adviser to private funds and has assets under management in the United States of less than $150 million) provide that the Commission shall require such advisers to maintain such records, which we have the authority to examine,[113] and to submit reports "as the Commission determines necessary or appropriate in the public interest." [114] We refer to these advisers in this release as "exempt reporting advisers."

To implement sections 203(l) and 203(m), we are proposing a new rule to require exempt reporting advisers to submit, and to periodically update, reports to us by completing a limited subset of items on Form ADV.[115] We are also proposing amendments to Form ADV to permit the form to serve as a reporting, as well as a registration, form and to specify the seven items exempt reporting advisers must complete.[116]

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[102] *See, e.g.,* Uniform Securities Act, *supra* note 99, at sections 102(15), 403(b).

[103] *See, e.g.,* Advisers Act sections 203(a) and (b), 203A(b); rule 203A–2. Such an adviser could not voluntarily register with the State securities authorities to avoid SEC registration.

[104] *See* proposed Form ADV, Part 1A, Item 2.A.(2)(a). For a discussion of proposed changes to Form ADV, Part 1A, Item 2, see *supra* section II.A.2. of this Release.

[105] *See* proposed rule 203A–1(b).

[106] This would allow an adviser to change registration status based upon a change during the course of the year regarding whether it is required to be registered with a State.

[107] *See, e.g.,* North American Securities Administrators Association, Inc., *State Securities Regulators Report on Regulatory Effectiveness and Resources with Respect to Broker-Dealers and Investment Advisers,* 7 (2010) ("NASAA Report"). The NASAA Report was submitted in connection with the Commission's study regarding obligations of brokers, dealers, and investment advisers, and is available on the Commission's Web site at *http://www.sec.gov/comments/4-606/4606-2789.pdf.*

[108] *See* section 410 of the Dodd-Frank Act.

[109] The bill introduced in the House included a requirement that we publish a list of the states that regulate and examine, or require regulation and examination of, investment advisers. *See* The Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. § 7418 (2009). Congress did not include this requirement in the Dodd-Frank Act. *See* section 410 of the Dodd-Frank Act.

[110] We also will request that each State notify the Commission promptly if advisers in the State will begin to be subject to examination or will no longer be subject to examination.

[111] *See* proposed Form ADV, Part 1A, Item 2.A.(2)(b). We will also make the list available on our Web site at *http://www.sec.gov.*

[112] Section 403 of the Dodd-Frank Act. Section 203(b)(3) exempts from registration any investment adviser who during the course of the preceding twelve months has had fewer than fifteen clients and who neither holds himself out generally to the public as an investment adviser nor acts as an investment adviser to any investment company registered under the Investment Company Act, or a company which has elected to be a business development company pursuant to Section 54 of the Investment Company Act (15 U.S.C. 80a–53).

[113] Under section 204(a) of the Advisers Act, the Commission has the authority to examine records, unless the adviser is "specifically exempted" from the requirement to register pursuant to section 203(b) of the Advisers Act. Investment advisers that are exempt from registration in reliance on section 203(l) or 203(m) of the Advisers Act are not "specifically exempted" from the requirement to register pursuant to section 203(b).

[114] *See* sections 407 and 408 of the Dodd-Frank Act, adding Advisers Act sections 203(l) and (m). See *supra* note 45 for a discussion of the term "private fund." *See also* Exemptions Release at section II. *See also* current section 204(a) of the Advisers Act and section 204(b)(5), as added by section 404 of the Dodd-Frank Act.

[115] Recordkeeping requirements for exempt reporting advisers will be addressed in a future release. *See* sections 407 and 408 (providing that the Commission shall require investment advisers exempt from registration under either section 407 or 408 to maintain such records as the Commission determines necessary or appropriate in the public interest or for the protection of investors.).

[116] For a discussion of additional amendments we are proposing to Part 1 of Form ADV, see *infra* section II.C. of this Release.

1. Reporting Required

We are proposing a new rule, rule 204–4, to require exempt reporting advisers to file reports with the Commission electronically on Form ADV.[117] Rule 204–4 would require these advisers to submit their reports through the IARD using the same process as registered investment advisers.[118] Each Form ADV would be considered filed with the Commission upon acceptance by the IARD,[119] and advisers filing the form would be required to pay a filing fee.[120] As we do for IARD filings by registered advisers, we would approve, by order, the amount of the filing fee charged by FINRA.[121] We anticipate that filing fees would be the same as those for registered investment advisers, which currently range from $40 to $200, based on the amount of assets an adviser has under management.[122] The filing fees would be set at amounts that are designed to pay the reasonable costs associated with the filing and the maintenance of the IARD.

The reports filed by exempt reporting advisers would be publicly available on our Web site.[123] Exempt reporting advisers unable to file electronically as a result of unanticipated technical difficulties may qualify for a temporary hardship exemption.[124] We also are proposing technical amendments to Form ADV–H, the form advisers use to request a hardship exemption from electronic filing, and Form ADV–NR, used to appoint the Secretary of the Commission as an agent for service of process for certain non-resident advisers.[125]

We are proposing to require reporting on Form ADV through the IARD to avoid the expense and delay of developing a new form and because the IARD already has the capacity to accept electronic filing of the form. Moreover, much of the information we propose that exempt reporting advisers would provide is required by Form ADV. Because exempt reporting advisers may be required to register on Form ADV with one or more State securities authorities,[126] use of the existing form and filing system would also permit exempt reporting advisers to satisfy both State and Commission requirements with a single electronic filing.[127] Our proposed approach would permit an adviser to transition from filing reports with us to applying for registration under the Act by simply amending its Form ADV; the adviser would check the box to indicate it is filing an initial application for registration, complete the items it did not have to answer as an exempt reporting adviser, and update the pre-populated items that it already has on file.[128]

We request comment on proposed rule 204–4 and its requirement that exempt reporting advisers file reports by responding to a subset of items on Form ADV and filing the report through IARD. Should we instead create a new form and/or a new filing system for exempt reporting advisers? Rather than use IARD or a new system, should we instead require exempt reporting advisers to use EDGAR? Should we not make this information available to the public on our Web site? Are there alternative approaches to reporting by exempt reporting advisers that we should consider? If so, please explain. Are there additional ways the Commission could distinguish between registered advisers and exempt reporting advisers?

2. Information in Reports

We are proposing several amendments to Form ADV to facilitate filings by exempt reporting advisers. First, we would re-title the form to reflect its dual purpose as both the "Uniform Application for Investment Adviser Registration," as well as the "Report by Exempt Reporting Advisers." Second, we are proposing to amend the cover page so that exempt reporting advisers would indicate the type of report they are filing.[129] Finally, we propose to amend Item 2 of Part 1A, which requires advisers to indicate their eligibility for SEC registration, by adding a new subsection C that would require an exempt reporting adviser to identify the exemption(s) that it is relying on to report, rather than register, with the Commission.[130]

Form ADV is today designed to obtain information from registered advisers that provide a wide variety of types of

[117] Proposed rule 204–4(a).

[118] Proposed rule 204–4(b). *See* General Instructions 6, 7, 8 and 9 (providing guidance about the IARD entitlement process, signing the form, and submitting it for filing).

[119] Proposed rule 204–4(c). *Cf.* rule 0–4(a)(2) ("All filings required to be made electronically with the * * * [IARD] shall, unless otherwise provided by the rules and regulations in this part, be deemed to have been filed with the Commission upon acceptance by the IARD.").

[120] Proposed rule 204–4(d).

[121] *See* section 204(b) of the Advisers Act.

[122] The current fee schedule may be found on our Web site at *http://www.sec.gov/divisions/investment/iard/iardfee.shtml.*

[123] The Investment Adviser Public Disclosure System ("IAPD") allows the public to access the most recent Form ADV filing made by an investment adviser and is available at *http://www.adviserinfo.sec.gov.* We would, however, make it clear to the public viewing reports filed by an exempt reporting adviser on IAPD that the adviser is not registered with us.

[124] *See* proposed rule 204–4(e) (providing a temporary hardship exemption for an adviser having unanticipated technical difficulties that prevent submission of a filing to IARD). The temporary hardship exemption is based on a similar exemption for registered advisers contained in rule 203–3(a) under the Act [17 CFR 275.203–3(a)], which provides an exemption of no more than seven business days after the filing was due.

[125] *See* proposed amended Form ADV–H, proposed amended Form ADV–NR, and proposed General Instruction 18. The amendments to Form ADV–H and Form ADV–NR would reflect that exempt reporting advisers would be filing on IARD and the forms would be used in the same way and for the same purpose as they are currently used by registered investment advisers.

[126] The Dodd-Frank Act exempts exempt reporting advisers from registration with the Commission. *See* sections 407 and 408 of the Dodd-Frank Act. It does not, however, exempt these advisers from registering or filing reports with State securities regulators. *See also* section 410 of the Dodd-Frank Act (re-allocating SEC and State jurisdiction over investment advisers); proposed rule 203A–1 (proposing the process for switching to or from State or SEC registration); and proposed General Instruction 13 to Form ADV (noting that exempt reporting advisers who file reports with the SEC may continue to be subject to State registration, reporting, or other obligations).

[127] Form ADV is used by advisers both to register with the Commission and with State securities authorities. At the request of the State securities authorities, we expect to add to Form ADV a check box and instructions that would permit exempt reporting advisers to direct the filing of reports filed with the Commission to the State securities authorities. Because these revisions to Form ADV and the obligation to file the report with the State securities authorities would not arise from a Federal law or Commission rule, we are not proposing them for comment. We urge interested persons to submit comments directly to the North American Securities Administrators Association, Inc. ("NASAA") for consideration by the State securities authorities at the following e-mail address: *advcomments@nasaa.org.* In addition, we understand that NASAA may propose a model rule that would exempt certain exempt reporting advisers from State registration but would require these advisers to submit to the States a report identical to the report an exempt reporting adviser would be required to submit to the SEC. Interested persons should visit the NASAA Web site at *http://www.nasaa.org* for the full text of any proposed rule and to respond to any request for comment.

[128] See proposed General Instruction 14 (providing procedural guidance to advisers that no longer meet the definition of exempt reporting adviser). *See also infra* note 140.

[129] An adviser would indicate whether it is submitting an initial report, an annual updating amendment, an other-than-annual-amendment, or a final report. We also propose corresponding changes to General Instruction 2.

[130] An adviser would check that it qualifies for an exemption from registration: (i) As an adviser solely to one or more venture capital funds; and/or (ii) because it acts solely as an adviser to private funds and has assets under management in the United States of less than $150 million. *See* proposed Form ADV, Part 1A, Item 2.C. An adviser relying on the latter exemption, for private fund advisers, would also be required to indicate the amount of private fund assets it manages in Section 2.C. of Schedule D to Form ADV, Part 1A. Investment advisers who have their principal office and place of business outside of the United States, however, would need only to include private fund assets that they manage from a place of business in the United States. *See* Exemptions Release at section II.B.2.

advisory services, including providing advice to private funds. Therefore, the information that we propose to collect from exempt reporting advisers is for the most part currently required by Form ADV.[131] We would provide an instruction to these advisers to complete only certain items in the form, but we do not propose to change the content of the items for exempt reporting advisers.[132] As noted above, we propose to require exempt reporting advisers to complete a limited subset of Form ADV items, which would provide us and the public with some basic information about the adviser and its business, but is not all of the information we require registered advisers to submit to us, and which is designed to support our regulatory program. We propose to require exempt reporting advisers to complete the following items in Part 1A of Form ADV: Items 1 (Identifying Information), 2.C. (SEC Reporting by Exempt Reporting Advisers), 3 (Form of Organization), 6 (Other Business Activities), 7 (Financial Industry Affiliations and Private Fund Reporting), 10 (Control Persons), and 11 (Disclosure Information). In addition, exempt reporting advisers would have to complete corresponding sections of Schedules A, B, C, and D. We would not require exempt reporting advisers to complete and file with us other Items in Part 1A or prepare a client brochure (Part 2).[133]

Congress gave us broad authority to require exempt reporting advisers to file reports as necessary or appropriate in the public interest or for the protection of investors.[134] The Dodd-Frank Act neither specifies the types of information we could require in the reports nor specifies the purpose for which we would use the information.[135] We have sought information that we believe would assist us to identify the advisers, their owners, and their business models. The items that we have proposed would also provide us with information as to whether these advisers or their activities might present sufficient concerns as to warrant our further attention in order to protect their clients, investors, and other market participants. We have also considered the broader public interest in making this information generally available and believe there may be benefits of providing information about their activities to the public. We acknowledge that there may be costs associated with providing this information to us, and that the adviser may provide some or all of this information to private fund investors or prospective investors, however we believe there will be benefits, which we describe in more detail below.

Items 1, 3, and 10 would elicit basic identification details about an exempt reporting adviser such as name, address, contact information, form of organization, and who owns the adviser. Items 6 and 7.A. would provide us with details regarding other business activities that the adviser and its affiliates are engaged in, which would permit us to identify conflicts that the adviser may have with its clients that may suggest significant risks to those clients. Item 11 would require advisers to disclose the disciplinary history for the adviser and its employees. An exempt reporting adviser that has, for example, an officer that has been found guilty of fraud or other crimes or has committed substantial regulatory infractions would be of concern to us and to investors and prospective investors in funds advised by the exempt reporting adviser.

Because exempt reporting advisers manage private funds, we also propose to require them to complete Item 7.B. and Section 7.B of Schedule D for the private funds they advise. As discussed in more detail in Section II.C. below, we are proposing significant amendments to Section 7.B.1. of Schedule D that are designed to provide us with a comprehensive overview, or census, of private funds.[136] Exempt reporting advisers' responses to Item 7.B., and Section 7.B.1. of Schedule D, in conjunction with information provided by registered advisers, would provide us with important data about these funds that we would use to identify risks to their investors.

Do commenters agree with our judgments regarding the items applicable to exempt reporting advisers? We have not proposed to require exempt reporting advisers to complete Items 4, 5, 8, 9, or 12 of Part 1 of Form ADV. We request comment on whether we should require exempt reporting advisers to complete any of these items to provide us and investors with the information required by those items.

Part 2 of Form ADV, the client brochure, is required of registered advisers to provide clients and potential clients with detailed information about their qualifications, investment strategies, and business practices. Our proposal would not require exempt reporting advisers to prepare Part 2 of Form ADV. Should we require exempt reporting advisers to complete Part 2 of Form ADV, file it with us on IARD, and make it available to the public on our Web site? Would some or all of this information be helpful to clients and potential clients of these advisers? Should we not require exempt reporting advisers to complete certain items of Part 2? For example, should we exclude those items that would require information similar to those items of Part 1 that we are not proposing to require exempt reporting advisers to complete? Are there other items we should include or not include? Should we require these advisers to complete brochure supplements? Would the information in the brochure supplements be helpful to the clients of these advisers? Do investors currently receive this type of information as a result of their investment in a private fund?

Should the reporting requirements be identical for exempt reporting advisers as they are for registered advisers? Are there items that we have proposed to apply to exempt reporting advisers that we should not apply or are unnecessary, and why? Is any of the information we propose to require not readily available to an exempt reporting adviser? Would any of the items require disclosure of proprietary or competitively sensitive information? If so, which items, and if competitively sensitive, describe the competitive impact. Would any of these disclosure requirements, either individually or cumulatively, impose a significant burden? Would they require disclosure of proprietary or competitively sensitive information such that they could impact or influence business or other decisions by these advisers? Would they materially affect a decision by an adviser whether to form a private fund? If so, why?

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[131] Some of the amendments we propose to Form ADV would apply to both registered and exempt reporting advisers. *See infra* section II.C. of this Release.

[132] We propose amending General Instruction 3 to explain which portions of Form ADV are applicable to exempt reporting advisers.

[133] Part 2 of Form ADV, which requires advisers to prepare a narrative, plain English client brochure, contains 18 items including information on the adviser's business practices, conflicts of interest, and background. Part 2 also requires advisers to prepare brochure supplements that include information about advisory personnel on whom clients rely for investment advice. Currently, only a *registered* adviser must deliver a brochure under rule 204–3, and only an adviser that must deliver a brochure must prepare and file one as part of its Form ADV. *See* rule 203–1.

[134] *See* sections 407 and 408 of the Dodd-Frank Act.

[135] The Dodd-Frank Act does, however, specify that the reports are those "the Commission determines necessary or appropriate in the public interest or for the protection of investors." *Id.*

[136] For instance, advisers who complete section 7.B.1. of Schedule D would have to provide identifying information about each private fund, such as its name and domicile, as well as information about its ownership, service providers, and its total and net assets. *See* proposed Form ADV, Part 1A, Schedule D, Section 7.B.1.

3. Updating Requirements

We are also proposing to amend rule 204–1 under the Advisers Act, which requires advisers to update their Form ADV filings, to require exempt reporting advisers to file updating amendments to reports filed on Form ADV.[137] Proposed rule 204–1(a) would require an exempt reporting adviser, like a registered adviser, to amend its reports on Form ADV: (i) At least annually, within 90 days of the end of the adviser's fiscal year; and (ii) more frequently, if required by the instructions to Form ADV. Consequently, we are proposing to amend General Instruction 4 to Form ADV to require an exempt reporting adviser to update Items 1 (Identification Information), 3 (Form of Organization), or 11 (Disciplinary Information) promptly if they become inaccurate in any way, and to update Item 10 (Control Persons) if it becomes materially inaccurate.[138] We are proposing the same updating requirements with respect to these Items as are applicable to registered advisers because we believe it is equally important for exempt reporting advisers to report information on a timely basis. We also believe it could create confusion to apply different updating standards *within* each item of the form depending on who completes the item. Consequently, we are proposing to require exempt reporting advisers to follow the same instructions applicable to the items they must complete, although they are required to complete fewer items than a registered adviser.

We request comment on the proposed amendments to rule 204–1 to extend its requirements to exempt reporting advisers. Should exempt reporting advisers be permitted to update Form ADV, or certain items, less frequently? If so, what should be the updating requirements, and should we be concerned that, as a result, an exempt reporting adviser that is also registered with a State securities regulator would have to update its Form ADV on a different schedule than an exempt reporting adviser that is not also registered with a State? Would less frequent reporting result in information that is less useful or materially inaccurate? Should exempt reporting advisers be required to update other items more frequently than annually?

We propose to include a provision in rule 204–4 to require an exempt reporting adviser to file an amendment to its Form ADV when it ceases to be an exempt reporting adviser.[139] The exempt reporting adviser would indicate in this amendment that it is filing a final report pursuant to rule 204–4 in order to alert us that the adviser no longer will be filing reports, and allow us to distinguish such a filer from one that is inattentive to its filing obligations.[140] We request comment on this proposed final report requirement. Is there an alternative approach we could take?

Finally, we propose amending the instructions to Form ADV to provide guidance to exempt reporting advisers who file final reports because they must register with the Commission. Such a transition may occur, for example, if an adviser relying on the "venture capital exemption" in section 203(l) of the Advisers Act accepts a client that is not a venture capital fund,[141] or the value of the assets under management in the United States of an adviser relying on the "private fund exemption" in section 203(m) of the Advisers Act meets or exceeds $150 million.[142] A transitioning adviser would file an amendment to its Form ADV simultaneously indicating that the filing will be its final "report" on Form ADV and applying for registration with the Commission.[143] We request comment on this proposed guidance.

4. Transition

We propose requiring each exempt reporting adviser to file its initial report with us on Form ADV no later than August 20, 2011, 30 days after the July 21, 2011 effective date of the Dodd-Frank Act.[144] We believe this would provide sufficient time to enable an adviser to determine whether it must report to us and to take the steps necessary to complete and submit its initial filing. We request comment on our proposed transition, including the amount of time we propose for exempt reporting advisers to submit their initial reports.

As discussed above, our ability to effect this transition may be affected by our need to reprogram IARD.[145] We are working closely with FINRA, our IARD contractor, to make the needed modifications, but the programming may not be completed until after we adopt these rules. If IARD is unable to accept filings of amended Form ADV by that time, we may want to delay the reporting deadline until the system can accept electronic filing of the revised form. Should we instead require an alternative procedure, such as a paper filing, for advisers to indicate their eligibility for this exemption from registration and to satisfy their reporting requirements?

C. Form ADV

Data collected from Form ADV is of critical importance to our regulatory program and our ability to protect investors. We use information reported to us on Form ADV for a number of purposes, one of which is to efficiently allocate our examination resources based on the risks we discern or the identification of common business activities from information provided by advisers. The information is used to create risk profiles of investment advisers and permits our examiners to better prepare for, and more efficiently conduct, their on-site examinations. Moreover, the information in Form ADV allows us to better understand the investment advisory industry and evaluate the implications of policy choices we must make in administering the Advisers Act.

To enhance our ability to oversee investment advisers, we are proposing to require advisers to provide us additional information about three areas of their operations.[146] First, we are proposing to require advisers to provide information regarding private funds they advise. Second, we are proposing to expand the data advisers provide about their advisory business, (including data about the types of clients they have, their employees, and their advisory activities), as well as about their business practices that may present significant conflicts of interest (such as the use of affiliated brokers, soft dollar arrangements, and compensation for client referrals). Third, we are proposing to require additional information about advisers'

[137] Proposed rule 204–1. We also propose to amend the title of the rule to be "Amendments to Form ADV," rather than "Amendments to application for registration," to reflect use of the Form by exempt reporting advisers.

[138] *See* General Instruction 4 to Form ADV.

[139] *See* proposed rule 204–4(f).

[140] Proposed rule 204–4(f). Advisers filing a final report would not be required to pay a filing fee. We note that failure to file a final report would result in a violation of the rule.

[141] *See* section 407 of the Dodd-Frank Act.

[142] *See* section 408 of the Dodd-Frank Act.

[143] *See* proposed General Instruction 14. In the Exemptions Release we propose that an adviser relying on the private fund adviser exemption would have three months from the end of a calendar quarter at which it failed to qualify for the exemption because of a fluctuation in private fund assets to apply to the Commission for registration unless it qualifies for another exemption. *See* proposed rule 203(m)–1(d).

[144] *See* sections 403, 407, 408, and 419 of the Dodd Frank Act.

[145] *See supra* section II.A.1. of this Release.

[146] In addition, we are proposing several clarifying or technical amendments based on frequently asked questions we receive from advisers as well as in our experience administering the form. *See infra* section II.C.6. of this release.

non-advisory activities and their financial industry affiliations. We are also proposing certain additional changes intended to improve our ability to assess compliance risks and also to identify advisers that are subject to the Dodd-Frank Act's requirements concerning certain incentive-based compensation arrangements.[147] We understand that advisers would have ready access to all of the new information as part of their normal operations or compliance programs, and thus these new requirements should impose few additional regulatory burdens. We request comment on whether our understanding is correct. In addition to (or instead of) these three areas of operations, are there other areas about which we should require advisers to report additional information?

1. Private Fund Reporting: Item 7.B.

We propose to expand the information we require advisers to provide us about the private funds they advise in response to Item 7.B., and Schedule D. Both registered and exempt reporting advisers would complete this Item. The information would provide us with a more complete understanding of the private funds advised by advisers and would permit us to enhance our assessment of private fund advisers for purposes of targeting our examinations. The information also would help us identify particular practices that may harm investors. We have been concerned that unregistered funds have been used as a vehicle for perpetrating fraud on investors.[148] The private fund reporting requirements we are proposing would provide a level of transparency that we believe would help us to identify practices that may harm investors,[149] and would deter advisers' fraud and facilitate earlier discovery of potential misconduct.[150]

Currently, Item 7 requires each adviser to complete Section 7.B. of Schedule D for any "investment-related limited partnership" that the adviser or a related person advises. A separate Schedule D must be completed for each partnership. We propose to modify the scope of Item 7 by requiring completion of Section 7.B. only for a private fund that the adviser (and not a related person) advises. This amendment would incorporate the new term "private fund," defined in section 202(a)(29) of the Act, the primary effect of which would be to require advisers to report pooled investment vehicles regardless of whether they are organized as limited partnerships.[151] We would no longer require an adviser to report to us funds that are advised by affiliates, which in many cases would now be reported to us by an affiliate that is either registered under the Act or is now an exempt reporting adviser.[152]

To avoid multiple reporting for each private fund, we propose to permit a sub-adviser to exclude private funds for which an adviser is reporting on another Schedule D,[153] and would permit an adviser sponsoring a master-feeder arrangement to submit a single Schedule D for the master fund and all of the feeder funds that would otherwise be submitting substantially identical data.[154] Finally, we propose to permit an adviser with a principal office and place of business outside the United States to omit a Schedule D for a private fund that is not organized in the United States and that is not offered to, or owned by, "United States persons."[155] This approach is designed to limit the reporting burden imposed on foreign advisers with respect to funds in which U.S. investors have no direct interest.

We request comment on the scope of the Schedule D filing requirements about private funds. Should we, as proposed, require exempt reporting advisers to file Section 7.B. of Schedule D? Would the disclosure of private fund information by exempt reporting advisers impact or influence business or other decisions by these advisers, such as whether to form additional private funds or discourage entry into management of private funds all together?

Should we require advisers to report information also about other pooled investment vehicles they may advise, such as foreign funds not offered to U.S. persons? Specifically, are there sufficient investor protection or other concerns that the Commission should seek to require this information? Is information about these funds important to understand conduct that directly

[147] *See* section 956 of the Dodd-Frank Act.

[148] For example, since January 2009, the Commission has brought more than 50 enforcement cases in which we assert hedge fund advisers have defrauded hedge fund investors or used the fund to defraud others.

[149] For instance, census data about a private fund's gatekeepers, including administrators and auditors, would be available on proposed Section 7.B.1. of Schedule D and would be verifiable by investors and the Commission. Recent enforcement actions suggest that the availability of such information could be helpful. *See, e.g., SEC* v. *Grant Ivan Grieve, et al.,* Litigation Release No. 21402 (Feb. 2, 2010) (default judgment against hedge fund adviser that was alleged to have fabricated and disseminated false financial information for the fund that was "certified" by a sham independent back-office administrator and phony accounting firm); *See In the Matter of John Hunting Whittier,* Investment Advisers Act Release No. 2637 (Aug. 21, 2007) (settled action against hedge fund manager for, among other things, misrepresenting to fund investors that a particular auditor audited certain hedge funds, when in fact it did not).

[150] *See, e.g.,* Second Amended Complaint, *SEC* v. *Hoover,* Civil Action No. 01–10751–RGS, (D. Mass. Mar. 20, 2002) *available at http://www.sec.gov/litigation/complaints/complr17487.htm* (adviser allegedly participated in a scheme to defraud clients of his advisory firm by, among other things, misappropriating assets and overbilling expenses. When he became aware that the Commission staff was investigating his firm, he established a separate, unregistered advisory firm and perpetuated his fraud through use of a hedge fund he created and controlled.); *SEC* v. *Hoover,* Litigation Release No. 17981 (Feb. 11, 2003) (announcing final judgment by consent).

[151] *See supra* note 45 (discussing the definition of private fund). In 2004, the Commission adopted amendments to Form ADV to require reporting of "private fund" information, including a similar amendment to Item 7. A Federal appeals court vacated the 2004 amendments to Item 7 that we had adopted for private funds. *See Registration under the Advisers Act of Certain Hedge Fund Advisers,* Investment Advisers Act Release No. 2333 (Dec. 2, 2004) [69 FR 72054 (Dec. 10, 2004)] ("Hedge Fund Adviser Registration Release"); *Goldstein* v. *Securities and Exchange Commission,* 451 F.3d 873 (D.C. Cir. June 23, 2006) ("*Goldstein*"). The amendments we propose would, in part, reinstate these amendments we adopted in 2004.

[152] Currently, a related person may be able to rely on the private adviser exemption from registration, which, as discussed above, was repealed by the Dodd Frank Act effective July 21, 2011. *See supra* at sections I, II.B. of this Release.

[153] If an investment adviser completes section 7.B.1. of Schedule D for a private fund, other advisers to that fund (most of which are likely to be sub-advisers) would not have to complete section 7.B.1. for that private fund. *See* proposed Form ADV, Part 1A, Note to Item 7.B.; proposed Section 7.B.2. of Schedule D. When filing Section 7.B.1. of Schedule D for a private fund, an adviser would acquire a unique identification number to the fund. The adviser would be required to continue to use the same identification number whenever it amends Section 7.B.1. for that fund. Any adviser that files a Section 7.B.1. for a private fund for which an identification number has already been acquired by another adviser would not be permitted to acquire a new identification number, but would be required to instead utilize the existing number. *See* proposed Form ADV: Instructions for Part 1A, instr. 6.b.

[154] *See* proposed Form ADV: Instructions for Part 1A, instr. 6. In a master-feeder arrangement, one or more funds ("feeder funds") invest all or substantially all of their assets in a single fund ("master fund"). Advisers would report on a single Schedule D if their responses to certain questions of Section 7.B.1. of Schedule D would be identical for each master and feeder fund. Our staff estimates that most master-feeder arrangements involving private funds would meet this condition. An adviser filing a single Schedule D for a master-feeder arrangement would complete its Schedule D under the name of the master fund, following our proposed instructions for Section 7.B.

[155] *Id. See also* proposed Form ADV: Glossary. We propose to define "United States person" by reference to the definition in proposed rule 203(m)–1(e)(8), which tracks the definition of a "U.S. person" under Regulation S, except that it contains a special rule for discretionary accounts maintained for the benefit of United States persons. *See* Exemptions Release at section II.B.4. As discussed in the Exemptions Release, our proposed use of the Regulation S definition for various purposes under the Advisers Act would lessen the burden imposed on advisers, which are familiar with the definition because they apply it for other purposes under the securities laws.

involves U.S. investors? Are the instructions eliminating multiple filing of Section 7.B. by advisers helpful? Are there different approaches we might take to achieve our intended goals? We request that commenters review our proposed instructions and identify any ambiguities that we should address.

We propose to amend Section 7.B. of Schedule D, which currently requires very limited information about limited partnerships established by an adviser, and which provides us with little data about the operations of the many large hedge funds and other types of private funds advised by a growing number of advisers registered with the Commission.[156] New Section 7.B.1. would expand on the identifying information currently required to be reported in order to provide us with basic organizational, operational and investment characteristics of the fund; the amount of assets held by the fund; the nature of the investors in the fund; and the fund's service providers.[157] Although we are proposing several new items of information that would be reported to us, much of the information should be readily available to private fund advisers (*e.g.,* the amount of fund assets) and the responses to many of the items are unlikely to change from year to year (*e.g.,* on which exclusion from the Investment Company Act the fund relies) and thus the additional reporting should not involve a significant reporting burden. As discussed in more detail below, the information will help us identify potential compliance risks and inform our regulatory activities.

Part A of the Section would require identifying information, including the name of the private fund. We propose to add an instruction to the item to permit an adviser that seeks to preserve the anonymity of a private fund client by maintaining its identity in code in its records to identify the private fund in Schedule D using the same code.[158] We request comment on this new instruction.

We also propose to revise Part A to require an adviser to identify the State or country where the private fund is organized, and the name of its general partner, directors, trustees or persons occupying similar positions.[159] The item would ask information about the organization of the fund, including whether it is a master or a feeder fund, and some information about the regulatory status of the fund and its adviser, including the exclusion from the Investment Company Act on which it relies, whether the adviser is subject to a foreign regulatory authority, and whether the fund relies on an exemption from registration of its securities under the Securities Act of 1933.[160] The Item also would contain questions regarding whether the adviser is a subadviser to the private fund and would require the adviser to identify by name and SEC file number any other advisers to the fund.[161] We are proposing several questions to help us better understand the private fund's investment activities and other areas of potential investor protection concerns. For example, we would ask about the size of the fund, including both its gross and net assets, from which we could better understand the scope of its operations and the extent of leverage it employs.[162] We would ask the adviser to identify within seven broad categories (which the applicable instruction would define) the type of investment strategy employed by the adviser,[163] and to break down the assets and liabilities held by the fund by class and categorization in the fair value hierarchy established under U.S. generally accepted accounting principles (GAAP).[164] Many private funds managed by investment advisers that would be reporting to us prepare financial statements in accordance with GAAP.[165] Others may use international accounting standards requiring substantially similar information. Their adviser, therefore, should have access to this information from such financial statements. We would ask about both the number and the types of investors in the fund, as well as the minimum amounts required to be invested by fund investors to get a better idea of the types of investors the fund is intended to serve and to get a sense of the extent to which investors may themselves be in a position to exercise oversight of the adviser.[166] Finally, some items would ask information about characteristics of the fund that may present the fund manager with conflicts of interest with fund investors of the sort that may implicate the adviser's fiduciary obligations to the fund and, in some cases, create risks for the fund investors. Thus we would continue to ask whether clients of the adviser are solicited to invest in the fund and what percentage of the other clients has invested in the fund.[167]

In Part B of the Section, we propose to require advisers to report information concerning five types of service providers that generally perform important roles as "gatekeepers" for private funds (*i.e.,* auditors, prime brokers, custodians, administrators and marketers).[168] We would require that an adviser identify them, provide their location, and State whether they are related persons. For each of these service providers, we would also require specific information that would clarify the services they provide and include certain identifying information such as

[156] Today, Section 7.B. of Schedule D requires an adviser to a private fund that is a limited partnership or limited liability company to identify: (1) The name of the fund; (2) the name of the general partner or manager; (3) whether the adviser's clients are solicited to invest in the fund; (4) the approximate percentage of the adviser's clients that have invested in the fund; (5) the minimum investment commitment; and (6) the current value of the total assets of the fund.

[157] We have considered the potential application of section 210(c) of the Advisers Act (which precludes us from requiring advisers to disclose to us the "identity, investments, or affairs" of any of its clients) to the information about private fund clients of advisers and have concluded that the Dodd-Frank Act permits us to require this information in Form ADV. *See, e.g.,* section 404(2) of the Dodd-Frank Act, adding Advisers Act section 204(b)(1)(A) (authorizing the Commission to require any investment adviser registered under the Act "to maintain such records of, and file with the Commission such reports regarding, private funds advised by the investment adviser, as necessary and appropriate in the public interest and for the protection of investors * * *").

[158] Rule 204–2(d) permits any books and records required to be maintained by the rule "in such manner that the identity of any client to whom such investment adviser renders investment supervisory services is indicated by numerical or alphabetical code or some similar designation." We included the provision in the rule in 1961 to reconcile our then new examination authority (the exercise of which has required us to examine client records) with section 210(c) of the Act. *See Notice of Proposed Rule to Require Investment Advisers to Maintain Specified Books and Records Under the Investment Advisers Act of 1940,* Investment Advisers Act Release No. 111 (Jan. 25, 1961) [26 FR 987 (Feb. 1, 1961)]. We are proposing to add the instruction to permit the few advisers that in our experience have sought to encode the identity of their clients to do so.

[159] *See* proposed Form ADV, Part 1A, Section 7.B.1.A. of Schedule D, questions 2–3.

[160] *Id.* questions 4–7 and questions 23–24 (asking whether the fund relies on Regulation D and what is the fund's Form D file number, if any).

[161] *Id.* questions 19–20.

[162] *Id.* question 11.

[163] *Id.* question 10. The categories include: (i) Hedge fund; (ii) liquidity fund; (iii) private equity fund; (iv) real estate fund; (v) securitized asset fund; (vi) venture capital fund; and (vii) other private fund.

[164] *Id.* question 12. *See* FASB ASC 820–10–50–2b. We also propose to ask whether the fund invests in securities of registered investment companies, which is relevant to evaluating compliance with the fund of funds provision of the Investment Company Act, section 12(d)(1). *See* section 12(d)(1) of the Investment Company Act; proposed Form ADV, Part 1A, Section 7.B.1.A. of Schedule D, question 9.

[165] *See supra* note 56. In addition, advisers to private funds that prepare and distribute financial statements prepared in accordance with GAAP may be deemed to satisfy certain requirements of our custody rule. *See* Advisers Act rule 206(4)–2(b)(4).

[166] *See* proposed Form ADV, Part 1A, Section 7.B.1.A. of Schedule D, questions 13–18.

[167] *Id.* questions 21–22.

[168] *See* proposed Form ADV, Part 1A, Section 7.B.1.B. of Schedule D.

registration status. This information includes the following for each service provider. For the auditors, whether they are independent, registered with the Public Company Accounting Oversight Board (PCAOB) and subject to its regular inspection, and whether audited statements are distributed to fund investors.[169] For the prime broker, whether it is SEC-registered and whether it acts as custodian for the private fund.[170] For the custodian, whether it is a related person of the adviser.[171] For the administrator, whether it prepares and sends to investors account statements and what percentage of the fund's assets are valued by the administrator or another person that is not a related person of the adviser.[172] Finally, for marketers, whether they are related persons of the adviser, their SEC file number (if any), and the address of any Web site they use to market the fund.[173] The questions in Part B are generally designed to improve our ability to assess conflicts and potential risks, identify funds with service provider arrangements that raise a "red flag," and identify firms for examination. For instance, it would be relevant to us to know that a private fund is using a service provider that we are separately investigating for alleged misconduct.

The information we propose to require advisers to report on private funds is similar to (although less extensive than) the information that we understand investors in hedge funds and other private funds commonly seek in their due diligence questionnaires.[174] Professional investors use information acquired as part of their vetting process before they invest. We likewise are seeking to acquire the information to help us identify private fund advisers that present investors with greater compliance or other risks. Each particular item of information may not itself indicate an elevated risk of a compliance failure, but could serve as an input to the risk metrics by which our staff identifies potential risk and allocates examination resources. The staff conducts similar analyses today, but have limited inputs, which constrains their effectiveness.

The information would be publicly available as is other information on Form ADV, and we expect it would be used by investors to supplement their due diligence efforts. We expect the use of these data could further help investors and other industry participants protect against fraud. For example, using the IARD data, auditors would be able to compare their list of funds they audit with those whose advisers report them as auditor in order to uncover false representations.[175] Investors (and their consultants) would be able to compare representations made on Schedule D with those made in private offering documents or other material provided to prospective investors.

We request comment on our proposed amendments to Section 7.B. of Schedule D. Should we modify our requests for information? Is there information requested in due diligence questionnaires that would yield additional or more relevant risk information and that we should require? For instance, should we require advisers to report information regarding their legal counsel? If so, what information? Is the information we request readily available to fund managers, and in particular to sub-advisers? If not, is there information that is readily available that could serve the same purpose?

In crafting these new disclosure items, we have sought to avoid requiring disclosure of proprietary information that could harm the interests of the fund or fund investors. Have we succeeded? Commenters asserting that information not be reported should identify the specific harm asserted. Do commenters agree with our belief that reporting and disclosure of private fund information will be beneficial to investors (although they may currently receive some or all of this information) as well as prospective investors and other market participants?

Will it be burdensome for registered or exempt reporting advisers to use for purposes of Question 12 the valuation hierarchy established under GAAP with respect to those funds that do not have financial statements prepared in accordance with GAAP? If we require all advisers to fair value their private fund assets under management as proposed,[176] would advisers be able to rely on such a valuation for purposes of Question 12? Should we require that the information provided in response to Question 12 be part of audited financial statements or be subject to review by auditors or another independent third party? Are there additions, deletions, or changes to the definitions of the seven categories of private fund we would require advisers to use to identify a private fund that we should consider? Should some of the items apply only to certain types of private funds (*e.g.,* hedge funds)? If so, which items and why?

2. Advisory Business Information: Employees, Clients and Advisory Activities: Item 5

Item 5 of Part 1A requires an adviser to provide basic information regarding the business of the adviser that allows us to identify the scope of the adviser's business, the types of services it provides, and the types of clients to whom it provides those services. The item requires information from the adviser about the number of its employees, the amount of assets it manages, the number and types of its clients, and the types of advisory services provided. The modifications we are proposing today, which primarily refine or expand existing questions, would help us better understand the operations of advisers.

First, we propose to seek additional information about the adviser's employees. Currently, Item 5 asks for the number of employees that are registered representatives of a broker-dealer, which we would expand to ask for the number of employees that are registered as investment adviser representatives or insurance agents.[177] In order to obtain more precise data, we also propose that advisers provide a single numerical approximate response to the questions about employees, instead of checking a box corresponding to a range of numbers, as is currently required.[178] This additional employee data would, for instance, permit us to develop ratios (*e.g.,* number of employees to assets under management of clients) that we can use to identify

[169] *See* proposed Form ADV, Part 1A, Section 7.B.1.B. of Schedule D, question 25. We are also proposing amendments to the instructions contained in Item 9 to avoid having advisers reporting overlapping information (relevant to compliance with rule 206(4)–2, the "custody rule") under Section 9 and Section 7.B. of Schedule D.

[170] *See id.* question 26.

[171] *See id.* question 27. "Related Person" is defined in Form ADV: Glossary.

[172] *See id.* question 28.

[173] *See id.* question 29. For purposes of this question, marketers include placement agents, consultants, finders, introducers, municipal advisors or other solicitors, or similar persons.

[174] *See, e.g.,* AIMA's Illustrative Questionnaire For Due Diligence of Hedge Fund Managers, *available at* (registration required) *http://www.aima.org/en/knowledge_centre/index.cfm.*

[175] *See In the Matter of John Hunting Whittier,* Investment Advisers Act Release No. 2637 (Aug. 21, 2007) (settled action against hedge fund manager for, among other things, misrepresenting to fund investors that a particular auditor audited certain hedge funds, when in fact it did not.)

[176] *See supra* section II.A.3.

[177] Proposed Form ADV, Part 1A, Items 5.B.(3) and (5).

[178] For instance, proposed Item 5.B.(1) asks how many of an adviser's employees perform advisory functions. Under the current Form, an adviser with seven such employees would check a box for "6–10." We propose the adviser simply fill in a blank with the number "7."

advisers to inform our risk-based examination program.

Second, we propose to add some questions to help us better understand an adviser's business by reference to the types of clients the adviser services. Items 5.C. and D. currently require an adviser to report how many clients it has (in ranges) and to indicate the types of clients, *e.g.* high net worth individuals, investment companies. We propose to expand the list of types of clients provided in Item 5.D., to include business development companies, insurance companies, and other investment advisers, as well as to distinguish pension and profit-sharing plans subject to ERISA [179] from those that are not. As amended, this Item also would require an adviser to indicate the approximate amount of its regulatory assets under management attributable to each client type.[180] We also propose to ask approximately what percentage of the adviser's clients are not United States persons.[181] This additional information would allow us to better understand the focus of an adviser's business.

Third, we are proposing two amendments related to the advisory activities that are reported in Item 5. Item 5.G. requires an adviser to select from a list the advisory services that it provides, such as financial planning or portfolio management. We propose to expand the list of advisory activities to include portfolio management for pooled investment vehicles, *other* than registered investment companies, and educational seminars or workshops.[182] We would also require advisers to provide the SEC file number for a registered investment company if they check the box for portfolio management for an investment company, which would permit our examination staff to link information reported on Form ADV to information reported on forms filed through our EDGAR system by investment companies managed by these advisers.[183] We are proposing new Item 5.J. that would require advisers to select from a list the types of investments about which they provided advice during the fiscal year for which they are reporting.[184] These changes would provide us with more details regarding the services an adviser provides, allowing us to better identify candidates if, for instance, we choose to do a risk-targeted examination of advisers based on the nature of the advice they provide.

We request comment on our proposed amendments to Item 5. Would advisers readily have access to the additional data we request? Does the switch from ranges to a single approximate number of employees in Items 5.A. and 5.B. pose any significant problems or burdens for advisers? If so, would providing an instruction to permit an adviser to round its responses up or down help? Are there additional types of clients, advisory activities, and investments we should add to our proposed lists in Items 5.D., 5.G., and 5.J., respectively?

3. Other Business Activities and Financial Industry Affiliations: Items 6 and 7

Items 6 and 7 of Part 1A require advisers, including exempt reporting advisers, to report those financial services the adviser or a related person is actively engaged in providing from lists of financial services set forth in the items. We are proposing several changes to these Items that would provide us with a more complete picture of the activities of an adviser and its related persons, which would better allow us to assess the conflicts of interest and risks that may be created by those relationships and to identify affiliated financial service businesses. We propose to expand the lists in both Items 6 and 7 to include business as a trust company, registered municipal advisor, registered security-based swap dealer, and major security-based swap participant, the latter three of which are new SEC-registrants under the Dodd-Frank Act's amendments to the Exchange Act.[185] We also propose to add accountants (or accounting firms) and lawyers (or law firms) to the list in Item 6, to parallel current Item 7. We are also proposing to move from Item 7.B. to Item 7.A. the question that asks whether a related person is a sponsor or the general partner or managing member of a pooled investment vehicle.[186] Finally, we would clarify in the instruction to Item 7 that advisers are to include related persons that are foreign affiliates.

We are also proposing to require additional reporting in the corresponding sections of Schedule D for Items 6 and 7. First, we propose a new Section 6.A. of Schedule D that would require an adviser that checks the box that it is engaged in another business under a different name to list those other business names and the other lines of business in which the adviser engages using that name.[187] Second, we propose a similar modification to Item 6.B. to require advisers primarily engaged in another business under a different name to also provide that name in Section 6.B. of Schedule D. Third, we propose to amend Section 7.A. of Schedule D, which currently requires that advisers provide identifying information for related persons that are investment advisers or broker-dealers. We propose to require advisers to provide this same information with respect to *any* type of related person listed in Item 7.A. We also propose to expand the information we collect regarding these related persons to include more details about the relationship between the adviser and the related person, whether the related person is registered with a foreign financial regulatory authority, and how they share personnel and confidential information.[188] This additional information on related persons would allow us to link disparate pieces of information that we have access to concerning an adviser and its affiliates as well as identifying whether the adviser controls the related

[179] Employee Retirement Income Security Act of 1974 (29 U.S.C. 18).

[180] Proposed Form ADV, Part 1A, Item 5.D. We are also proposing amendments to the calculation of an adviser's regulatory assets under management. *See supra* section II.A.3. of this Release.

[181] Proposed Form ADV, Part 1A, Item 5.C.(2). *See supra* note 155 (discussing the definition of "United States person"). We also propose to add an instruction to Item 5.C., 5.D. and 5.H. to clarify that advisers should not count as clients the investors in a private fund they advise unless they have a separate advisory relationship with them.

[182] Proposed Form ADV, Part 1A, Item 5.G.

[183] Proposed Form ADV, Part 1A, Schedule D, Section 5.G.(3).

[184] Advisers would also be required to indicate the types of investments, such as various types of swaps and variable life insurance, about which they provided advice. Proposed Form ADV, Part 1A, Item 5.J.

[185] Proposed Form ADV, Part 1A, Items 6.A. and 7.A. Section 975 of the Dodd-Frank Act amends the Exchange Act to require "municipal advisors" to register with the Commission, Section 761 of that Act amends the Exchange Act to define the terms "security-based swap dealer" and "major security-based swap participant," and section 764 amends the Exchange Act to require these entities to register with the Commission.

[186] The question we propose to ask in Item 7.A. would, therefore, retain information about related persons that would otherwise not be required as a result of our proposed changes to Item 7.B. As discussed above, we are proposing to require advisers to report in Item 7.B. and section 7.B.1. of Schedule D private fund information only about funds they advise, not funds advised by a related person. *See supra* section II.C.1. of this Release. We would also delete "investment company" from the list in Item 7 as duplicative of information we obtain in Item 5. *See, e.g.,* Form ADV, Part 1A, Items 5.D., 5.G., and proposed Form ADV, Part 1A, Section 5.G.(3) of Schedule D. *See also supra* note 183 and accompanying text.

[187] For example, an adviser registered with us under the name "Adam Bob Charlie Advisers LLC" that is also actively engaged in business as an insurance agent under the name "ABC Insurance LLC" would put the name "ABC Insurance LLC" in Section 6.A. of Schedule D and would check the box for "Insurance broker or agent."

[188] Proposed Form ADV, Part 1A, Section 7.A., questions 1, 2, 5 and 6.

person or vice versa. It would also provide us with a tool to identify where there may be advisory activities by unregistered affiliates. Finally, we propose to relocate to this section a question currently under Section 9 that requires reporting of whether a related person bank or futures commission merchant is a qualified custodian for client assets under the adviser custody rule, and to ask, if the adviser is reporting a related person investment adviser, whether the related person is exempt from registration.[189]

We request comment on these proposed amendments. Should we request additional information about advisers' and their related persons' other business? Should we request less information? Are there other types of financial services providers we should include in the lists contained in Items 6 and 7? Are there other questions in Section 7.A. that we should ask to determine additional conflicts of interest advisers face through related persons? Is the information advisers need to complete the proposed additional questions contained in Section 7.A. readily available?

4. Participation in Client Transactions: Item 8

Item 8 requires an adviser to report information about its transactions, if any, with clients, including whether the adviser or a related person engages in transactions with clients as a principal, sells securities to clients, or has discretionary authority over client assets. This item also currently requires an adviser to indicate if it has discretionary authority to determine the brokers or dealers for client transactions and if it recommends brokers or dealers to clients.[190] We propose to further ask whether any of the brokers or dealers are related persons of the adviser.[191] An adviser that indicates that it receives "soft dollar benefits" would also report whether all those benefits qualify for the safe harbor under section 28(e) of the Exchange Act for eligible research or brokerage services.[192] Finally, we would add a new question requiring an adviser to indicate whether it or its related person *receives* direct or indirect compensation for client referrals to complement the existing question concerning whether the adviser compensates any person for client referrals.[193] The amendments we are proposing would enhance our ability to identify additional conflicts of interest that advisers may face that we have identified through our experience administering the Advisers Act.

We request comment on our proposed amendments. Should we request additional information about advisers' receipt of soft dollar benefits, such as requiring advisers to quantify the benefits they receive or disclose the names of the brokers or dealers from whom the adviser receives soft dollar benefits? Is there other information that would assist us in identifying conflicts of interest?

5. Reporting $1 Billion in Assets: Item 1

Section 956 of the Dodd-Frank Act requires us, jointly with certain other Federal regulators, to adopt rules or guidelines addressing certain excessive incentive-based compensation arrangements, including those of investment advisers with $1 billion or more in assets.[194] To enable us to identify those advisers that would be subject to section 956, we propose to require each adviser to indicate in Item 1 whether or not the adviser had $1 billion or more in assets as of the last day of the adviser's most recent fiscal year.[195] We propose that for purposes of this reporting requirement, the amount of assets would be the adviser's total assets determined in the same manner as the amount of "total assets" is determined on the adviser's balance sheet for its most recent fiscal year end.[196] We request comment on whether Form ADV generally, and the proposed requirement in particular, is the appropriate method to identify these investment advisers. Should we identify these advisers by other means, and if so, what other means? We also request comment on the proposed method that advisers must use to determine the amount of their assets.

6. Other Amendments to Form ADV

The proposed amendments also include a number of additional changes unrelated to the Dodd-Frank Act that are intended to improve our ability to assess compliance risks. First, we propose changes to improve certain identifying information we obtain from other items of Part 1A of Form ADV. Item 1 currently requires an adviser to provide contact information for an employee designated to handle inquiries regarding the adviser's Form ADV. We propose instead to require an adviser to provide contact information for its chief compliance officer to give us direct access to the person designated to be in charge of its compliance program.[197] Advisers would have the option, in Item 1.K., to provide an additional regulatory contact for Form ADV, neither of which would be viewable by the public on our Web site.[198] We also propose to amend Item 1 to require an adviser to indicate whether it or any of its control persons is a public reporting company under the Exchange Act.[199] This would provide a signal, not only to us, but to investors and to prospective investors, that additional public information is available about the adviser and/or its control persons. In addition, we propose to add "Limited Partnership" as another choice advisers may select to indicate how their organization is legally formed.[200]

We are also proposing to add an additional custody question to Item 9 to require advisers to indicate the *total* number of persons that act as qualified custodians for the adviser's clients in connection with advisory services the adviser provides to its clients.[201] We recently modified Item 9 to elicit

[189] Proposed Form ADV, Part 1A, Section 7.A., questions 3 and 4. We are also proposing a technical change to remove the same question in section 9.D. of Schedule D.

[190] Form ADV, Part 1A, Items 8.C.3. and 8.E.

[191] Proposed Form ADV, Part 1A, Items 8.F.

[192] Proposed Form ADV, Part 1A, Item 8.G.(2). *Commission Guidance Regarding Client Commission Practices Under Section 28(e) of the Securities Exchange Act of 1934,* Exchange Act Release No. 54165 (July 18, 2006) [71 FR 41978 (July 24, 2006)].

[193] Proposed Form ADV, Part 1A, Item 8.I.

[194] *See* sections 956(a)–(c), (e)(2)(D), (f) of the Dodd-Frank Act. The other Federal regulators include the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Board of Directors of the Federal Deposit Insurance Corporation, the Director of the Office of Thrift Supervision, the National Credit Union Administration Board, and the Federal Housing Finance Agency.

[195] *See* proposed Form ADV, Part 1A, Item 1.O. (adviser would mark "yes" or "no" to indicate whether it had $1 billion or more in assets).

[196] *See* proposed Form ADV: Instructions for Part 1A, instr. 1.b. We construe section 956 as specifying, and thus propose to define "assets" to mean, the total assets of the advisory firm rather than the total "assets under management," *i.e.,* assets managed on behalf of clients.

[197] Proposed Form ADV, Part 1A, Item 1.J. An adviser is currently required to provide the name of its chief compliance officer on Schedule A of Form ADV, but not other identifying information. *See also* 17 CFR 275.206(4)–7; *Compliance Programs of Investment Companies and Investment Advisers,* Investment Advisers Act Release No. 2204 (Dec. 17, 2003) [68 FR 74714 (Dec. 24, 2003)] (adopting rule 206(4)–7 requiring registered investment advisers to designate a chief compliance officer). An exempt reporting adviser that does not have a chief compliance officer would instead provide a designated person's contact information in Item 1.K. Proposed Form ADV, Part 1A, Item 1.K. Likewise, we would not require an exempt reporting adviser to provide the name of a chief compliance officer on Schedule A of Form ADV.

[198] Proposed Form ADV, Part 1A, Item 1.K. We note that clients will be provided with a supervisory contact in brochure supplements. *See* Part 2 Release, *supra* note 46.

[199] Proposed Form ADV, Part 1A, Items 1.N., 10.B., and Section 10.B. of Schedule D.

[200] Proposed Form ADV, Part 1A, Item 3.A.

[201] Proposed Form ADV, Part 1A, Item 9.F.

information about the adviser or its related person(s) acting as qualified custodian.[202] We did not, however, request information about *other* qualified custodians. We expect this discrete piece of additional data to provide us with a more complete picture of an adviser's custodial practices.[203]

Finally, we are proposing three technical changes with respect to the reporting of disciplinary events. First, we propose to add a box to Item 11 for advisers to check if any disciplinary information reported in that item and the corresponding disclosure reporting pages is being reported about the adviser or any of its supervised persons.[204] This would enable us to easily determine if an adviser is only reporting disciplinary events for its affiliates, and would facilitate our ability to focus examination and enforcement resources on those advisers that appear to present the greatest compliance risks. Second, we propose to add a third reason to each disclosure reporting page (DRP) that permits an adviser to remove the DRP from its filing by adding a box an adviser could check if it was filed in error. Third, we propose to amend Item 3.D. of Part 2B, the brochure supplement, to correct a drafting error regarding when a brochure supplement would need to include disclosure regarding the revocation or suspension of a professional attainment, designation, or license. The amendment would replace "proceeding" in that item with "hearing or formal adjudication."[205] By using the term "proceeding," which is defined in the Form ADV Glossary, this item limits the required disclosure to actions initiated by a government agency, self-regulatory organization or foreign financial regulatory authority. The item was intended to require disclosure of actions taken by the designating authority to revoke or suspend the use of the attainment, designation, or license that it administers, and not actions taken by regulatory authorities who are unlikely to bring an action to revoke or suspend a professional designation.

We request comment on these proposed changes. Are there additional items we should consider amending, and why? We are considering whether to add an additional reporting requirement to Item 1 that would require advisers to provide a unique identification code to provide additional uses for the data that we collect. For example, the Office of Financial Research (OFR) is required to publish a financial company reference database as part of its role in assisting the Financial Stability Oversight Council (FSOC) under the Dodd-Frank Act.[206] Would a unique identification code assigned by, on behalf of, or otherwise used by FSOC or OFR that is reported on Form ADV permit cross-referencing of the data we collect with this future database? Is there a reason why we should not require an adviser to report such an identifier on Form ADV if one is provided?

Should we consider accelerating any of the updating requirements for Form ADV to improve the usefulness of the form to the Commission and to investors? For instance, while we have accelerated filing deadlines in for other types of reports,[207] since 1979, advisers have had 90 days from their fiscal year ends to provide an annual update to Form ADV.[208] To provide more timely information to us and the public, should advisers be required to file their annual amendments to Form ADV within 60 days of the end of the adviser's fiscal year or some other shorter time period?

D. Other Amendments

1. Amendments to "Pay to Play" Rule

Adopted last July, rule 206(4)–5, generally prohibits registered and certain unregistered advisers from engaging directly or indirectly in pay to play practices identified in the rule.[209] We are proposing three amendments to the rule that we believe are needed as a result of the enactment of the Dodd-Frank Act.

First, we propose to amend the scope of the rule to make it apply to exempt reporting advisers and foreign private advisers.[210] Rule 206(4)–5 currently applies to advisers that are either registered with the Commission, or unregistered in reliance on the exemption under section 203(b)(3) of the Advisers Act.[211] As a consequence of the repeal of the private adviser exemption in section 203(b)(3), many unregistered advisers will register under the Act and will be subject to rule 206(4)–5 (albeit pursuant to a different clause of the rule).[212] In addition, the Dodd-Frank Act has added an exemption for "foreign private advisers" in section 203(b)(3) of the Act, which will result in these advisers being subject to the pay to play rule.[213] However, some unregistered advisers to which the rule currently applies because of section 203(b)(3) will remain exempt from registration because of the new exemptions for exempt reporting advisers, which we did not contemplate when we adopted rule 206(4)–5, and will no longer be subject to the rule. To prevent unintended narrowing of the application of the rule as a result of the amendments to the Advisers Act, we are

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[202] *See Custody of Funds or Securities of Clients by Investment Advisers,* Investment Advisers Act Release No. 2968 (Dec. 30, 2009) [75 FR 1456 (Jan. 11, 2010)].

[203] Consistent with the updating requirements for Items 9.A.(2), 9.B.(2), and 9.E., we propose requiring new Item 9.F. to be updated only annually. *See* proposed General Instruction 4.

[204] Proposed Form ADV, Part 1A, Item 11.

[205] If adopted, the revised item would State "[A]ny other hearing or formal adjudication in which a professional attainment, designation, or license of the supervised person was revoked or suspended because of a violation of rules relating to professional conduct. If the supervised person resigned (or otherwise relinquished the attainment, designation, or license) in anticipation of such a hearing or formal adjudication (and the adviser knows, or should have known, of such resignation or relinquishment), disclose the event."

[206] *See* sections 154(b)(2)(A) and 201(a)(11) of the Dodd Frank Act.

[207] *See, e.g.,Acceleration of Periodic Report Filing Dates and Disclosure Concerning Web site Access to Reports,* Exchange Act Release No. 46464 (Sept. 5, 2002) [67 FR 58480 (Sept. 16, 2002)], at nn. 22–24 and accompanying text (noting that the deadline to file Form 10–K within 90 days after a company's fiscal year end had not been changed in 32 years and accelerating it to 60 days for "large accelerated filers" and 75 days for "accelerated filers," each as defined in rule 12b–2 under the Exchange Act, in order to modernize the periodic reporting system and improve the usefulness of periodic reports to investors).

[208] *See Investment Adviser Requirements Concerning Disclosure, Recordkeeping, Applications for Registration and Annual Filings,* Investment Advisers Act Release No. 664 (Jan. 30, 1979) [44 FR 7870 (Feb. 7, 1979)] (adopting rule 204–1).

[209] *Political Contributions by Certain Investment Advisers,* Investment Advisers Act Release No. 3043 (July 1, 2010) [75 FR 41018, 41024 (July 14, 2010)] ("Pay to Play Release"). The rule prohibits covered advisers from (i) providing advisory services for compensation to a government client for two years after the adviser or certain of its executives or employees makes certain political contributions; (ii) paying any third party to solicit advisory business from any government entity unless the person is a "regulated person," subject to similar pay to play restrictions; and (iii) soliciting others, or coordinating, contributions to certain elected officials or candidates or payments to political parties where the adviser is providing or seeking government business. *See id.*

[210] Proposed rule 206(4)–5(a).

[211] *See* rule 206(4)–5(a)(1) and (2).

[212] Instead of being subject to the rule as advisers "unregistered in reliance on the exemption available under section 203(b)(3) of the Advisers Act," they will be subject to the rule as advisers "registered (or required to be registered)" under the Act. Rule 206(4)–5(a)(1) and (2).

[213] *See* section 402 of the Dodd-Frank Act (defining "foreign private adviser"); section 403 of the Dodd-Frank Act (amending section 203(b)(3) of the Advisers Act to strike the current language exempting certain "private advisers" from registration and inserting language exempting "foreign private advisers" from registration).

Applying rule 206(4)–5 to foreign private advisers, unlike exempt reporting advisers, does not require any amendment of the rule specifically regarding these advisers because the rule currently cross-references section 203(b)(3) of the Advisers Act.

proposing to extend the rule to apply it to exempt reporting advisers, as well as foreign private advisers.

We request comment on our proposal to make rule 206(4)–5 applicable to exempt reporting advisers and foreign private advisers. Should either of these types of unregistered advisers be excluded from the rule? If so, what protections should apply instead? We are not proposing to require advisers that will become subject to State registration as a result of the Dodd-Frank Act to comply with the pay to play rule.[214] Should we?

Second, we propose to amend the provision of rule 206(4)–5 that prohibits advisers from paying persons (*e.g.,* "solicitors" or "placement agents") to solicit government entities unless such persons are "regulated persons" (*i.e.,* registered investment advisers or broker-dealers subject to rules of a registered national securities association, such as the Financial Industry Regulatory Authority ("FINRA"), that restricts its members from engaging in pay to play activities).[215] Instead, we would permit an adviser to pay any "regulated municipal advisor" to solicit government entities on its behalf. A regulated municipal advisor under the proposed rule would be a person that is registered under section 15B of the Securities Exchange Act and subject to pay to play rules adopted by the MSRB.[216]

The Dodd-Frank Act creates a new category of person known as a "municipal advisor," which it defines to include persons that undertake "a solicitation of a municipal entity."[217] These persons include, among others, any third-party solicitor, including registered investment advisers and broker-dealers, seeking business on behalf of an investment adviser from a municipal entity, including a pension fund.[218] These municipal advisors are subject to MSRB rules, and we understand that the MSRB intends to consider subjecting municipal advisors to pay to play rules similar to its rules governing municipal securities dealers.[219] Broker-dealers acting as placement agents or solicitors and investment advisers acting as solicitors of municipal entities and obligated persons generally meet the statutory definition of a municipal advisor and thus would be subject to MSRB rules.[220] Our proposed amendment would, like the current rule, permit advisers to pay persons to solicit government entities on their behalf only if such third parties are registered with us and subject to pay to play rules.[221] Given the new regulatory regime applicable to municipal advisors, including solicitors of government entities that meet the definition of "regulated person" under rule 206(4)–5,[222] broker-dealer solicitors are expected to be subject to MSRB's pay to play rules, rendering it unnecessary at this time for FINRA to adopt a pay to play rule that would satisfy rule 206(4)–5(f)(9)(ii). We are proposing, therefore, to replace references in rule 206(4)–5 to FINRA's pay to play rules with references to MSRB rules that we find are consistent with the objectives of rule 206(4)–5 and impose substantially equivalent or more stringent pay to play restrictions.

We are not proposing to amend the compliance date of rule 206(4)–5's limitation on payments to third-party solicitors, which is September 13, 2011. MSRB staff has informed our staff that the pay to play rules it expects to consider would likely be in effect by that date.[223] If rule 206(4)–5 is amended as proposed, an investment adviser subject to the rule would be prohibited from paying any third party to solicit government entities on its behalf that is not registered with us under Section 15B of the Securities Exchange Act and thus not subject to the MSRB's pay to play rules.

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[214] For a discussion of the Dodd-Frank Act's reallocation of responsibility for regulation of investment advisers between the Commission and the states, see *supra* section II.A. of this Release.

[215] Rule 206(4)–5(a)(2)(i). FINRA is currently the only national securities association registered under section 19(a) of the Exchange Act (15 U.S.C. 78s(a)).

[216] Proposed rule 206(4)–5(a)(2), (f)(9). As provided in the proposed rule, these pay to play rules must prohibit municipal advisors from engaging in distribution or solicitation activities if certain political contributions have been made. In addition, the Commission must find that they both impose substantially equivalent or more stringent restrictions on municipal advisors than rule 206(4)–5 imposes on investment advisers and that they are consistent with the objectives of rule 206(4)–5.

[217] Section 975 of the Dodd-Frank Act. In creating this new municipal advisor category, Congress expressed its intent that municipal advisors be permitted to solicit government clients. *See* Senate Committee Report, *supra* note 11, at 148 ("The SEC recently proposed new rules under the Investment Advisers Act of 1940 relating to the provision by registered investment advisers of investment advisory services to municipal entities in which, among other things, the SEC proposed prohibiting investment advisers from making payments to unrelated persons for solicitation of municipal entities for investment advisory services on behalf of investment advisers. Rather than effectively prohibiting such third-party solicitation for investment advisory services, [section 975] would provide that activities of a municipal advisor, broker, dealer or municipal securities dealer to solicit a municipal entity to engage an unrelated investment adviser to provide investment advisory services to a municipal entity or to engage to undertake underwriting, financial advisory or other activities for a municipal entity in connection with the issuance of municipal securities would be subject to regulation by the MSRB * * *").

[218] *See* Section 975(e) of the Dodd-Frank Act (defining: (i) "Municipal advisor," in relevant part, as "a person * * * that * * * undertakes a solicitation of a municipal entity;" (ii) "municipal entity," in relevant part, as "any State, political subdivision of a State, or municipal corporate instrumentality of a State, including * * * any plan, program, or pool of assets sponsored or established by the State, political subdivision * * * or any agency, authority or instrumentality thereof. * * *;" and (iii) "solicitation of a municipal entity or obligated person," in relevant part, as "a direct or indirect communication with a municipal entity or obligated person made by a person, for direct or indirect compensation, on behalf of * * * an investment adviser (as defined in section 202 of the Investment Advisers Act of 1940) that does not control, is not controlled by, or is not under common control with the person undertaking such solicitation for the purpose of obtaining or retaining an engagement by a municipal entity or obligated person * * * of an investment adviser to provide investment advisory services to or on behalf of a municipal entity.").

[219] *See* MSRB, *Municipal Securities Rulemaking Board Issues Statement on Financial Reform Legislation,* Press Release, July 15, 2010, *available at http://www.msrb.org/News-and-Events/Press-Releases/2010/MSRB–Issues-Statement-on-Financial-Reform-Legislation.aspx* ("The transition [to a majority public governing board] will be coordinated with a rulemaking program designed to ensure careful but prompt development of rules fulfilling the MSRB's expanded mission. The MSRB will develop rules in the areas of fair practice and fiduciary duties, pay to play and other conflicts of interest, gifts, disclosures, professional qualifications, continuing education and other areas identified by the new governing board."); MSRB rule G–37. MSRB rule G–37 is available on the MSRB's Web site at *http://www.msrb.org/Rules-and-Interpretations/MSRB-Rules/General/Rule-G-37.aspx*.

[220] *See supra* note 218. While section 15B(e)(4)(C) of the Exchange Act excludes from the definition of municipal advisor "a broker, dealer, or municipal securities dealer serving as an underwriter (as defined in section 2(a)(11) of the Securities Act of 1933)," we interpret this exclusion to apply solely to a broker, dealer, or municipal securities dealer serving as an underwriter on behalf of a municipal issuer in connection with the issuance of municipal securities. Congress enacted section 975 of the Dodd-Frank Act, which added the definition of "municipal advisor" to Section 15B of the Exchange Act, to subject the relationship between a municipal advisor and a municipal entity to regulation by the MSRB. *See* Senate Committee Report, *supra* note 11, at 148 (noting the need to subject activities such as solicitation of a municipal entity to engage an investment adviser to MSRB regulation). The Commission expects to consider a proposal for a permanent municipal advisor registration program, including requirements for the registration of municipal advisors. *See Temporary Registration of Municipal Advisors,* Exchange Act Release No. 62824 (Sept. 1, 2010) [75 FR 54465 (Sept. 8, 2010)].

[221] *See* Pay to Play Release at section II.B.2.(b). We note that a person that solicits investors to invest in investment interests that are securities also may need to consider whether that person is acting as a broker. *See* Pay to Play Release at n. 326.

[222] *See* rule 206(4)–5(f)(9)(ii) (defining "regulated person" to include a broker-dealer that is registered with the Commission and is a member of a national securities association registered under section 15A of the Exchange Act (currently limited to FINRA)).

[223] If it appears that the MSRB will not be able to adopt pay to play rules for municipal advisors by September 13, 2011 that would meet the requirements of rule 206(4)–5, we will consider whether to take alternative action.

We request comment on our proposal to permit investment advisers to hire registered municipal advisors to solicit government entities on their behalf, if those registered municipal advisors are subject to pay to play restrictions under MSRB rules. Could our proposal result in rule 206(4)–5's solicitation limitations applying to certain solicitors affiliated with an investment adviser?[224] Should we amend rule 206(4)–5 expressly to allow advisers to pay these investment adviser-affiliated solicitors? Should we amend rule 206(4)–5 to provide that any person that controls, is controlled by, or is under common control with an investment adviser (and, if that person is an entity, its personnel) would be deemed to be a "covered associate" of the investment adviser if the investment adviser pays or agrees to pay such person (or such personnel) to solicit a government entity on its behalf?

Finally, we are proposing a minor amendment to rule 206(4)–5's definition of a "covered associate"[225] of an investment adviser to clarify that a legal entity, not just a natural person, that is a general partner or managing member of an investment adviser would meet the definition. Under the rule as adopted, "covered associate" includes any owner and personnel of an adviser and political action committees the owner, personnel, or adviser control for purposes of the rule's restrictions. Currently, the owners of an adviser included in the definition of "covered associate" are: "[a]ny general partner, managing member * * * or other individual with a similar status or function."[226] We are proposing to replace the word "individual" with the word "person." Unlike the other proposed amendments to rule 206(4)–5, this proposed amendment is not related to the Dodd-Frank Act, but instead is meant to clarify the rule and the Commission's original intent that "covered associate" include legal entities as well as natural persons, and to respond to interpretive questions our staff has received.

2. Technical and Conforming Amendments

a. Rules 203(b)(3)–1 and 203(b)(3)–2

We intend, at the adoption of rule and form amendments to implement provisions of the Dodd-Frank Act, to rescind rules 203(b)(3)–1[227] and 203(b)(3)–2,[228] which specify how advisers "count clients" for purposes of determining whether the adviser is eligible for the private adviser exemption of section 203(b)(3) of the Advisers Act (which, as discussed above, Congress repealed in section 403 of the Dodd-Frank Act). In the Exemptions Release, we are proposing a new client counting rule, rule 202(a)(30)–1, for purposes of the new foreign private adviser exemption.[229]

b. Rule 204–2

We are proposing to amend rule 204–2 under the Advisers Act, the "books and records" rule, to update the rule's "grandfathering provision" for investment advisers that are currently exempt from registration under the "private adviser" exemption, but will be required to register when the Dodd-Frank Act's elimination of the "private adviser" exemption becomes effective on July 21, 2011. At that time, these advisers would become subject to the recordkeeping requirements of the Act, including the requirement to keep certain records relating to performance.[230] We propose that these advisers would not be obligated to keep certain performance-related records so long as they did not actually register when they were eligible for the "private adviser" exemption; however, to the extent that these advisers preserved these performance-related records without being required to do so by current rule 204–2, the proposed grandfathering provision would require them to continue to preserve them.[231] In addition, we are proposing to amend rule 204–2(e)(3)(ii) to cross-reference the new definition of "private fund" added to the Dodd-Frank Act.[232] Finally, we expect to rescind rule 204–2(l)[233] because it was vacated by the Federal appeals court in *Goldstein* and because the Dodd-Frank Act's addition of section 204(b)(2) to the Advisers Act codifies this concept in the statute itself.[234]

c. Rule 0–7

Rule 0–7(a)(1) under the Advisers Act, which defines "small entities" under the Advisers Act for purposes of the Regulatory Flexibility Act, cross-references section 203A(a)(2) of the Advisers Act.[235] The Dodd-Frank Act has renumbered section 203A(a)(2) of the Advisers Act to 203A(a)(3)), and thus we are proposing to amend rule 0–7(a)(1) to cross-reference section 203A(a)(3) rather than section 203A(a)(2).[236]

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[224] *See* section 15B(e)(4) of the Exchange Act (defining "municipal advisor" to include "a person (who is not a municipal entity or an employee of a municipal entity) that * * * undertakes a solicitation of a municipal entity"); section 15B(e)(9) of the Exchange Act (defining "solicitation of a municipal entity or obligated person" to mean "a direct or indirect communication with a municipal entity or obligated person made by a person, for direct or indirect compensation, on behalf of * * * [an] investment adviser * * * *that does not control, is not controlled by, or is not under common control with the person undertaking such solicitation* for the purpose of obtaining or retaining an engagement by a municipal entity or obligated person * * * of an investment adviser to provide investment advisory services to or on behalf of a municipal entity" (emphasis added)).

[225] *See* rule 206(4)–5(f)(2) (defining a "covered associate" of an investment adviser as: "(i) Any general partner, managing member or executive officer, or other individual with a similar status or function; (ii) Any employee who solicits a government entity for the investment adviser and any person who supervises, directly or indirectly, such employee; and (iii) Any political action committee controlled by the investment adviser or by [any other covered associate].").

[226] *See id.*

[227] Rule 203(b)(3)–1.

[228] Rule 203(b)(3)–2. We adopted rule 203(b)(3)–2 in 2004 in order to require certain hedge fund advisers to register under the Act. *See* Hedge Fund Adviser Registration Release. That rule, and certain amendments to rule 203(b)(3)–1 and other rules, were vacated by a Federal appeals court in *Goldstein,* but have remained in the Code of Federal Regulations.

[229] *See* Exemptions Release at section II.C.1.

[230] *See* rule 204–2(a)(16).

[231] *See* proposed amendment to rule 204–2(e)(3)(ii) (stating, "[i]f you are an investment adviser that was, prior to July 21, 2011, exempt from registration under section 203(b)(3) of the Act (15 U.S.C. 80b–3(b)(3)), as in effect on July 20, 2011, [this rule] does not require you to maintain or preserve books and records that would otherwise be required to be maintained or preserved under [certain sections of this rule] to the extent those books and records pertain to the performance or rate of return of such private fund (*as defined in section 202(a)(29) of the Act (15 U.S.C. 80b–2(a)(29)*), or other account you advise for any period ended prior to July 21, 2011, *provided that* you were not registered with the Commission as an investment adviser during such period, and *provided further* that you continue to preserve any books and records in your possession that pertain to the performance or rate of return of such private fund or other account for such period." (emphasis added)). Advisers to private funds that registered with the Commission based on adoption of rule 203(b)(3)–2 in the Hedge Fund Adviser Registration Release and then withdrew their registration based upon the *Goldstein* decision would be permitted to rely on the proposed grandfathering provision.

[232] *See* rule 204–2(e)(3)(ii) (using the term private fund without reference to a definition). We are proposing to add a parenthetical noting that the term is defined in section 202(a)(29) of the Advisers Act.

[233] Rule 204–2(l) states that books and records of a private fund are, under certain circumstances, treated as books and records of its adviser.

[234] Section 404 of the Dodd-Frank Act (adding section 204(b)(2) to the Advisers Act, which states, "The records and reports of any private fund to which an investment adviser registered under this title provides investment advice shall be deemed to be the records and reports of the investment adviser.").

[235] Rule 0–7(a)(1) (stating that the term "small business" or "small organization" for purposes of the Advisers Act means an investment advisers that: "Has assets under management, as defined under Section 203(a)(2) of the Act (15 U.S.C. 80b–3a(a)(2)) and reported on its annual updating amendment to Form ADV [17 CFR 279.1], of less than $25 million, or such higher amount as the Commission may by rule deem appropriate * * *.").

[236] Proposed amendment to rule 0–7(a)(1).

d. Rule 222–1

We are proposing to replace the term "principal place of business" in rule 222–1(b) [237] under the Advisers Act, which contains definitions relevant to section 222 of the Advisers Act's provisions regarding State regulation of investment advisers, with the term "principal office and place of business" to conform to the Dodd-Frank Act's amendments to that section.[238] We are not proposing to modify the definition.

e. Rule 222–2

We are proposing technical amendments to rule 222–2 to define "client" for purposes of the national *de minimis* standard by cross-referencing the definition of "client" in proposed rule 202(a)(30)–1 rather than the definition in rule 203(b)(3)–1 because we expect to rescind rule 203(b)(3)–1.[239] We also propose to change a cross-reference to paragraph (b)(6) of existing rule 203(b)(3)–1 to paragraph (b)(4) of proposed rule 202(a)(30)–1 to account for the changed location of that particular provision. Finally, because proposed rule 202(a)(30)–1, unlike rule 203(b)(3)–1, does not include a "special rule" specifying that an adviser is not required to count as a client any person for whom the adviser provides investment advisory services without compensation, we are proposing to include this instruction in rule 222–2. We request comment on our proposed amendments to rule 222–2. Should we preserve the instruction that an adviser is not required to count as a client any person for whom the adviser provides investment advisory services without compensation for purposes of the national *de minimis* standard?

f. Rule 202(a)(11)–1

We intend, at the adoption of rule and form amendments to implement the Dodd-Frank Act, to rescind rule 202(a)(11)–1.[240] Although the rule was vacated by a Federal appeals court (and is therefore not in effect),[241] it has remained in the CFR.

III. General Request for Comment

The Commission requests comment on the rules, and rule and form amendments proposed in this Release, suggestions for additional changes to the existing rules and comment on other matters that might have an effect on the proposals contained in this Release. Commenters should provide empirical data to support their views.

IV. Cost-Benefit Analysis

The Commission is sensitive to the costs and benefits of its rules. The new rules and rule and form amendments we are proposing would give effect to provisions in Title IV of the Dodd-Frank Act that: (i) Reallocate responsibility for oversight of investment advisers by delegating generally to the states responsibility over certain mid-sized advisers; (ii) repeal the "private adviser exemption" contained in section 203(b)(3) of the Advisers Act; and (iii) provide for reporting by advisers to certain types of private funds that are exempt from registration. As part of these amendments, we are also proposing amendments to the Advisers Act pay to play rule, rule 206(4)–5. Additionally, we propose to identify the advisers that are subject to the Dodd-Frank Act's requirements concerning certain incentive-based compensation arrangements. Because many of our proposals would implement or clarify provisions of the Dodd-Frank Act, they would not create benefits and costs separate from the benefits and costs considered by Congress in passing the Dodd-Frank Act.[242] However, certain of our proposals, if adopted, would generate costs and benefits independent of those generated by the Dodd-Frank Act itself. These costs and benefits are discussed below.

A. Benefits

1. Eligibility To Register With the Commission: Section 410

Section 410 of the Dodd-Frank Act amends section 203A of the Advisers Act to create a new group of "mid-sized advisers" and shifts primary responsibility for their regulatory oversight to the State securities authorities.[243] It does this by prohibiting from registering with the Commission an investment adviser that is required to be registered and subject to examination as an investment adviser in the State in which it maintains its principal office and place of business and that has assets under management between $25 million and $100 million.[244] We are proposing rules and rule amendments that would provide us a means of identifying advisers that must transition to State regulation, clarify the application of new statutory provisions, and modify certain of the exemptions we have adopted under section 203A of the Act.

Transition to State Registration

We are proposing a new rule, rule 203A–5, which would require *each* investment adviser registered with us on July 21, 2011 to file an amendment to its Form ADV no later than August 20, 2011 (30 days after the July 21, 2011 effective date of the amendments to section 203A), and withdraw from Commission registration by October 19, 2011 (60 days after the required filing of Form ADV), if no longer eligible.[245] As a consequence of section 410 of the Dodd-Frank Act, we estimate that approximately 4,100 advisers currently registered with the Commission will be required to withdraw their registration and register with one or more State securities authorities.[246] Given this significant re-alignment of regulatory authority over numerous advisers, our proposed rule would allow us to easily and efficiently identify the advisers that are subject to our regulatory authority after the Dodd-Frank Act's amendment to section 203A becomes effective, and which advisers have switched to State registration due to the amendment to section 203A. The proposed rule would confer this same benefit on State securities authorities. This would promptly implement the Congressional mandate, and accommodate the IARD processing of renewals and fees for State registration and licensing, while allowing for an orderly transition. It would also help minimize any potential uncertainty about the effects of the Dodd-Frank Act on the registration status of a particular adviser among investors and other market participants by providing a simple, efficient means

[237] Rule 222–1(b) (defining "principal place of business" of an investment adviser as "the executive office of the investment adviser from which the officers, partners, or managers of the investment adviser direct, control, and coordinate the activities of the investment adviser.").

[238] *See* section 985 of the Dodd-Frank Act (replacing the term "principal place of business" each time it appears—*i.e.,* six times—with the term "principal office and place of business" in section 222 of the Advisers Act).

[239] *See supra* section II.D.2.a. of this Release (discussing rescinding rule 203(b)(3)–1); Exemptions Release at section II.C.1. (discussing the definition of "client" in proposed rule 202(a)(30)–1).

[240] Rule 202(a)(11)–1.

[241] *Financial Planning Association v. SEC,* 482 F.3d 481 (D.C. Cir. 2007).

[242] *See* Dodd-Frank Act, *supra* note 2; Conference Committee Report, *supra* note 67; Senate Committee Report, *supra* note 11; *supra* section I. of this Release. Proposals not generating costs and benefits independent of those generated by the Dodd-Frank Act include the proposed amendments to rules 0–7, 204–2, 222–1, 222–2 and our proposal to rescind rule 203(b)(3)–1.

[243] *See supra* section II.A.7. of this Release.

[244] *See supra* notes 11–12 and accompanying text (discussing section 410 of the Dodd-Frank Act, which amends Section 203A of the Advisers Act to increase the threshold above which all investment advisers must register with the Commission from $25 million to $100 million).

[245] Proposed rule 203A–5(a), (b). *See supra* section II.A.1. of this Release.

[246] *See supra* note 15 and accompanying text.

of determining the adviser's post-Dodd-Frank registration status through the IARD system as of a specific date. To the extent that rule 203A–5 would minimize uncertainty among investors and other market participants, it could help minimize any disruption in advisory business that such uncertainty could provoke, and investors would know clearly whether an adviser that advises them is subject to State or Commission registration and regulation.

Switching Between State and Commission Registration

Rule 203A–1 currently contains two means of preventing an adviser from having to switch frequently between State and Commission registration as a result of changes in its assets under management or the departure of one or more clients.[247] We propose to amend rule 203A–1 to eliminate the $5 million buffer that permits an investment adviser having between $25 million and $30 million of assets under management to remain registered with the states and that does not subject the adviser to cancellation of its Commission registration until its assets under management fall below $25 million.[248] We are proposing to eliminate the current $5 million buffer because it seems unnecessary in light of Congress's determination generally to require most advisers having between $30 million and $100 million of assets under management to be registered with the states.[249] Elimination of this portion of the rule also promotes efficiency and competition by making the registration requirements for advisers with assets under management between $25 million and $30 million consistent with the requirements for advisers with assets under management between $30 million and $100 million. Moreover, we are proposing to retain the 180-day grace period from the adviser's fiscal year end to address concerns about advisers frequently having to register and then de-register with the Commission as a result of changes in their eligibility to register.[250]

Exemptions From the Prohibition on Registration With the Commission

We are proposing amendments to three exemptions from the prohibition on registration in rule 203A–2 to reflect developments since their initial adoption, including the enactment of the Dodd-Frank Act.[251] First, we are proposing to eliminate the exemption in rule 203A–2(a) from the prohibition on Commission registration for NRSROs.[252] Since we adopted this exemption, Congress amended the Act to exclude NRSROs from the Act and provided for a separate regulatory regime for NRSROs under the Exchange Act.[253] Only one NRSRO remains registered as an investment adviser under the Act and reports that it has more than $100 million of assets under management and thus would not need to rely on the exemption.[254] Given that NRSROs do not currently rely on the exemption and that Congress has excluded NRSROs from the Act, we do not believe that our proposed amendment would generate any benefits or costs and would not impact efficiency, competition or capital formation, separate from the benefit of simplifying our rules by eliminating an unused exemption.

Second, we are proposing to amend the exemption available to pension consultants in rule 203A–2(b) to increase the minimum value of plan assets from $50 million to $200 million.[255] We had set the threshold at $50 million of plan assets for these advisers to ensure that a pension consultant's activities are significant enough to have an effect on national markets.[256] We propose to increase this threshold to $200 million in light of Congress's determination to increase from $25 million to $100 million the amount of "assets under management" that requires advisers to register with the Commission without regard to State regulatory requirements.[257] This amendment would maintain the same ratio of plan assets to the statutory assets under management requirements currently in place, and would provide the regulatory benefit of allowing the Commission to focus its resources on oversight of those pension consultants that are more likely to have an effect on national markets.

Finally, we propose to amend the multi-State adviser exemption in rule 203A–2(e) to align the rule with the multi-State exemption Congress built into the mid-sized adviser provision under section 410 of the Dodd-Frank Act.[258] Under rule 203A–2(e), the prohibition on registration with the Commission does not apply to an investment adviser that is required to register in 30 or more states. Once registered with the Commission, the adviser remains eligible for Commission registration as long as it would be obligated, absent the exemption, to register in at least 25 states.[259] We propose to amend rule 203A–2(e) to permit all investment advisers required to register as an investment adviser with 15 or more states to register with the Commission.[260] We believe this reflects a Congressional view on the number of states with which an adviser must be required to be registered before the regulatory burdens associated with such regulation warrants registration with the Commission and application of the preemption provision.[261] This amendment reduces the regulatory burdens on advisers required to be registered with at least 15 states, but less than 30, by allowing them to register with a single securities regulator—the Commission. Additionally, the amendment promotes efficiency and reduces the effect on competition between small and mid-sized investment advisers by imposing a consistent multi-State exemption standard. We also propose to eliminate the provision in the rule that permits advisers to remain registered until the number of states in which they must register falls below 25 states, and we are not proposing a similar cushion for the 15–State threshold.[262] We do not see any significant benefit of retaining the buffer and believe it is unnecessary as a result of our proposal to lower the number of states from 30 to 15 and because advisers elect to rely on the exemption.

Elimination of Safe Harbor

We are proposing to eliminate the safe harbor in rule 203A–4 from Commission registration for an investment adviser that is registered with a State securities authority of the State in which it has its principal office and place of business, based on a reasonable belief that it is prohibited from registering with the Commission because it does not have sufficient assets under management.[263] Advisers have not, in our experience, asserted the availability of this safe harbor as a defense, which protects only

[247] *See supra* note 62–65 and accompanying text.

[248] *See supra* note 66.

[249] *See supra* note 67.

[250] *See* proposed rule 203A–1(b); *supra* notes 66–68 and accompanying text.

[251] *See* proposed rule 203A–2; *supra* section II.A.5. of this Release. We would also make conforming amendments to renumber rule 203A–2(b) through (f).

[252] *See supra* section II.A.5.a. of this Release.

[253] *See supra* notes 73–74.

[254] Based on IARD data as of September 1, 2010.

[255] *See* proposed rule 203A–2(a); *supra* section II.A.5.b. of this Release.

[256] *See supra* note 78.

[257] *See supra* note 79.

[258] *See* proposed rule 203A–2(d); *supra* section II.A.5.c. of this Release.

[259] *See supra* note 82.

[260] *See* proposed rule 203A–1(d)(1).

[261] *See supra* note 84.

[262] *See supra* note 85–86.

[263] Rule 203A–4. *See supra* section II.A.6. of this Release.

against enforcement actions by us and not any private actions, and we view it as unlikely that an adviser would be reasonably unaware that it has more than $100 million of regulatory assets under management when it is required to report its regulatory assets under management on Form ADV.[264] We do not believe that rescinding the safe harbor would generate any significant benefits, other than simplifying our rules in general and thereby marginally reducing costs of compliance, and we believe it would have little, if any, other effect on efficiency, competition or capital formation.

Mid-Sized Advisers

The Dodd-Frank Act does not explain how to determine whether a mid-sized adviser is "required to be registered" or is "subject to examination" by a particular State securities authority for purposes of section 203A(a)(2)'s prohibition on mid-sized advisers registering with the Commission.[265] We propose to incorporate into Form ADV an explanation of how we construe these provisions.[266] Our instructions are intended to clarify the meaning of these provisions, which would benefit advisers by promoting efficiency and competition. For example, as a result of our proposal to identify to advisers filing on IARD the states that do not subject advisers to examination, a mid-sized adviser would not be required to determine whether it is subject to examination in a particular State. Simplifying the process for mid-sized advisers to determine whether they are required to register with us would decrease any competitive disadvantages compared to smaller advisers. Our proposed changes to IARD also would ensure that only mid-sized advisers with a principal office and place of business in those states (or mid-sized advisers that are not registered with the states where they maintain a principal office and place of business) will register with the Commission, which would also make the registration process more efficient.

2. Exempt Reporting Advisers: Sections 407 and 408

Congress gave us broad authority to require exempt reporting advisers to file reports as necessary or appropriate in the public interest or for the protection of investors.[267] We have sought information that we believe would be useful to us to be able to identify the advisers, their owners, and their business models and, in addition, whether they might present sufficient concerns as to warrant our further attention in order to protect their clients and fulfill our regulatory responsibilities. We have also considered the broader public interest in making this information generally available and believe there may be benefits of providing information about their activities to the public. We acknowledge that there may be costs associated with providing this information to us, and that the adviser may provide some or all of this information to private fund investors or prospective investors, however, we believe these investors would benefit from the proposed reporting requirements.

To meet the Dodd-Frank Act's reporting provisions for "exempt reporting advisers," we are proposing a new rule, rule 204–4, to require exempt reporting advisers to file reports with the Commission electronically on Form ADV.[268] We are also proposing amendments to Form ADV so that it could serve the dual purpose of both an SEC reporting form for exempt advisers and, as it is used today, a registration form for both State and SEC-registered firms.[269] In addition to requiring that exempt reporting advisers use Form ADV, proposed rule 204–4 would require these advisers to submit reports through the IARD and to pay a filing fee.[270]

We believe that using Form ADV and IARD for exempt reporting adviser reports would yield several benefits. For instance, using Form ADV and IARD would create efficiencies that benefit both us and filers by taking advantage of an established and proven adviser filing system, while avoiding the expense and delay of developing a new form and filing system. Additionally, the IARD contains many time-saving features, like the ability to pre-populate prior responses and drop-down boxes for common responses. In addition, because exempt reporting advisers may be required to register on Form ADV with one or more State securities authorities, use of the existing form and filing system (which is shared with the states) should reduce regulatory burdens for them because they can satisfy multiple filing obligations through a uniform form.[271] Similarly, regulatory burdens would be diminished for an exempt reporting adviser that later finds it can no longer rely on an exemption and would be required to register with us because the adviser would simply file an amendment to its current Form ADV to apply for Commission registration.[272] Finally, certain items in Form ADV Part 1 are also linked to Form BD, which would create efficiencies if the exempt reporting adviser ever applies for broker-dealer registration.

Requiring that exempt reporting advisers file their reports through the IARD would also benefit clients, prospective clients, and members of the public who could readily access the information, without cost, through the Commission's Web site on the Investment Adviser Public Disclosure (IAPD) system. Investors would have access to some information that may have been previously unavailable or not easily attainable, such as whether a prospective exempt reporting adviser has certain disciplinary events and whether its affiliates present conflicts of interest or broader access to other financial services. As a result, investors would be in a better position to make informed decisions. As a secondary benefit, the easy availability of information about these advisers and their advisory affiliates may discourage advisers from engaging in certain practices (such as maintaining client assets with a related person custodian) or hiring certain persons (such as those with disciplinary history). Investors' access to information may also facilitate greater competition among advisers, which may in turn benefit clients.

Electronic reporting by exempt reporting advisers of certain Items within Form ADV would give us better access to information about these advisers to administer our regulatory programs and to identify advisers whose activities suggest a need for closer scrutiny. We can easily use the IARD to generate reports on the industry, its characteristics and trends. These reports would help us anticipate regulatory problems, allocate and reallocate our resources, and more fully evaluate and anticipate the implications of various regulatory actions we may consider taking, which should increase both the efficiency and effectiveness of our programs and thus increase investor protection. In addition, requiring

[264] *See supra* notes 91–92 and accompanying text.

[265] *See supra* note 94.

[266] *See* proposed Form ADV: Instructions for Part 1A, instr. 2.b. *See also supra* section II.A.7. of this Release (discussing these instructions in detail).

[267] *See* sections 407 and 408 of the Dodd-Frank Act.

[268] Proposed rule 204–4(a). *See supra* section II.B. of this Release.

[269] *See supra* section II.B.1. of this Release.

[270] Proposed rule 204–4(b), (d).

[271] *See supra* note 126–127 and accompanying text.

[272] *See* proposed General Instruction 14 (providing procedural guidance to advisers that no longer meet the definition of exempt reporting adviser). *See also supra* note 128.

exempt reporting advisers to complete Section 7.B of Schedule D for each private fund they manage should result in many of the same benefits that this information produces with respect to registered advisers that we address in the discussion of the proposed amendments to Form ADV below.

We are also proposing to amend rule 204–1 under the Advisers Act, which addresses when and how advisers must amend their Form ADV, to require that exempt reporting advisers file updating amendments to reports filed on Form ADV.[273] Proposed rule 204–1(a) would require an exempt reporting adviser, like a registered adviser, to amend its reports on Form ADV: (i) At least annually, within 90 days of the end of the adviser's fiscal year; and (ii) more frequently, if required by the instructions to Form ADV. Consequently, we are proposing to amend General Instruction 4 to Form ADV to require an exempt reporting adviser to update Items 1 (identification information), 3 (Form of Organization), or 11 (disciplinary information) promptly if they become inaccurate in any way, and to update Item 10 (Control Persons) if it becomes materially inaccurate.[274]

Requiring advisers to amend their reports on Form ADV at least annually, and more frequently if identification or disciplinary information becomes inaccurate in any way, would assure that we have access to updated information such as knowing when an exempt reporting adviser has added or no longer has a private fund client, which will provide us with the information necessary to assess whether they might present sufficient concerns to warrant our further inquiry. Updated information would also benefit clients, prospective clients, and other members of the public that could use this information in evaluating, for example, whether to make an investment in a venture capital fund managed by an exempt reporting adviser.

To accommodate their use by exempt reporting advisers, we also are proposing technical amendments to Form ADV–H, the form advisers use to request a hardship exemption from electronic filing,[275] and Form ADV–NR, used to appoint the Secretary of the Commission as an agent for service of process for certain non-resident advisers.[276] Proposed rule 204–4(e) and the proposed amendments to Form ADV–H would benefit exempt reporting advisers by allowing them to avoid non-compliance with reporting requirements based purely on unanticipated technical difficulties. The proposed amendments to Form ADV–NR would benefit investors by allowing us to obtain appropriate consent to permit the Commission and other parties to bring actions against non-resident partners or agents for violations of the Federal securities laws.

3. Form ADV Amendments

As discussed above, we are proposing to require advisers to provide us on Form ADV additional information about (1) private funds they advise, (2) their advisory business and conflicts of interest, and (3) their non-advisory activities and financial industry affiliations.[277] We are also proposing certain additional changes intended to improve our ability to assess compliance risks and to identify the advisers that are covered by section 956 of the Dodd-Frank Act addressing certain incentive-based compensation arrangements.

Private Fund Reporting Requirements

The private fund reporting requirements we are proposing would provide us with information designed to help us better understand private fund investment activities and the scope and potential impact of those activities on investors and our markets. The information would assist us in identifying particular practices that may harm investors and would allow us to conduct targeted examinations of private fund advisers based on these practices or other criteria. In addition the proposed items are designed to improve our ability to assess risk, identify funds with service provider arrangements that raise a "red flag," identify firms for examination, and allow us to more efficiently conduct examinations. For instance, it would be relevant to us to know that a private fund is using a service provider that we are separately investigating for alleged misconduct. We propose to ask about both the number and the types of investors in the fund to get a better idea of the investors the fund is intended to serve and to get a sense of the extent to which investors may themselves be in a position to evaluate the adviser. We would ask about the size of the fund, including both its gross and net assets, to better understand the scope of its operations and the extent of leverage it employs. Responses to the service provider questions would, for example, allow us to identify those funds that do not make use of independent service providers, which may indicate a higher level of risk, and provide other key information regarding the identity and role of these private fund gatekeepers. Each particular item of information may not itself indicate an elevated risk of a compliance failure, but is designed to serve as an input to the risk metrics by which our staff identifies potential risk and allocates examination resources. The staff conducts similar analyses today, but with fewer inputs.

Form ADV information that private fund advisers would report to us also would benefit private fund investors in evaluating potential managers. As amended, Form ADV would require private fund advisers to disclose information about their business, affiliates and owners, gatekeepers, and disciplinary history. This would create a publicly accessible foundation of basic information that could aid investors, to the extent they were not otherwise timely given the information, in conducting due diligence and could further help investors and other industry participants protect against fraud. For example, using the IARD data, auditors would be able to compare their list of funds they audit with those whose advisers report them as auditor. Investors (and their consultants) would be able to compare representations made on Schedule D with those made in private offering documents or other material provided to prospective investors.

Private fund reporting would benefit investors and market participants by providing us and other policy makers with better data. Better data would enhance our ability to form and frame regulatory policies regarding the private fund industry and its advisers, and to evaluate the effect of our policies and programs on this sector, including for the protection of private fund investors. Today we frequently have to rely on data from other sources, when available. Private fund reporting would provide us with important information about this rapidly growing segment of the U.S. financial system.

[273] Proposed rule 204–1. *See supra* section II.B.3. of this Release.

[274] Registered advisers are subject to the same updating requirements with respect to these Items. *See* General Instruction 4 to Form ADV.

[275] Proposed rule 204–4(e) would allow exempt reporting advisers having unanticipated technical difficulties that prevent submission of a filing to the IARD systems to request a temporary hardship exemption from electronic filing requirements.

[276] *See* proposed amended Form ADV–H, proposed amended Form ADV–NR, and proposed General Instruction 18. The amendments to Form ADV–H and Form ADV–NR would reflect that exempt reporting advisers use the forms in the same way and for the same purpose as they are currently used by registered investment advisers.

[277] *See supra* section II.C. of this Release.

Other Proposed Amendments to Form ADV

Other amendments we are proposing today to Form ADV would refine or expand existing questions, which would give us a more complete picture of an adviser's practices, help us better understand each adviser's operations, business and services, and provide us with more information to determine advisers' risk profiles and prepare for examinations. The amendments would provide us with critical information to identify practices that may harm clients, which would assist us in identifying candidates for risk-targeted examinations, detecting data or patterns that suggest further inquiry may be warranted about a particular issue, and distinguishing additional conflicts of interest that advisers may face. For example, the additional information we propose to require about related persons would allow us to link disparate pieces of information that we have access to concerning an adviser and its affiliates to identify whether those relationships present conflicts of interest that create higher risks for advisory clients. Another example is the proposed switch from ranges to approximate numbers of employees and assets by client type. Although these changes would refine data we already receive, it would provide significant benefits in developing risk-based profiles of advisers. Our proposal to expand the list of the types of advisory activities an adviser might engage in and to include a list of the types of investments about which they provide advice would help us better understand the operations of advisers. Additionally, our proposal to require advisers to report whether they have $1 billion or more in assets would help us to identify the advisers that are covered by section 956 of the Dodd-Frank Act addressing certain incentive-based compensation arrangements. Overall, the information proposed to be collected on Form ADV is designed to improve our risk-assessment capabilities and help us best allocate our examination resources.

Further, advisory clients and prospective clients would also benefit from these proposed amendments. The additional information that registered advisers would report to us would be publicly available, which would aid investors in evaluating potential managers and understanding their practices. For example, requiring an adviser to indicate whether it or any of its control persons is a public reporting company under the Exchange Act would provide a signal, not only to us, but to clients and to prospective clients, that additional public information is available about the adviser and/or its control persons. Requiring an adviser to report whether it has $1 billion or more of assets would help inform the adviser, its clients and the public whether or not the adviser is subject to section 956 of the Dodd-Frank Act and any rules or guidelines thereunder. The additional information about the adviser's related persons would assist clients to compare business practices, strategies, and conflicts of a number of advisers, which may help them to select the most appropriate adviser for them. Clients may also benefit indirectly because advisers may be incentivized to implement stronger controls and practices, particularly related to any conflicts of interest or business practices that may result in additional risks because of enhanced client awareness. Third parties would also be able to access the new information reported in filings of the amended form, which would allow academics, businesses, and others to access additional information about registered investment advisers and exempt reporting advisers, which they can use to study the industry.

We anticipate that the proposed amendments to the Form ADV instructions would assist investment advisers in determining their regulatory assets under management and whether they are eligible to register with us, which may result in cost savings for some advisers because they may more readily be able to make this determination.[278] Eliminating the choices we have given advisers in the Form ADV instructions for calculating assets under management would, for example, provide for a uniform method of determining assets under management for purposes of the form and the new exemptions from registration under the Advisers Act, which we expect would promote competition, would result in advisers' greater certainty in choosing to rely on an exemption from registration, and would result in consistent reporting across the industry.[279] Our proposed amendments to the instructions relating to calculation of assets under management would also clarify how an adviser would determine the amount of private fund assets it has under management, as there are currently no specific instructions on this point. We expect this may provide advisers with greater certainty in their calculation of regulatory assets under management and would provide greater certainty in determining their eligibility for the exemptions from registration available to certain private fund advisers.[280]

4. Amendments to Pay to Play Rule

We are proposing two amendments to rule 206(4)–5 that we believe are appropriate as a result of the enactment of the Dodd-Frank Act, and one minor amendment to clarify the rule.[281] First, we propose to amend the rule to make it continue to apply to all private advisers, including exempt reporting advisers and foreign private advisers.[282] We are proposing this amendment to prevent the narrowing of the application of the rule as a result of the amendments to the Act made by the Dodd-Frank Act.[283] We do not believe that this amendment would create any benefits (or costs) beyond those created by the rule as originally adopted,[284] but rather would merely assure that the rule continues to apply to the same advisers as we intended when we adopted the rule.[285]

Second, we propose to amend the provision of rule 206(4)–5 that prohibits advisers from paying persons (*e.g.,* "solicitors" or "placement agents") to solicit government entities unless such persons are "regulated persons" (*i.e.,* registered investment advisers or broker-dealers subject to rules of a registered national securities association, such as FINRA, that restrict its members from engaging in pay to play activities).[286] Instead, the proposed amendments would permit an adviser to pay any "regulated municipal advisor" to solicit government entities on its behalf. A regulated municipal advisor under the proposed rule would be a municipal advisor that is registered under section 15B of the Exchange Act and subject to pay to play rules adopted

[278] *See* section II.A.3.

[279] *See id. See also* Exemptions Release at section II.C. (discussing exemption for foreign private advisers).

[280] *See* Exemptions Release at sections II.B.2. and II.C.5.

[281] *See supra* section II.D.1. of this Release.

[282] Proposed rule 206(4)–5(a). *See supra* section II.B. of this Release (discussing the definitions of exempt reporting advisers and foreign private advisers).

[283] *See supra* section II.D.1. of this Release.

[284] *See* section IV of the Pay to Play Release.

[285] Rule 206(4)–5 currently applies to "private advisers" exempt from registration with the Commission under section 203(b)(3) of the Advisers Act. As discussed in section II.B. of this Release, the Dodd-Frank Act has eliminated the "private adviser" exemption from registration with the Commission in section 203(b)(3), but has created new exemptions for exempt reporting advisers and foreign private advisers. Advisers that qualify for these new exemptions generally are subsets of the advisers that qualify for the existing section 203(b)(3) "private adviser" exemption.

[286] Rule 206(4)–5(a)(2)(i). FINRA is currently the only national securities association registered under section 19(a) of the Exchange Act (15 U.S.C. 78s(b)).

by the MSRB.[287] We understand that the MSRB intends to consider subjecting municipal advisors to pay to play rules similar to its rules governing municipal securities dealers. Broker-dealers acting as placement agents or solicitors and investment advisers acting as solicitors of government entities meet the statutory definition of a municipal advisor and thus would be subject to MSRB rules. Our proposed amendment would, like the current rule, permit advisers to pay persons to solicit government entities on their behalf only if such third parties are registered with us and subject to pay to play rules of their own.[288] Given the new regulatory regime applicable to municipal advisors, including solicitors of municipal entities that meet the definition of "regulated person" under rule 206(4)–5, broker-dealer solicitors are expected to be subject to MSRB's pay to play rules, rendering it unnecessary at this time for FINRA to adopt a pay to play rule that would satisfy rule 206(4)–5(f)(9)(ii). We are proposing, therefore, to replace references in rule 206(4)–5 to FINRA's pay to play rules with references to MSRB rules that we find are consistent with the objectives of rule 206(4)–5 and impose substantially equivalent or more stringent pay to play restrictions. To the extent that our proposed amendment would eliminate the need to subject certain solicitors to multiple pay to play rules, it would reduce the regulatory burdens on such placement agents.

In addition, due to the fact that the definition of a municipal advisor includes certain registered investment advisers and broker dealers—the two categories of regulated persons that an adviser may currently use as placement agents under rule 206(4)–5—our amendment may increase the number of placement agents that an adviser potentially could hire.[289] This could benefit advisers by increasing competition in the market for placement agent services and reducing the cost of such services. It could also benefit those placement agents that are not "regulated persons" under rule 206(4)–5, but may meet the municipal advisor definition, by allowing advisers to hire them.

Finally, we are proposing a minor amendment to rule 206(4)–5's definition of a "covered associate"[290] of an investment adviser to specify that a legal entity, not just a natural person, that is a general partner or managing member of an investment adviser would meet the definition.[291] Because the minor amendment would not change the meaning of the rule, we do not believe that it would generate any additional benefits (or costs).

B. Costs

1. Eligibility To Register With the Commission: Section 410

Transition to State Registration

Proposed Rule 203A–5 would impose one-time costs on investment advisers registered with us by requiring them to file an amendment to Form ADV, and on advisers that are no longer eligible to remain registered with us by requiring them to file Form ADV–W to withdraw from Commission registration.[292] According to IARD data, approximately 11,850 investment advisers are registered with us and would be required to file an amended Form ADV,[293] and we estimate that approximately 4,100 of those advisers will be required to withdraw their registration and register with one or more State securities authorities.[294] We believe that the proposed rule would have little impact on competition among advisers registered with us because they would all be subject to these requirements, but the rule could have a limited impact on competition between SEC-registered advisers who are subject to the rule and State-registered advisers who are not. We also believe that the rule would have little, if any, effect on capital formation.

For purposes of calculating the currently approved Paperwork Reduction Act ("PRA") burden for Form ADV, we estimated that an annual updating amendment would take each adviser approximately 6 hours per amendment,[295] and we estimate the one-time transition amendment would have similar burden. In addition, for purposes of the increased PRA burden for Form ADV, we estimate that the proposed amendments to Part 1A of Form ADV would take each adviser approximately 4.5 hours, on average, to complete.[296] As a result, we estimate a total average time burden of 10.5 hours for each respondent completing the amendment to Form ADV required by proposed rule 203A–5 (excluding private fund information which is addressed below).[297] We estimate that each adviser would incur average costs of approximately $2,646,[298] for a total aggregate of $31,355,100.[299] In addition, of these 11,850 registered advisers, we estimate that 3,500 advise one or more private funds and would have to complete the private fund reporting

[287] Proposed rule 206(4)–5(a)(2), (f)(9). These pay to play rules must prohibit municipal advisors from engaging in distribution or solicitation activities if certain political contributions have been made. In addition, the Commission must find that they both impose substantially equivalent or more stringent restrictions on municipal advisors than rule 206(4)–5 imposes on investment advisers and that they are consistent with the objectives of rule 206(4)–5.

[288] Pay To Play Release at section II.B.2.(b).

[289] Our current "regulated person" definition does not include, for example, advisers prohibited from registering with the Commission under section 203A of the Advisers Act (15 U.S.C. 80b–3A), such as State-registered advisers, or advisers unregistered in reliance on an exemption other than section 203(b)(3) of the Act. (15 U.S.C. 80b–3(b)(3)). The definition of "municipal advisor" does not exclude these advisers. *See* section 975 of the Dodd-Frank Act.

We adopted the third-party solicitor ban to prevent advisers from circumventing the rule through third parties. *See* section II.B.2.(b) of the Pay To Play Release. Given the Dodd-Frank Act's creation of the "municipal advisor" category, and given that it requires these persons to register with the Commission and subjects them to MSRB rulemaking authority, we believe that expanding the current "regulated person" exception to the third party solicitor ban to include registered municipal advisors subject to pay to play rules would not undermine the ban's purpose. By potentially allowing advisers to choose from a broader set of potential third-party solicitors, we believe our proposed amendments may promote efficiency and competition in the market for advisory services to the extent third-party solicitors that are not regulated persons participate.

[290] *See* rule 206(4)–5(f)(2) (defining a "covered associate" of an investment adviser as: "(i) Any general partner, managing member or executive officer, or other individual with a similar status or function; (ii) Any employee who solicits a government entity for the investment adviser and any person who supervises, directly or indirectly, such employee; and (iii) Any political action committee controlled by the investment adviser or by [any other covered associate].").

[291] *See* proposed rule 206(4)–5(f)(2); *supra* section II.D.1. of this Release.

[292] *See* proposed rule 203A–5; *supra* section II.A.1. of this Release.

[293] Based on IARD data as of September 1, 2010, 11,867 investment advisers are registered with the Commission. We have rounded this number to 11,850 for purposes of our analysis.

[294] According to data from the IARD as of September 1, 2010, 4,136 Commission-registered advisers, which we are rounding to 4,100 for our analysis, either: (i) Had assets under management of between $25 million and $100 million and did not indicate on Form ADV Part 1A that they are relying on an exemption from the prohibition on Commission registration; or (ii) were permitted to register with us because they rely on the registration of an SEC-registered affiliate that has assets under management between $25 million and $100 million and are not relying on an exemption.

[295] *See infra* section V.B.2.a.3. of this Release.

[296] *See infra* sections V.B.1.a. and V.B.2.a.3. of this Release.

[297] 6 hours (Form ADV amendment) + 4.5 hours (new Form ADV items) = 10.5 hours.

[298] We expect that the performance of this function would most likely be equally allocated between a senior compliance examiner and a compliance manager. Data from the Securities Industry Financial Markets Association's *Management & Professional Earnings in the Securities Industry 2009* ("SIFMA Management and Earnings Report"), modified to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead, suggest that costs for a senior compliance examiner and a compliance manager are $210 and $294 per hour, respectively. [5.25 hours × $210 = $1,102.50] + [5.25 hours × $294 = $1,543.50] = $2,646.

[299] 11,850 advisers × $2,646 = $31,355,100.

requirements we are proposing today.[300] We expect this would take 33,350 hours,[301] in the aggregate, for a total cost of $8,404,200.[302] As a result, the total estimated costs associated with filing amended Form ADV as required by proposed rule 203A–5 would be $39,759,300.[303]

For the estimated 4,100 advisers that will be required to withdraw their registrations, we estimate that the average burden for each respondent is 0.25 hours for filing a partial withdrawal on Form ADV–W.[304] An adviser would likely use compliance clerks to prepare the filings and review the prepared Form ADV–W.[305] We estimate that each adviser would incur average costs of approximately $14.75 [306] to comply with the Form ADV–W filing requirements, for a total one-time cost of $60,475.[307] As a result, proposed rule 203A–5 would result in a total one-time cost of $39,819,775.[308]

Switching Between State and Commission Registration

The proposed amendment to rule 203A–1 may impose costs on advisers by eliminating the $5 million buffer in current rule 203A–1(a), which permits but does not require an adviser to register with the Commission if the adviser has between $25 million and $30 million of assets under management.[309] Specifically, the proposed amendment may require advisers with between $25 million and $30 million in assets under management that are still eligible for registration with the Commission despite the Dodd-Frank Act's amendments to section 203A of the Advisers Act to switch their registration between the Commission and the states when they otherwise would not do so if the rule continued to include the buffer.[310] As of September 1, 2010, approximately 530 advisers registered with the Commission had between $25 million and $30 million of assets under management.[311] Because the Dodd-Frank Act has amended section 203A to prohibit most of these advisers from registering with the Commission,[312] we believe that all of these advisers could see increased costs as a result of our proposed amendment.[313] These costs include those associated with withdrawing their registration with the Commission and registering with the states, including filing a notice of withdrawal on Form ADV–W in accordance with rule 203–2 under the Advisers Act. We have estimated for purposes of our current approved hour burden under the PRA for rule 203–2 and Form ADV that a partial withdrawal imposes an average burden of approximately 0.25 hours for an adviser, and the filing (and costs associated with the filing) by these 530 advisers are included in our discussion above of the Form ADV–W filing requirement under rule 203A–5.[314] These advisers also would incur the costs of State registration and of compliance with State laws and regulations, which we expect would vary widely depending on the number of, and which, states with which each adviser is required to register. For example, individual State registration fees range from approximately $60 to $400 annually and some states require advisers to submit documentation in addition to Form ADV.[315] We believe these amendments would have little, if any, effect on capital formation.

Exemptions From the Prohibition on Registration With the Commission

Amending the exemption from the prohibition on registration available to pension consultants in rule 203A–2(b) to increase the minimum value of plan assets from $50 million to $200 million [316] may impose costs on some of the approximately 350 advisers that currently rely on the exemption.[317]

[300] *See infra* note 400.

[301] *See infra* note 403.

[302] [16,675 hours × $210 = $3,501,750] + [16,675 hours × $294 = $4,902,450] = $8,404,200. As noted above, we expect that the performance of this function will most likely be equally allocated between a senior compliance examiner and a compliance manager. *See supra* note 298.

[303] $31,355,100 + $8,404,200 = $39,759,300.

[304] Form ADV–W is designed to accommodate the different types of withdrawals an investment adviser may file. An investment adviser ceasing operations would complete the entire form to withdraw from all jurisdictions in which it is registered (full withdrawal), while an adviser withdrawing from some, but not all, of the jurisdictions in which it is registered would omit certain items that we do not need from an adviser continuing in business as a State-registered adviser. We expect that advisers that would be required to file Form ADV–W if proposed rule 203A–5 is adopted would file only a partial withdrawal because switching to State registration only requires a partial withdrawal. Compliance with the requirement to complete Form ADV–W imposes an average burden of 0.25 hours for an adviser filing for partial withdrawal.

[305] We have assumed for purposes of the current approved PRA burden for rule 203–2 and Form ADV–W that advisers would use clerical staff to file for a partial withdrawal. Data from the Securities Industry Financial Markets Association's *Office Salaries in the Securities Industry 2009* ("SIFMA Office Salaries Report") modified to account for an 1,800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead, suggest that the hourly rate for a compliance clerk is $59.

[306] 0.25 hours × $59 (hourly wage for clerk) = $14.75 (total cost for Form ADV–W filing).

[307] $14.75 × 4,100 = $60,475.

[308] $39,759,300 (total cost for Form ADV filing) + $60,475 (total cost for Form ADV–W filing) = $39,819,775 (total cost for proposed rule 203A–5).

[309] *See* proposed rule 203A–1; *supra* section II.A.4. of this Release.

[310] *See supra* section II.A.4. of this Release. Under the Dodd-Frank Act, a mid-sized adviser is not prohibited from registering with the Commission if: (i) The adviser is not required to be registered as an investment adviser with the securities commissioner (or any agency or office performing like functions) of the State in which it maintains its principal office and place of business; (ii) if registered, the adviser would not be subject to examination as an investment adviser by that securities commissioner; or (iii) the adviser is required to register in 15 or more states. *See* section 410 of the Dodd-Frank Act; *supra* section II.A. of this Release.

[311] Based on IARD data as of September 1, 2010.

[312] *See supra* section II.A. of this Release (discussing new section 203A(a)(2) of the Advisers Act, which prohibits certain mid-sized advisers from registering with the Commission).

[313] For purposes of this analysis, we assume that all of these advisers would not remain eligible to register with the Commission because they would be required to be registered and subject to examination by securities authorities in the states where they maintain their respective principal offices and places of business. *See* Section 203A(a)(2); *supra* section II.A.7.b. of this Release (discussing the fact that we are writing a letter to each State securities commissioner (or official with similar authority) to request that each advise us whether investment advisers registered in the State would be subject to examination as an investment adviser by that State's securities commissioner (or agency or office with similar authority)). *See also* NASAA Report at 7.

[314] *See supra* notes 304–308 and accompanying text addressing the costs of filing Form ADV–W for advisers that will be required to withdraw their registrations.

[315] *See, e.g.,* Ohio Rev. Code § 1707.17(B)(3) (2010) ($100 registration fee); Ark. Code § 23–42–304(a)(3) (2010) ($300 registration fee); Colorado Division of Securities Fee Schedule ($60 registration fee), available at *http://www.dora.State.co.us/securities/feeschedule.htm;* Illinois Secretary of State, Securities Fees ($400 registration fee), available at *http://www.sos.state.il.us/departments/securities/investment_advisers/fees.html*; Texas State Securities Board Check Sheet for a Sole Proprietor Corporation LLC or Partnership Applying for Registration as an Investment Adviser (requiring copies of adviser's organizational documents, balance sheet, fee schedule, advisory contract, and brochure or disclosure document delivered to clients), available at *http://www.ssb.state.tx.us/Dealer_And_Investment_Adviser_Registration/Check_Sheet_For_a_Sole_Proprieter_Corporation_LLC_or_Partnership_Applying_For_Registration_as_an_Investment_Adviser.php;* NASAA Report at 7 (among other things, states review registrants' disclosure history, financial status, business practices, and provisions in client contracts).

[316] *See* proposed rule 203A–2(a). *See also supra* section II.A.5.b. of this Release.

[317] Based on IARD data as of September 1, 2010, 353 SEC-registered advisers, which we rounded to 350, indicated that they rely on the exemption for pension consultants by marking Item 2.A.(6) on Form ADV Part 1A. These advisers do not report the amount of plan assets for which they provide investment advice, so we are unable to determine how many have between $50 million and $200 million of plan assets and may have to register with the State securities authorities as a result of the proposed amendment. It is also difficult to determine whether such advisers would be prohibited from registering with the Commission because they are required to register with and are subject to examination by the State securities authority where they maintain a principal office and place of business under the Dodd-Frank Act.

These costs, which include those associated with withdrawing their registration with the Commission and registering with the states, if required, would have a negative impact on competition for the advisers that no longer qualify for the exemption and potentially must register as an adviser with more than one State securities authority. We estimate that 50 of the 350 advisers relying on the exemption would have to file a notice of withdrawal on Form ADV–W in accordance with rule 203–2 under the Advisers Act and withdraw their registration based on the proposed amendment.[318] We have estimated that a partial withdrawal imposes an average burden of approximately 0.25 hours for an adviser.[319] Thus, we estimate that the proposed amendment to rule 203A–2(b) associated with filing Form ADV–W would generate a burden of 12.5 hours [320] at a cost of $738.[321] These advisers will incur the costs of State registration, which we expect will vary widely depending on the number of, and which, states with which an adviser is required to register.[322] We believe the amendment would have little, if any, effect on capital formation.

As discussed above, the proposed amendment to the multi-State adviser exemption in rule 203A–2(e) would reduce costs for advisers in the aggregate because more advisers would be permitted to register with one securities regulator—the Commission—rather than being required to register with multiple States.[323] Advisers relying on the exemption, however, would incur costs of complying with the Advisers Act and our rules, and would incur the costs associated with keeping records sufficient to demonstrate that they would be required to register with 15 or more states. We estimate that, in addition to the approximately 40 advisers that rely on the exemption currently, approximately 110 would rely on the exemption if amended as proposed.[324] For purposes of the PRA, we have estimated that these advisers would incur an average one-time initial burden of approximately 8 hours, and an average ongoing burden of approximately 8 hours per year, to keep records sufficient to demonstrate that they meet the 15-State threshold.[325] We further estimate that a senior operations manager would maintain the records at an hourly rate of $311, resulting in average initial and annual recordkeeping costs associated with our proposed amendments to rule 203A–2(e) of $2,488 per adviser,[326] and total increased costs of approximately $273,680 per year.[327] Advisers newly relying on the proposed amended exemption would also incur costs associated with completing and filing Form ADV for purposes of registration with the Commission. For purposes of the increase in our PRA burden for Form ADV, we have estimated that advisers newly registering with the Commission would incur a burden of approximately 13.58 hours per year,[328] resulting in costs of approximately $3,422 per adviser [329] and total increased costs of approximately $376,420 per year.[330] Additionally, we estimate that 40 of the newly registering advisers would use outside legal services, and 50 would use outside compliance consulting services, to assist them in preparing their Part 2 brochures, for a total cost of $176,000, and $250,000, respectively, resulting in a total non-labor cost among the newly registering advisers of $426,000.[331] If adopted, the proposal could also impact competition between advisers who rely on the exemption and are subject to our full regulatory program, including examinations and our rules, and State-registered advisers who do not rely on the exemption. We believe these amendments would have little, if any, effect on capital formation.

Mid-Sized Advisers

As discussed above, the Dodd-Frank Act does not explain how to determine whether a mid-sized adviser is "required to be registered" or is "subject to examination" by a particular State securities authority for purposes of section 203A(a)(2)'s prohibition on mid-sized advisers registering with the Commission, and we propose to incorporate into Form ADV an explanation of how we construe these provisions.[332] We do not, however, believe that they would generate costs independent of any costs associated with Congress' enactment of section 203A(a)(2), and would have little, if any, effect on capital formation.

2. Exempt Reporting Advisers: Sections 407 and 408

While we believe that our proposed approach to implementing the Dodd-Frank Act's reporting provisions applicable to exempt reporting advisers would minimize costs inherent in such reporting, we acknowledge that it would impose some costs on these advisers.[333] Although not significant, these costs would include paying a filing fee to FINRA to support the IARD. We anticipate that filing fees for exempt reporting advisers would be the same as those for registered investment advisers,

[318] Based on IARD data as of September 1, 2010, approximately 225 pension consultants reported assets under management of less than $100 million, and 202 of those advisers reported assets under management of less than $25 million. We believe that most pension consultants relying on the exemption provide advice regarding a large amount of plan assets, so we expect the number of advisers affected by the proposed amendment to be one quarter of the advisers with less than $25 million of assets under management. We expect that advisers that would be required to file Form ADV–W if our proposed amendment to rule 203A–2(b) is adopted would file only a partial withdrawal because they would be registering with the states. *See supra* note 304. Compliance with the requirement to complete Form ADV–W imposes an average burden of approximately 0.25 hours for an adviser filing for partial withdrawal. *See id.*

[319] *See supra* note 304.

[320] 50 responses on Form ADV–W × 0.25 hours = 12.5 hours.

[321] 12.5 hours × $59 = $738.

[322] *See, e.g., supra* note 315.

[323] *See* proposed rule 203A–2(d); *supra* section II.A.5.c. of this Release.

[324] Based on IARD data as of September 1, 2010, of the approximately 11,850 SEC-registered advisers, 40 checked Item 2.A.(9) of Part 1A of Form ADV to indicate their basis for SEC registration under the multi-State advisers rule. Of the advisers that have less than $100 million of assets under management, 94 currently file notice filings with 15 or more states. However, State notice filing requirements for SEC-registered advisers may differ from registration requirements because Form ADV does not distinguish between states where the registration is mandatory and where registration is voluntary. In addition, we estimate that 15 advisers currently registered with the states that are registered with 15 or more states could rely on the proposed exemption and register with us. Thus, we estimate that approximately 150 advisers will rely on the proposed exemption (40 currently relying on it + estimated 95 eligible based on IARD data + 15 advisers required to be registered in 15 or more states that are not registered with us today).

[325] These estimates are based on an estimate that each year an investment adviser would spend approximately 0.5 hours creating a record of its determination whether it must register as an investment adviser with each of the 15 states required to rely on the exemption, and approximately 0.5 hours to maintain the record, for a total of 8 hours. *See infra* note 383 and accompanying text.

[326] 8 hours × $311 = $2,488. The $311 compensation rate used is the rate for a senior operations manager in the SIFMA Management and Earnings Report, modified by Commission staff to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

[327] 110 new advisers relying on the exemption × $2,488 = $273,680.

[328] *See infra* note 399 and accompanying text.

[329] We expect that the performance of this function would most likely be equally allocated between a senior compliance examiner at $210 per hour and a compliance manager at $294 per hour. *See infra* note 338. [6.79 hours × $210 = $1,425.90] + [6.79 hours × $294 = $1,996.26] = $3,422.

[330] 110 advisers relying on the exemption × $3,422 = $376,420.

[331] The currently approved burden associated with Form ADV already accounts for similar estimated costs to be incurred by current registrants. *See infra* notes 420–421 and accompanying text.

[332] *See supra* notes 265–266 and accompanying text.

[333] *See* proposed rules 204–1 and 204–4; proposed Form ADV, Part 1A; *supra* section II.B. of this Release.

which currently range from $40 to $200, based on the amount of assets an adviser has under management.[334] In order to estimate the costs associated with paying filing fees, we will assume for purposes of this cost-benefit analysis that exempt reporting advisers will pay a fee of $200 per report filed on Form ADV. We estimate that approximately 2,000 advisers would qualify as exempt reporting advisers pursuant to sections 407 and 408 of the Dodd-Frank Act and would have to file Form ADV on the IARD,[335] which would result in total annual costs consisting of filing fees of approximately $400,000.[336]

In addition to filing fees, our proposals would result in internal costs to exempt reporting advisers associated with collecting, reviewing, reporting, and updating a limited subset of Form ADV items in Part 1A, as we propose to amend it, including Items 1, 2.C., 3, 6, 7, 10, 11 and corresponding schedules, but exempt reporting advisers would not be required to complete the remainder of Part 1A or Part 2. The costs of completing these items would vary from one adviser to the next, depending in large part on the number of private funds these advisers manage. We believe the information required by these items should be readily available to any adviser, particularly the identifying data and control person information required by Items 1, 3, and 10. The check-the-box style of most of these items, as well as some of the features of the IARD system (such as drop-down boxes for common responses) should also keep the average completion time for these advisers to a minimum. For purposes of the PRA, we estimate that exempt reporting advisers, in the aggregate, would spend 14,000 hours to prepare and submit their initial reports on Form ADV.[337] Based on this estimate, we expect that exempt reporting advisers would incur costs of approximately $3,528,000 to prepare and submit their initial report on Form ADV.[338] Additionally, for PRA purposes, we estimate that exempt reporting advisers in the aggregate would spend 2,200 hours per year on amendments to their filings.[339] Based on this estimate, we expect that exempt reporting advisers would incur costs of approximately $554,400 to prepare and submit annual amendments to their reports on Form ADV.[340]

Completing and filing Form ADV–H and Form ADV–NR would also impose costs on exempt reporting advisers. For purposes of the PRA, we estimate that approximately 2 exempt reporting advisers would file Form ADV–H annually and that it would impose an average burden per response of 1 hour on exempt reporting advisers.[341] Thus, proposed rule 204–4 would result in an increase in the total hour burden associated with Form ADV–H of 2 hours.[342] We further estimate that for each hour required by the Form, professional staff time would comprise 0.625 hours, and clerical staff time would comprise 0.375 hours. The Commission staff estimates the hourly wage for compliance professionals to be $294 per hour,[343] and the hourly wage for general clerks to be $52 per hour.[344] Accordingly, we estimate the average cost per response imposed on exempt reporting advisers by proposed rule 204–4 and amended Form ADV–H would be $203,[345] for a total annual cost of $406.[346] With regard to Form ADV–NR, we estimate that exempt reporting advisers would file Form ADV–NR at the same annual rate (0.17 percent) as advisers registered with us.[347] Thus, we estimate that the amendments would increase the total annual hour burden associated with Form ADV–NR by 1 hour.[348] We further estimate that for each hour required by the Form, compliance clerk time comprises 0.75 hours and general clerk time comprises 0.25 hours.[349] Therefore, we estimate that the proposed amendments to Form ADV–NR would impose approximately $57 in total additional annual costs for advisers.[350]

If adopted, our proposed reporting requirement would also result in other costs for exempt reporting advisers. For example, some of the information these advisers would report (and that we would make publicly available), such as the identification of owners of the adviser or disciplinary information, could impose costs on the advisers and, in some cases their supervised persons or owners, including the potential loss of business to competitors, as this information, today, is not typically made available to others. In addition, there may be other costs associated with the reporting requirements, including the possibility that the proposed disclosure requirements could influence business or other decisions by exempt reporting advisers, such as whether to form additional private funds or discourage entry into management of funds all together.

3. Form ADV Amendments

The costs of completing these new and amended items would vary among advisers. We believe that the information required by these items, however, should be readily available to any adviser. The check-the-box style of most of these items, as well as some of the features of the IARD system (such as drop-down boxes for common responses) should also keep costs down by reducing the average completion time.

One-time monetary costs we expect to be borne by current registrants to complete the proposed amendments to

[334] *See supra* note 122 and accompanying text.

[335] *See infra* note 422. While this is an estimate of the total number of advisers that may file reports rather than register with the Commission, a number of these advisers may choose to register with the Commission rather than file reports. We cannot determine *ex ante* the number of these advisers that will choose to register rather than report. Therefore, in order to avoid under-estimating the costs of our proposals, we are using the total number of potential exempt reporting advisers in our estimates.

[336] 2,000 exempt reporting advisers × $200 per year = $400,000. Advisers pay for initial Form ADV submissions and for annual amendments; there is no charge for an interim amendment.

[337] *See infra* note 425; *infra* section V. of this Release.

[338] We expect that the performance of this function would most likely be equally allocated between a senior compliance examiner and a compliance manager, or persons performing similar functions. Data from the SIFMA Management and Earnings Report, modified to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead, suggest that costs for these positions are $210 and $294 per hour, respectively. [7,000 hours × $210 = $1,470,000] + [7,000 hours × $294 = 2,058,000] = $3,528,000. For an exempt reporting adviser that does not already have a senior compliance examiner or a compliance manager, we expect that a person performing a similar function would have similar hourly costs.

[339] *See infra* note 430.

[340] [1,100 hours × $210 = $231,000] + [1,100 hours × $294 = 323,400] = $554,400.

[341] *See infra* section V.F. of this Release.

[342] 2 responses × 1 hour = 2 hours.

[343] Data from the SIFMA Management and Earnings Report, modified to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead, suggest that the cost for a Compliance Manager is approximately $294 per hour.

[344] Data from the SIFMA Office Salaries Report, modified to account for an 1,800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead, suggest that the cost for a general clerk is approximately $52 per hour.

[345] (0.625 hours × $294) + (0.375 hours × $52) = approximately $203.

[346] $203 per response × 2 responses annually = $406.

[347] *See infra* note 450.

[348] 0.17% (rate of filing) × (9,150 estimated registered investment advisers + 2,000 estimated exempt reporting advisers) × 1 hour per ADV–NR filing = 19.

[349] Data from the SIFMA Office Salaries Report, modified to account for an 1,800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead, suggest that the cost for a general clerk is approximately $52 per hour and cost for a compliance clerk is approximately $59 per hour.

[350] 1 hour × ((0.75 hours × $59) + (0.25 hours × $52)) = approximately $57.

Form ADV in connection with the transition filing are discussed above, but that discussion does not take into account costs we expect to be borne by newly registering advisers.[351] For purposes of the PRA, we estimate that 650 advisers will register with us within the next year as a result of normal annual growth of our population of registered advisers[352] and would spend, on average, 4.5 hours to respond to the new and amended questions we are proposing today, other than the private fund reporting requirements.[353] We expect the aggregate cost associated with this process would be $737,100.[354] In our PRA analysis, we also project that 750 new advisers would register with us as a result of the Dodd-Frank Act's elimination of the private adviser exemption, and this group of advisers would be required to complete and submit to us the entire form.[355] We expect these newly registering advisers would spend, in the aggregate, 30,555 hours to complete the form (Part 1 except for the private fund reporting requirements, and Part 2) as well as to periodically amend the form, prepare brochure supplements and deliver codes of ethics to clients,[356] for a total cost of $7,699,860.[357] In addition, of these 1,400 newly registering advisers,[358] we estimate that 950 advise one or more private funds and would have to complete the private fund reporting requirements we are proposing today.[359] We expect this would take 4,750 hours,[360] in the aggregate, for a total cost of $1,197,000.[361] The total estimated costs associated with our amendments for newly registering advisers, therefore, are $9,633,960.[362]

Additionally, we estimate that a quarter (or 188) of the 750 new registered advisers no longer able to rely on the private adviser exemption would use outside legal services, and half (or 375) would use outside compliance consulting services, to assist them in preparing their Part 2 brochures, for a total cost of $827,200, and $1,875,000, respectively, resulting in a total non-labor cost among all newly registering advisers of $2,702,200.[363]

If adopted, our proposed amendments to Form ADV would also result in other costs. For instance, our proposed changes to the instructions on calculating regulatory assets under management, and proposed rule 203A–3(d), would result in some advisers reporting greater assets under management than they do today, and would preclude some advisers from excluding certain assets from their calculation in order to remain below the new asset threshold for registration with the Commission. The impact of these changes may result in a limited number of State-registered advisers that report assets under management of less than $30 million under the current Form ADV reporting requirements to register with us if under the proposed revised instructions they would report $100 million or more in assets under management.[364]

We have also proposed to require advisers to private funds to use fair value of private fund assets for determining regulatory assets under management.[365] We understand that many, but not all, private funds value assets based on their fair value in accordance with U.S. generally accepted accounting principles (GAAP) or other international accounting standards.[366] The advisers to private funds that do not use fair value methodologies would likely incur costs to comply with this proposed requirement. These costs would vary based on factors such as the nature of the asset, the number of positions that do not have a market value, and whether the adviser has the ability to value such assets internally or would rely on a third party for valuation services. We do not believe, however, that these costs would be significant. We understand that private fund advisers, including those that may not use fair value methodologies for reporting purposes, perform administrative services, including valuing assets, internally as a matter of business practice.[367] Commission staff estimates that such an adviser would incur $1,224 in internal costs to conform its internal valuations to a fair value standard.[368] In the event a fund does not have an internal capability for valuing specific illiquid assets, we expect that it could obtain pricing or valuation services from an outside administrator or other service provider. Staff estimates that the cost of such a service would range from $250 to $75,000 annually.[369] We request

[351] *See supra* section IV.B.1. of this release.

[352] *See infra* note 376 and accompanying text.

[353] *See infra* section V.B.1.a. of this Release. We are calculating costs only of the increased burden because we have previously assessed the costs of the other items of Form ADV for registered advisers and for new advisers attributed to annual growth. The amendments we are proposing today would neither increase the burden associated with the other items on Form ADV, nor would they increase the external costs associated with certain Part 2 requirements.

[354] We expect that the performance of this function would most likely be equally allocated between a Senior Compliance Examiner and a Compliance Manager. Data from the SIFMA Management and Earnings Report, modified to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead, suggest that costs for these positions are $210 and $294 per hour, respectively. 650 advisers × 4.5 hours = 2,925 hours. [1,462.5 hours × $210 = $307,125] + [1,462.5 hours × $294 = $429,975] = $737,100.

[355] *See infra* note 396.

[356] 750 advisers × 40.74 hours per adviser to complete entire form (except private fund reporting requirements) = 30,555 hours. *See infra* note 388.

[357] [15,277.5 hours × $210 = $3,208,275] + [15,277.5 hours × $294 = $4,491,585] = $7,699,860. As noted above, we expect that the performance of this function will most likely be equally allocated between a senior compliance examiner and a compliance manager. *See supra* note 354.

[358] 650 advisers expected to register with us within the next year + 750 advisers expected to register with us as a result of the elimination of the private adviser exemption = 1,400.

[359] *See infra* text preceding note 405.

[360] *See infra* notes 407 and 408.

[361] [2,375 hours × $210 = $498,750] + [2,375 hours × $294 = $698,250] = $1,197,000. As noted above, we expect that the performance of this function will most likely be equally allocated between a senior compliance examiner and a compliance manager. *See supra* note 354.

[362] $737,100 + $7,699,860 + $1,197,000 = $9,633,960.

[363] The currently approved burden associated with Form ADV already accounts for similar estimated costs to be incurred by current registrants, and it already accounts for a percentage of annual growth in our population of registered advisers. *See also infra* text following note 421.

[364] A registered investment adviser that reports more than $30 million in assets under management under the current instructions to Item 5 of Form ADV would be required to register with the Commission. These advisers would not have additional costs associated with registration as they would already be incurring those costs.

[365] *See* proposed Form ADV: Instructions for Part 1A, inst. 5.b.(4).

[366] *See supra* note 56.

[367] For example, a hedge fund adviser may value fund assets for purposes of allowing new investments in the fund or redemptions by existing investors, which may be permitted on a regular basis after an initial lock-up period. An adviser to private equity funds may obtain valuation of portfolio companies in which the fund invests in connection with financing obtained by those companies. Advisers to private funds also may value portfolio companies each time the fund makes (or considers making) a follow-on investment in the company. Private fund advisers could use these valuations as a basis for complying with the fair valuation requirement we propose with respect to private fund assets.

[368] This estimate is based upon the following calculation: 8 hours × $153/hour = $1,224. The hourly wage is based on data for a fund senior accountant from the SIFMA Management and Earnings Report, modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

[369] These estimates are based on conversations with providers of valuation services. We understand that the cost of valuation for illiquid fixed income securities generally ranges from $1.00 and $5.00 per security, depending on the difficulty of valuation, and is performed for clients on weekly or monthly basis. Appraisals of privately placed equity securities may cost from $3,000 to $5,000 (with updates to such values at much lower prices). As proposed, an adviser only has to calculate regulatory assets under management for purposes of reporting on Form ADV annually. For purposes of this cost benefit analysis, we are estimating the range of costs for (i) a private fund that holds 50 illiquid fixed income securities at a cost of $5.00

comment on these estimates. Do advisers that do not use fair value methodologies for reporting purposes have the ability to fair value private fund assets internally? If not, what would be the costs to retain a third party valuation service? Are there certain types of advisers (*e.g.,* advisers to real estate private funds) that would experience special difficulties in performing fair value analyses? If so, why?

Requiring advisers to report whether they have $1 billion or more in assets also may have costs for advisers that are not publicly traded or otherwise do not publicly disclose the amount of their own assets as it would be easy to identify the very largest advisers in terms of assets. These proposals may provide limited efficiency improvements as a result of the uniformity in calculating and reporting managed assets, and there may also be, as discussed below, competitive effects of these changes and other proposed amendments to Form ADV. We believe these proposals would have little, if any, effect on capital formation.

In addition, some of the proposed amendments also could impose costs including potential competitive effects with other advisers as certain information we are proposing to be disclosed may not typically be provided to others. This would be the case, for example, for advisers that currently disclose only to certain clients and prospective clients, or only upon request, such information as census data about the private funds and the amount of private fund assets that the adviser manages, information about the State registrations of the adviser's employees, the types of investments about which the adviser provides advice, and the service providers to each private fund that the adviser manages. This could create benefits as well as costs. While exempt reporting advisers may be subject to a lower regulatory burden, investors may have greater confidence in advisers that provide more fulsome disclosure and are subject to our oversight.

4. Amendments to Pay to Play Rule

Our proposal to permit an adviser to pay any municipal advisor that is registered with the Commission under section 15B of the Exchange Act [370] and subject to pay to play rules adopted by the MSRB to solicit government entities on its behalf may result in limited additional costs to comply with rule 206(4)–5.[371] Specifically, advisers that have created compliance programs in anticipation of rule 206(4)–5's compliance date may have to make adjustments to those programs to account for the fact that our proposed amendment would permit them to hire placement agents that are registered municipal advisors.[372] But, as explained above, our proposed amendments would allow them greater latitude in hiring placement agents.

C. Request for Comment

- The Commission requests comments on all aspects of the cost-benefit analysis, including the accuracy of the potential costs and benefits identified and assessed in this release, as well as any other costs or benefits that may result from the proposals.
- We encourage commenters to identify, discuss, analyze, and supply relevant data regarding these or additional costs and benefits.

V. Paperwork Reduction Act Analysis

Certain provisions of our proposal contain "collection of information" requirements within the meaning of the PRA, and we are submitting the proposed collections of information to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507 and 5 CFR 1320.11. The titles for the collections of information we are proposing or proposing to amend are: (i) "Form ADV"; (ii) "Rule 203–2 and Form ADV–W under the Investment Advisers Act of 1940;" (iii) "Rule 204–2 under the Investment Advisers Act of 1940;" (iv) "Exemption for Certain Multi-State Investment Advisers (Rule 203A–2(e));" (v) "Rule 203A–5;" (vi) "Form ADV–H;" [373] and (vii) "Rule 0–2 and Form ADV–NR under the Investment Advisers Act of 1940." 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.

While our proposed rules and rule and form amendments would impose new collection of information burdens for certain advisers and change existing burdens on advisers under our rules, the Dodd-Frank Act also will impact our total burden estimates for certain of our rules, principally by changing the numbers of advisers subject to these rules. Specifically, we estimate the Dodd-Frank Act's amendments to section 203A to reallocate regulatory responsibility over numerous registered advisers to the states will result in about 4,100 registered advisers switching from Commission to State registration.[374] At the same time, we estimate that the Dodd-Frank Act's elimination of the private adviser exemption in section 203(b)(3) of the Advisers Act will result in approximately 750 additional private fund advisers registering with the Commission.[375] Based on IARD data as of September 1, 2010, we estimate that approximately 11,850 advisers are currently registered with the Commission. We further estimate that approximately 650 additional advisers register with the Commission each year.[376] Therefore, for purposes of

to price and (ii) a private fund that holds privately placed securities of 15 issuers that each cost $5,000 to value. We believe that costs for funds that hold both fixed-income and privately placed equity securities would fall within the maximum of our estimated range. We note that funds that have significant positions in illiquid securities are likely to have the in-house capacity to value those securities or already subscribe to a third party service to value them. We note that many private funds are likely to have many fewer fixed income illiquid securities in their portfolios, some or all of which may cost less than $5.00 to value. Finally, we note that obtaining valuation services for a small number of fixed income positions on an annual basis may result in a higher cost for each security or require a subscription to the valuation service for those that do not already purchase such services. The staff's estimate is based on the following calculations: (50 × $5.00 = $250; 15 × $5,000 = $75,000).

[370] 15 U.S.C. 78o–4.

[371] *See* proposed rule 206(4)–5(a)(2), (f)(9). As discussed in section II.D.1. of this Release, we believe that our proposed amendment to rule 206(4)–5 to make it apply to exempt reporting advisers and foreign private advisers and our proposed technical amendment to the definition of "covered associate" would not generate new costs.

[372] *See* section III.B of the Pay to Play Release (requiring advisers to comply with the rule's prohibition on making payments to third parties to solicit government entities for investment advisory services on September 13, 2011).

[373] The current title for the collection of information on Form ADV–H is "Rule 203–3 and Form ADV–H under the Investment Advisers Act of 1940" because currently only registered advisers file Form ADV–H under rule 203–3. However, because we are proposing to amend Form ADV–H to allow exempt reporting advisers to apply for a temporary hardship exemption on Form ADV–H under rule 204–4, we are proposing to re-title the collection of information simply "Form ADV–H."

[374] *See supra* section II.A. of this Release (discussing the Dodd-Frank Act's amendments to section 203A). Based on IARD data as of September 1, 2010, we estimate that approximately 4,050 will switch registration because they have assets under management of less than $100 million. We also estimate that approximately 50 additional advisers will switch to State registration because they are relying on the registration of an affiliated adviser with the same principal office and place of business that will be switching to State registration.

[375] *See* Exemptions Release at section I. (discussing elimination of the private adviser exemption in section 203(b)(3)).

[376] Over the past several years, approximately 1,000 new advisers have registered with us annually. Due to the Dodd-Frank Act's reallocation of regulatory responsibility for advisers with assets under management of less than $100 million, we estimate that about 650 new advisers will register with us annually based on reducing the current growth rates by the gross reduction in the number of advisers due to the Dodd-Frank Act. (4,100 (SEC advisers withdrawing)/11,850 (total SEC advisers))

Continued

calculating the burdens of our proposed rules and amendments under the PRA, we estimate that the number of advisers registering with the Commission after the Dodd-Frank Act's amendments to sections 203A and 203(b)(3) become effective will be approximately 9,150.[377]

A. Rule 203A–2(e)

Rule 203A–2(e) exempts certain multi-State investment advisers from section 203A's prohibition on registration with the Commission. We are proposing to renumber and amend rule 203A–2(e) to permit investment advisers required to register as an investment adviser with 15 or more states, instead of 30 or more states under the current rule, to register with the Commission.[378] An investment adviser relying on this exemption would be required to maintain in an easily accessible place a record of the states in which the investment adviser has determined it would, but for the exemption, be required to register.[379] We have submitted this collection of information to OMB for review.

Respondents to this collection of information would be investment advisers who are required to register in 15 or more states absent the exemption from the prohibition on Commission registration. This collection of information is mandatory for those advisers relying on the exemption provided by rule 203A–2(e) (proposed rule 203A–2(d)). The records kept by investment advisers in compliance with the rule would be necessary for the Commission staff to use in its examination and oversight program, and the information in these records generally would be kept confidential.[380]

As of September 1, 2010, there were approximately 40 advisers relying on the exemption under rule 203A–2(e).[381] Although it is difficult to estimate the number of advisers that would rely on the exemption if amended as proposed because such reliance is entirely voluntary, we estimate that approximately 150 advisers would rely on the exemption.[382] These advisers would incur an average one-time initial burden of approximately 8 hours, and an average ongoing burden of approximately 8 hours per year, to keep records sufficient to demonstrate that they meet the 15-State threshold. These estimates are based on an estimate that each year an investment adviser would spend approximately 0.5 hours creating a record of its determination whether it must register as an investment adviser with each of the 15 states required to rely on the exemption, and approximately 0.5 hours to maintain these records.[383]

B. Form ADV

Form ADV (OMB Control No. 3235–0049) is the two-part investment adviser registration form. Part 1 of Form ADV contains information designed for use by Commission staff, and Part 2 is the client brochure. We use the information to determine eligibility for registration with us and to manage our regulatory and examination programs. Clients use certain of the information to determine whether to hire or retain an adviser. Rule 203–1 requires every person applying for investment adviser registration with the Commission to file Form ADV. Rule 204–1 requires each registered adviser to file amendments to Form ADV at least annually, and requires advisers to submit electronic filings through the IARD. These collections of information are found at 17 CFR 275.203–1, 275.204–1, and 279.1 and are mandatory, although the paperwork burdens associated with rules 203–1 and 204–1 are included in the approved annual burden associated with Form ADV and thus do not entail separate collections of information. Responses are not kept confidential. The respondents to this information collection are investment advisers registered or applying for registration with us, and as discussed below, would include exempt reporting advisers.

The current total annual burden for all advisers completing, amending, and filing Form ADV (Part 1 and Part 2) with the Commission, approved recently in connection with amendments we adopted to Part 2,[384] is 268,457 hours.[385] This burden is based on an average total collection of information burden of 36.24 hours per adviser for the first year that an adviser completes Form ADV. The currently approved burden also includes a total annual cost burden of $22,775,400, which includes costs associated with outside legal assistance and outside consulting services that vary based on the size of the adviser.[386]

As discussed above, in order to give effect to provisions in Title IV of the Dodd-Frank Act, we are proposing amendments to Part 1A of Form ADV to reflect the new statutory threshold for registration with the Commission and to restructure it to accommodate filings by exempt reporting advisers. Additionally, to enhance our ability to oversee investment advisers, we are proposing amendments to Part 1A of Form ADV to require advisers to provide us additional

× 1000 (number of new advisers each year) = 0.35 × 1000 = 350 (number of additional new advisers registering with the states, not the SEC). 1000–350 = 650.

[377] 11,850 (total SEC advisers)–4,100 (SEC advisers withdrawing) + 750 (private advisers registering with the SEC) + 650 (new SEC advisers each year) = 9,150.

[378] *See* proposed rule 203A–2(d). Under rule 203A–2(e) an adviser, once registered with the Commission, is not required to withdraw its registration as long as it would be required to register with at least 25 states.

[379] *See* proposed rule 203A–2(d)(3). An investment adviser relying on this exemption also would continue to be required to: (i) Include a representation on Schedule D of Form ADV that the investment adviser has reviewed applicable law and concluded that it must register as an investment adviser with 15 or more states; and (ii) undertake on Schedule D to withdraw from registration with the Commission if the adviser indicates on an annual updating amendment to Form ADV that the investment adviser would be required by the laws of fewer than 15 states to register as an investment adviser with the State. *See* proposed rule 203A–2(d)(2). The proposed increase in the PRA burden for Form ADV reflects these requirements. *See infra* section V.B. of this Release.

[380] *See* section 210(b) of the Advisers Act.

[381] Based on IARD data as of September 1, 2010, of the approximately 11,850 SEC-registered advisers, 40 checked Item 2.A.(9) of Part 1A of Form ADV to indicate their basis for SEC registration under the multi-State advisers rule.

[382] Based on IARD data as of September 1, 2010, 94 of the advisers that have less than $100 million of assets under management currently file notice filings with 15 or more states. This number may overestimate the number of advisers required to be registered with 15 or more states, and therefore eligible for the proposed multi-State exemption, because notice filing requirements may differ from registration requirements. In addition, we are unable to determine the number of advisers currently registered with the states that are registered with 15 or more states that may rely on the proposed exemption and register with us. We expect this number to be small based on the scope of business of an adviser that has less than $25 million in assets under management and because section 222(d) of the Advisers Act provides a de minimis exemption for limited State operations without registration. For purposes of this analysis, we estimate the number is 15. As a result, we estimate that approximately 150 advisers would rely on the proposed exemption (40 currently relying on it + estimated 95 eligible based on IARD data + 15 advisers required to be registered in 15 or more states that are not registered with us today).

[383] 0.5 hours × 15 states = 7.5 hours + 0.5 hours = 8 hours.

[384] *See* section VI of Part 2 Release, *supra* note 46 at nn. 341 and 342 and accompanying text. This estimate includes the annual burden associated with advisers' obligations to deliver to clients copies of their codes of ethics upon request.

[385] The approved burden is comprised of 11,658 advisers preparing an initial filing of Form ADV at 36.24 hours, which is amortized over a three-year period (the estimated period that advisers are expected to use Form ADV) for an annual burden of 152,909 hours. The burden also includes two amendments to Form ADV annually, one annual amendment and one other than annual amendment, for an annual burden of 87,435 hours; an annual burden of 11,658 hours to account for new brochure supplements that advisers are required to prepare; and 16,455 hours attributable to the obligation to deliver to clients codes of ethics upon request.

[386] For outside legal services, ($4,400 × 535 medium advisers) + ($3,200 × 2,370 small advisers)) + ($10,400 × 36 large advisers) = $ 10,312,400. For compliance consulting services, ($3,000 × 2,371 small advisers) + ($5,000 × 1,070 medium advisers) = $12,463,000. $10,312,400+$12,463,000 = $22,775,400. *See* Part 2 Release, *supra* note 46, for a discussion of these estimates.

information regarding: (i) Private funds they advise; (ii) their advisory business and business practices that may present significant conflicts of interest; and (iii) advisers' non-advisory activities and their financial industry affiliations.[387] We are also proposing certain additional changes intended to improve our ability to assess compliance risks and to enable us to identify the advisers that are covered by section 956 of the Dodd-Frank Act addressing certain incentive-based compensation arrangements.

We expect that an increase in the information requested in Form ADV Part 1A as a result of these amendments would increase the currently approved collection of information associated with Form ADV. In addition, the annual burden also would increase as a result of an increase in the number of respondents attributable to new investment adviser registrations and the proposed use of the form for reporting by exempt reporting advisers. We discuss below, in three sub-sections, the estimated revised collection of information requirements for Form ADV: First, we address the change to the collection as a result of our proposed amendments to Part 1A of Form ADV excluding those related to private fund reporting for registered advisers; second, we discuss the proposed amendments related to private fund reporting for registered advisers; and third, we address the proposed amendments to Part 1A of Form ADV for its use as a reporting form by exempt reporting advisers.

1. Changes in Average Burden Estimates and New Burden Estimates

a. Estimated Change in Burden Related to Proposed Part 1A Amendments (Not Including Private Fund Reporting)

We are proposing amendments to many Items in Part 1A, some that are merely technical changes or very simple in nature, and others that would require more of an adviser's time to respond. The paperwork burdens of filing an amended Form ADV, Part 1A would, however, vary among advisers, depending on factors such as the size of the adviser, the complexity of its operations, and the number or extent of its affiliations. Although burdens would vary among advisers, we believe that the proposed revisions to Part 1A would impose few additional burdens on advisers in collecting information as advisers should have ready access to all the information necessary to respond to the proposed items in their normal course of operations. We also are working with FINRA, as our IARD contractor, to implement measures intended to minimize the burden for advisers filing proposed amended Form ADV on IARD (*e.g.,* pre-populating fields and drop-down boxes for common responses). We anticipate, moreover, that the responses to many of the questions are unlikely to change from year to year, minimizing the ongoing reporting burden associated with these questions.

In large part, the amendments we propose to Form ADV, Part 1A, including those to account for the statutory changes in the threshold for SEC registration, primarily refine or expand existing questions or request information advisers already have for compliance purposes. For instance, some of the proposed changes to Item 5 would require advisers to provide numerical responses to certain questions about their employees. An adviser would likely already have this information in order to respond to those questions today by checking boxes that correspond to a range of numbers. Likewise, the proposed amendments to Item 8 require advisers to expand on information they provide in response to existing Item 8, such as whether the broker-dealers that advisers recommend or have discretion to select for client transactions are related persons of the adviser. Other questions expand upon existing requirements to elicit information advisers would already have available for compliance purposes, such as whether the soft dollar benefits they currently report receiving under Item 8 qualify for the safe harbor under section 28(e) of the Exchange Act for eligible research or brokerage services. As amended, Item 2 would require an adviser to report to us its basis for registration or reporting, as already determined for compliance purposes. Other proposed amendments to Items 5, 6 and 7 expand existing lists of information advisers already provide to us on Form ADV, such as types of advisory activities the advisers perform and other types of business engaged in by advisers and their related persons. We believe several of the new questions we propose would merely require advisers to provide readily available or easily accessible information, such as Chief Compliance Officer contact information and whether the adviser has $1 billion or more in assets in Item 1, form of organization in Item 3, or types of investments about which they provided advice during the fiscal year for which they are reporting in Item 5.

We anticipate other proposed questions may take longer for advisers to complete, even with readily available information, such as calculating regulatory assets under management according to our revised instruction. Other proposed new items may present greater burdens for some advisers, but not others, depending on the nature and complexity of their businesses, such as the proposed requirement to provide a list of the SEC file numbers of investment companies they advise, or providing expanded information about related person financial industry affiliates.

We estimate these proposed amendments to Part 1A of Form ADV would take each adviser approximately 4.5 hours, on average, to complete. We have based this estimate, in part, by comparing the relative complexity and availability of the information elicited by the proposed items and the nature of the response required (*i.e.,* checking a box as opposed to providing a narrative response) to the current form and its approved burden. As a result, we estimate the average total collection of information burden would increase to 40.74 hours per adviser for the first year that an adviser completes Form ADV (Part 1 and Part 2).[388]

b. New Estimated Burden Related to Proposed Private Fund Reporting Requirements

The amendments that we propose to Item 7.B. and Section 7.B. of Schedule D to collect new data on private funds managed by advisers would provide us with basic census data on private funds and would permit us to conduct a more robust risk assessment of private fund advisers for purposes of targeting our examinations. The information would include fund data such as basic organizational, operational, and investment characteristics of the fund; the amount of assets held by the fund; and the fund's service providers or gatekeepers. We believe much of the information we are proposing to be reported to us should be readily available to private fund advisers because, among other things, it is information that private fund investors commonly seek in their due diligence questionnaires or it is information that would often be included in a private placement memorandum offering fund shares.

Although we understand that the information we are proposing to require

[387] *See supra* section II.C of this Release. In addition, we are proposing several clarifying or minor amendments based on frequently asked questions we receive from advisers as well as in our experience administering the form.

[388] Current approved per adviser total (36.24) + estimated per adviser increase (4.5) = 40.74.

for private funds typically would be readily available to advisers to these funds, we expect that these amendments could require advisers, particularly those with many private funds, to be subject to a significantly increased paperwork burden. We are proposing certain measures to minimize the increase in burden associated with this proposed reporting requirement. We propose to permit a sub-adviser to exclude private funds for which an adviser is reporting on another Schedule D, and would permit an adviser sponsoring a master-feeder arrangement to submit a single Schedule D for the master fund and all of the feeder funds that would otherwise be submitting substantially identical data.[389] We also propose to permit an adviser with a principal office and place of business outside the United States to omit a Schedule D for a private fund that is not organized in the United States and that does not have any investors who are "United States persons."[390] And as discussed above, we are working with FINRA to implement measures intended to minimize the burden for advisers filing proposed amended Form ADV, such as the ability to automatically populate private fund service provider information provided for other funds advised by the same adviser. Finally, we note that as proposed, Item 7.B. would no longer require advisers to report the funds that their related persons advise on Schedule D, which we expect would decrease the burden on private fund advisers. Taking into account, as discussed above, the scope of the information we propose to request and our understanding that much of the information is readily available, as well as the technology upgrades we expect to be incorporated into the IARD, we estimate advisers to private funds would each spend, on average, one hour per private fund to complete these questions.

c. New Estimated Burden Related to Proposed Exempt Reporting Adviser Reporting Requirements

Exempt reporting advisers would be required to complete a limited number of items in Part 1A of Form ADV (consisting of Items 1, 2.C., 3, 6, 7, 10, 11 and corresponding schedules), and are not required to complete Part 2. We believe the information required by these items should be readily available to any adviser, particularly the identifying data and control person information required by Items 1, 3, and 10. The check-the-box style of most of these items, as well as some of the features of the IARD system (such as drop-down boxes for common responses) should also keep the average completion time for these advisers to a minimum. Moreover, in our staff's experience, the types of advisers that would meet the criteria for exempt reporting advisers are unlikely to have significantly large numbers of affiliations, nor do we expect them to have to report disciplinary events at a greater rate than currently registered advisers.[391] We estimate that these items, other than Item 7.B., would take each exempt reporting adviser approximately two hours to complete. We anticipate that, like registered advisers, exempt reporting advisers would each spend an additional hour per private fund to complete Item 7.B. and Schedule 7.B.

2. Annual Burden Estimates

a. Estimated Annual Burden Applicable to All Registered Investment Advisers

i. Estimated Initial Hour Burden (Not Including Burden Applicable to Private Funds)

As a result of the transition filing discussed above,[392] we expect the total number of registered adviser respondents to this collection of information would be 9,150.[393] Approximately 11,850 investment advisers are currently registered with the Commission.[394] We expect 4,100 will withdraw from registration.[395] We expect about 750 advisers who currently rely on the private adviser exemption to apply for registration with us, and we estimate that approximately 650 new advisers will register with us each year beginning in 2011.[396]

The estimated total annual burden applicable to these advisers, including new registrants, but excluding private fund reporting requirements, is 372,771 hours.[397] We believe that most of the paperwork burden would be incurred in advisers' initial submission of the new and amended items of Form ADV Part 1A, and that over time this burden would decrease substantially because the paperwork burden will be limited to updating information. Amortizing this total burden imposed by Form ADV over a three-year period to reflect the anticipated period of time that advisers would use the revised Form would result in an average burden of an estimated 124,257 hours per year,[398] or 13.58 hours per year for each new applicant[399] and for each adviser currently registered with the Commission that would re-file through the IARD.

ii. Estimated Initial Hour Burden Applicable to All Registered Advisers to Private Funds

The amount of time each of the registered advisers to private funds would incur to complete Item 7.B. and Section 7.B. of Schedule D would vary depending on the number of funds the advisers manage. Of the 9,150 advisers currently registered with us, approximately 3,500 indicate that they are advisers to private funds.[400] Due to the assets under management these advisers report on Form ADV,[401] and considering that today these advisers either do not qualify for the private adviser exemption or choose not to rely on it, we expect these advisers to remain registered with us. Based on Form ADV filings by these advisers, we estimate that 50% of these advisers, or 1,800, currently advise an average of 3 private funds each; 45%, or 1,550 advisers, currently advise an average of 10 private funds each, and the remaining 5%, or 150 advisers, manage an average of 83 private funds each.[402] As we discussed above, we estimate that private fund advisers would spend, on average, one hour per private fund to complete Item 7.B. and Section 7.B. of Schedule D. As a result, the private fund reporting requirements that would be applicable to registered investment advisers would add 33,350 hours to the overall annual

[389] *See supra* notes 153–154 and accompanying text.

[390] *See supra* note 155 and accompanying text.

[391] As of September 1, 2010, approximately 13% of SEC-registered investment advisers reported a disclosure in Item 11 of Form ADV.

[392] *See supra* section IV.B.1. of this Release.

[393] *See supra* note 377.

[394] Based on IARD data as of September 1, 2010.

[395] *See supra* section IV.B.1. of this Release.

[396] (4,100 (SEC advisers expected to withdraw from registration)/11,850 (total SEC advisers)) x 1000 (average number of new advisers registered with the Commission each year) = 0.35 x 1000 = 350 (number of additional new advisers registering with the states, not the SEC). 1000 − 350 = 650. *See also infra* note 422.

[397] 40.74 per-adviser burden x 9,150 = 372,771 hours.

[398] 372,771/3 = 124,257.

[399] 124,257/9,150 = 13.58.

[400] 3,500 advisers indicate by reporting a fund in Schedule D, Section 7.B. that they, or a related person, advise private funds or investment related funds. Based on IARD data as of September 1, 2010.

[401] Approximately 71% of the advisers to private funds or investment related funds report assets under management over $100 million.

[402] Based on IARD data as of September 1, 2010. Form ADV currently asks for an adviser to report about investment-related partnerships and limited liability companies advised by the adviser *and* its related persons. As a result, the data we have obtained from IARD over-estimates the average number of funds as a result of reporting of the same fund multiple times by affiliated registered advisers.

burden applicable to registered advisers.[403]

In addition to the registered advisers that advise private funds today, we estimate that about 200 of the 650 new advisers that will register with us annually will manage private funds,[404] and an estimated 750 new private fund advisers will register with us that previously relied on the private adviser exemption. We believe that these 950 advisers that would be required to register will generally be similar to the 50% of our current registrants that advise, on average, 3 private funds, but believe that some portion of them may advise a greater number of funds, as the estimated 750 currently exempt private advisers rely on the private adviser exemption, which permits up to 14 private fund clients.[405] In addition, with respect to the 650 new registrants we estimate annually, the elimination of the private adviser exemption will require them, unless they are eligible for another exemption, to register even if they have only a single private fund client. To account for the addition of these two groups of advisers to the registrant pool, but taking into account the demographics of our current registrant pool (with 50% having on average 3 private fund clients), we estimate that each registered private fund adviser, on average, will advise five private funds.[406] Accordingly, private fund reporting requirements attributable to the estimated 750 new registrants because of the elimination of the private adviser exemption would add 3,750 hours to the overall annual burden applicable to registered advisers.[407] We also estimate that private fund reporting requirements applicable to new registered investment advisers would add 1,000 hours to the overall annual burden applicable to registered advisers.[408]

The total annual burden related to private fund reporting that is applicable to registered advisers would be 38,100 hours.[409] We believe that most of the paperwork burden would be incurred in connection with advisers' initial submission of private fund data, and that over time this burden would decrease substantially because the paperwork burden will be limited to updating information. Amortizing this total burden imposed by Form ADV over a three-year period, as we did above with respect to the initial filing or re-filing of the rest of the form, would result in an average burden of an estimated 12,700 hours per year,[410] or 2.85 hours per year for each new private fund adviser[411] and for each private fund adviser currently registered with the Commission.

iii. Estimated Annual Burden Associated With Amendments, New Brochure Supplements and Delivery Obligations

The current approved collection of information burden for Form ADV has three additional elements: (1) The annual burden associated with annual and other amendments to Form ADV, (2) the annual burden associated with creating new Part 2 brochure supplements for advisory employees throughout the year, and (3) the annual burden associated with delivering codes of ethics to clients as a result of the offer of such codes contained in the brochure. Although we do not anticipate that our proposed amendments to Form ADV would affect the per adviser burden imposed by these three elements, the Dodd-Frank Act's amendments to sections 203A and 203(b)(3) will change our estimates of the number of advisers subject to them, which will result in a change to the total annual burden associated with these elements of the collection of information for Form ADV.[412]

We continue to estimate that, on average, each adviser filing Form ADV through the IARD will likely amend its form two times during the year.[413] We estimate, based on IARD data, that advisers, on average, make one interim updating amendment (at an estimated 0.5 hours per amendment) and one annual updating amendment (at an estimated 6 hours per amendment) each year. We also expect advisers, on average, to continue to incur one hour annually to prepare new brochure supplements as required by Part 2 of the form,[414] and to continue to spend 1.3 hours annually to meet obligations to deliver codes of ethics to clients.[415] These obligations would add 80,520 hours annually to the collection of information. These 80,520 hours consist of 59,475 hours attributable to amendments,[416] 9,150 hours attributable to the creation of new brochure supplements,[417] and 11,895 hours for delivery of codes of ethics.[418]

iv. Estimated Annual Cost Burden

The current approved collection of information burden for Form ADV has a one-time initial cost for outside legal and compliance consulting fees in connection with the initial preparation of Part 2 of Form ADV. Although we do not anticipate that our proposed amendments to Form ADV would affect the per adviser cost burden estimates, the Dodd-Frank Act's amendments to sections 203A and 203(b)(3) of the Adviser's Act will result in a significant change to our estimates of the number of advisers subject to these costs. The current approved collection is based on an estimate that 2,941 advisers will elect to obtain outside legal assistance and 3,441 advisers will elect to obtain outside consulting services, for a total cost among all respondents of $22,775,400 for a one-time initial cost to draft the new narrative brochure.

By the time the amendments to Form ADV that we are proposing today would become effective, substantially all SEC-registered advisers will have completed their initial filing of the narrative brochure required by our recent amendments to Part 2 of Form ADV and will have already incurred these estimated one-time costs.[419] As a result, the only respondents that we expect would incur legal and consulting costs for the initial drafting of Part 2 of Form ADV, subsequent to the effective date of the amendments to Part 2, would consist of the estimated 650 new advisers that we expect to register annually and the estimated 750 advisers that will have to register as a result of

[403] (1,800 advisers x 3 hours (3 funds x 1 hour per fund)) + (1,550 advisers x 10 hours (10 funds x 1 hour per fund)) + (150 advisers x 83 hours x 1 hour per fund)) = 5,400 + 15,500 + 12,450 = 33,350.

[404] About 30% of current registrants report that they advise one or more private funds. (3,500 advisers to private funds/11,850 registered advisers). Applying the same proportion to new registrants results in approximately 200 additional advisers to private funds each year. (650 x .30 = 195).

[405] Section 203(b)(3).

[406] Approximately 65% of advisers that reported a fund in Schedule D, Section 7.B. listed five or fewer funds and 72% of advisers that registered since September 1, 2009 and reported a fund reported five or fewer private funds. The average number of private funds reported is about five funds for the new registrants in the past year.

[407] 750 newly registering advisers x 5 private funds on average x 1 hour/private fund = 3,750.

[408] 200 new advisers x 5 private funds on average x 1 hour/private fund = 1,000.

[409] 33,350 for existing registered advisers + 3,750 for no longer exempt advisers + 1,000 for estimated new registrants due to growth = 38,100.

[410] 38,100/3 = 12,700.

[411] 12,700/[3,500 + 200 + 750] = 2.85.

[412] We anticipate that the clarification we are proposing to make to the brochure supplement (Part 2B) would not affect this cost burden estimate. *See* note 205 and accompanying text for a discussion of this proposed clarifying amendment.

[413] Based on IARD system data regarding the number of filings of Form ADV amendments.

[414] *See* section VI of Part 2 Release, *supra* note 46.

[415] *Id.*

[416] (9,150 advisers x .5 hours/other than annual amendment) + (9,150 advisers x 6 hours/annual amendment) = 59,475.

[417] 9,150 advisers x 1 hour = 9,150.

[418] 9,150 advisers x 1.3 hours = 11,895.

[419] *See* section V. of Part 2 Release, *supra* note 46.

the elimination of the private adviser exemption.

The current approved burden estimates that the initial per adviser cost for legal services related to preparation of Part 2 of Form ADV would be $3,200 for small advisers, $4,400 for medium-sized advisers, and $10,400 for larger advisers.[420] The current approved burden also contains an initial per adviser cost for compliance consulting services related to initial preparation of the amended Form ADV that ranges from $3,000 for smaller advisers to $5,000 for medium-sized advisers.[421] We estimate that the 750 new registered advisers no longer able to rely on the private adviser exemption will be medium-sized. The current approved burden anticipates that a quarter of medium-sized advisers would seek the help of outside legal services and half would seek the help of compliance consulting services. Accordingly, we estimate that 188 of these advisers would use outside legal services, for a total cost burden of $827,200, and 375 advisers would use outside compliance consulting services, for a total cost burden of $1,875,000, resulting in a total cost burden among all respondents of $2,702,000.

b. Estimated Annual Burden Applicable to Exempt Reporting Advisers

i. Estimated Initial Hour Burden

Based on publications, reports, and general information publicly available from trade organizations, financial research companies, and news organizations as well as safe harbor filings with the SEC, we expect approximately 2,000 investment advisers will qualify for an exemption from registration, but will be required to submit reports to us on Form ADV.[422] The paperwork burden applicable to these new exempt reporting advisers would consist of the burden attributable to completing a limited number of items in Part 1A as well as the burden attributable to the private fund reporting requirements of Item 7.B. and Section 7.B. of Schedule D. We estimated the burden to complete the subset of items in Part 1A applicable to exempt reporting advisers, above, to be two hours, which would result in an annual burden of approximately 4,000 hours.

As discussed above, we estimate the private fund reporting requirements of the form to be one hour per private fund. We assume that each exempt reporting adviser currently relies on the private adviser exemption and, therefore, has 14 or fewer private fund clients. Based on reporting by registered advisers to private funds and industry publications and reports, we expect each of these advisers, on average, advises five private funds.[423] Accordingly, we would attribute an additional 10,000 burden hours to exempt reporting advisers' private fund reporting requirements.[424]

The estimated total annual hour burden applicable to exempt reporting advisers is 14,000 hours.[425] We believe that most of the paperwork burden would be incurred in advisers' initial submission of private fund data, and that over time this burden would decrease substantially because the paperwork burden would be limited to updating information. Amortizing this total burden imposed by Form ADV over a three-year period, as we did above with respect to the initial filing for registered advisers, would result in an average burden of an estimated 4,667 hours per year,[426] or 2.33 hours per year, on average, for each exempt reporting adviser.[427]

ii. Estimated Annual Burden Associated With Amendments

In addition to the burdens associated with initial completion and filing of the portion of the form that exempt reporting advisers would be required to prepare, we estimate that, on average, each exempt reporting adviser would prepare an annual updating amendment and 20% of these advisers would file an interim updating amendment.[428] With respect to an exempt reporting adviser's annual updating amendment of Form ADV, we expect that advisers would not have to spend a significant amount of time entering responses into the electronic version of the form to file their annual updating amendments because IARD will automatically pre-populate their prior responses. Based on this consideration, we estimate that the average exempt reporting adviser will spend 1 hour per year completing its annual updating amendment to Form ADV. This estimate is based on our estimate for registered advisers, but it is 85% shorter because exempt reporting advisers would be required to complete and update only a limited number of items in the form, not including Part 2. The other amendment that we estimate 20% of the exempt reporting advisers would file is an interim updating amendment to Items 1, 3, 10 or 11 of Form ADV,[429] and we estimate that this amendment would require 0.5 hours per amendment. We therefore, estimate that the total paperwork burden on exempt reporting advisers of amendments to Form ADV would be 2,200 hours per year.[430]

3. Total Revised Burdens

The revised total annual collection of information burden for registered advisers to file and complete the revised Form ADV (Parts 1 and 2), including the initial burden for both existing and anticipated new registrants, including private fund advisers, plus the burden associated with amendments to the form, preparing brochure supplements and delivering codes of ethics to clients is estimated to be approximately 217,477 hours per year.[431] This burden represents an decrease of 50,980 hours

[420] For purposes of this estimate, we categorize small advisers as advisers with 10 or fewer employees, medium advisers as having between 11 and 1,000 employees, and large advisers as those with 1,000 or more employees. *See* Part 2 Release, *supra* note 46, at nn. 301 and 324.

[421] *Id.* at n. 325.

[422] This estimate was collectively derived from various sources including the National Venture Capital Association's Yearbook 2010 (*http://www.nvca.org*), First Research reports (*http://www.firstresearch.com*), Preqin reports (*http://www.preqin.com*), Bloomberg (*http://www.bloomberg.com*), the Managed Funds Association (*http://www.managedfunds.org*), PerTrac data (*http://www.pertrac.com*), and Form D data. Specific data relevant to the number or types of advisers that would be exempt reporting advisers was not available, but the information located did inform the staff to the probable number of exempt reporting advisers.

[423] *Id.* Based upon the reported general number of private funds and the estimated number of advisers to these private funds, it is estimated that each adviser advises five private funds on average. (approximately 10,000 private funds/estimated 2,000 advisers = 5 private funds per adviser.

[424] 2,000 exempt reporting advisers × 5 private funds/adviser × 1 hour/private fund = 10,000. *See Id.* for 5 funds estimate.

[425] 4,000 + 10,000 = 14,000.

[426] 14,000/3 = 4,667.

[427] 4,667/2,000 = 2.33.

[428] Approximately 20% of advisers with a fiscal year end of December that filed an other-than-amendment changed Item 1 or 11 between April 1, 2009 and December 31, 2009 (period between annual amendment filing time).

[429] *See* General Instruction 4 to Form ADV.

[430] [(2,000 advisers × .20) × 0.5 hours] = 200 hours per year for interim amendments. 2,000 advisers × 1 hour = 2,000 hours per year for annual amendments. 200 + 2,000 = 2,200 hours. Exempt reporting advisers would not incur any burden to prepare new brochure supplements, however, as is required of registered advisers; nor would they be required to meet obligations to deliver codes of ethics to clients, as is also required of registered advisers. Similarly, we have not prepared an estimated annual cost burden to be incurred by exempt reporting advisers because the cost burden attributed to registered advisers is associated with Part 2 obligations to which exempt reporting advisers are not subject.

[431] 124,257 hours per year attributable to initial preparation of Form ADV + 12,700 hours per year attributable to initial private fund reporting requirements + 59,475 hours per year for amendments to Form ADV + 9,150 hours per year for brochure supplements for new employees + 11,895 hours per year to meet code of ethics delivery obligations = 217,477 hours.

from the current approved burden.[432] This decrease is attributable primarily to the 4,100 advisers that we expect to withdraw from SEC registration.

Registered investment advisers are also expected to incur an annual cost burden of $2,702,000, a reduction from the current approved cost burden of $22,775,400. The decrease in annual cost burden is attributed to the nature of the costs, which are one-time initial costs to draft the narrative brochure. As the transition to the narrative brochure will have substantially been completed, the on-going costs arise from new registrants.

The total annual collection of information burden for exempt reporting advisers to file and complete the required Items of Part 1A of Form ADV, including the burden associated with amendments to the form, would be 6,867 hours.[433]

We estimate that, if the amendments to Form ADV are adopted, the total annual hour burden for the form would decrease by 44,113 hours to 224,344.[434] The resulting blended average per adviser amortized burden for Form ADV would be 20.12 hours,[435] which would consist of an average annual amortized burden of 23.77 hours for the estimated 9,150 registered advisers and 3.43 hours for the estimated 2,000 exempt reporting advisers.[436]

C. Rule 203A–5

Proposed rule 203A–5 would require *each* investment adviser registered with us on July 21, 2011 to file an amendment to its Form ADV no later than August 20, 2011, and withdraw from Commission registration by October 19, 2011, if no longer eligible.[437] The amendment to Form ADV would, among other things, require each adviser to declare whether it remains eligible for Commission registration.[438] The likely respondents to this information collection are all investment advisers registered with the Commission on July 21, 2011, and the investment advisers that withdraw their registration. Compliance with this collection of information is mandatory, and the information collected on Form ADV and Form ADV–W is not kept confidential. We have submitted this collection of information to OMB for review.

We estimate that there would be approximately 11,850 respondents to this collection of information filing an amendment to Form ADV[439] and 4,100 respondents filing Form ADV–W.[440] Each respondent would respond once. For purposes of the collection of information burden for Form ADV, we estimate that the amendment would take each adviser approximately 6 hours per amendment, on average,[441] and that the proposed amendments to Part 1A of Form ADV would take each adviser approximately 4.5 hours, on average, to complete.[442] We also estimate the average burden for each respondent to be 0.25 hours for filing Form ADV–W.[443]

We estimate that the burdens associated with the Form ADV amendment required by rule 203A–5 would be more like an annual amendment with respect to the burden to complete than an other-than-annual amendment, as a result of our proposed changes to Part 1A. Consequently, we estimate the total one-time burden for completing the Form ADV amendments to be 124,425 hours,[444] and for completing Form ADV–W to be 1,025 hours,[445] for a total one-time burden of 125,450 hours.[446]

D. Form ADV–NR

We are proposing minor amendments to Form ADV–NR (OMB Control No. 3235–0238), the form used to appoint the Secretary of the Commission as an agent for service of process for certain non-resident advisers.[447] Non-resident general partners or managing agents of SEC-registered investment advisers must make a one-time filing of Form ADV–NR with the Commission. Form ADV–NR requires these non-resident general partners or managing agents to furnish us with a written irrevocable consent and power of attorney that designates the Commission as an agent for service of process, and that stipulates and agrees that any civil suit or action against such person may be commenced by service of process on the Commission. The amendments we are proposing reflect that exempt reporting advisers would be filing reports on IARD, and that they would use Form ADV–NR in the same way and for the same purpose as it is currently used by registered investment advisers. The collection of information is necessary for us to obtain appropriate consent to permit the Commission and other parties to bring actions against non-resident partners or agents for violations of the Federal securities laws. This collection of information is found at 17 CFR 279.4. The collection of information is mandatory, and the information provided in response to the collection is not kept confidential. The currently approved collection of information in Form ADV–NR is 18 hours.

We estimate that approximately 9,150[448] investment advisers will be registered with the Commission and that approximately 2,000[449] exempt reporting advisers would file reports with the Commission, and that these advisers would file Form ADV–NR at the same annual rate (0.17 percent) as advisers registered with us.[450] Accordingly, we estimate that as a result of the amendments to Form ADV–NR and the change in the number of filers after the effectiveness of the Dodd-Frank Act the annual aggregate information collection burden for Form ADV–NR would be 19 hours, an increase of 1 hour over the currently approved burden.[451]

E. Rule 203–2 and Form ADV–W

We are proposing amendments to rule 203A–2(b), the exemption from the prohibition on registration for certain pension consultants. The proposed amendments would raise the amount of plan assets that an adviser must consult on from $50 to $200 million annually.[452] If we adopt the proposed amendment to rule 203A–2(b), an investment adviser would have to be a pension consultant with respect to assets of plans having an aggregate value of $200 million or more to be able to

[432] Current approved burden of 268,457 hours—revised burden 217,477 hours = 50,980 decrease in hours.

[433] 4,667 hours per year attributable to initial preparation of Form ADV + 2,200 hours per year for amendments = 6,867 hours.

[434] 217,477 + 6,867 = 224,344.

[435] 224,344/11,150 = 20.12.

[436] Registered advisers (217,477/9,150 = 23.77), exempt reporting advisers (6,867/2,000 = 3.43).

[437] Proposed rule 203A–5(a), (b). *See supra* section II.A.1. of this Release.

[438] *See supra* section II.A.2. of this Release.

[439] Based on IARD data as of September 1, 2010, 11,867 investment advisers are registered with the Commission. We have rounded this number to 11,850 for purposes of our analysis.

[440] *See supra* note 294.

[441] We anticipate that the hour burden for the refiling of Form ADV for purposes of rule 203A–5 would be the same as an adviser's annual amendment filing, which has an approved burden of 6 hours.

[442] *See supra* sections V.B.1.a., V.B.2.a.3. of this Release.

[443] *See supra* note 304.

[444] [6 hours (annual amendment) + 4.5 hours (new items)] × 11,850 = 124,425.

[445] 0.25 hours × 4,100 = 1,025.

[446] 124,425 + 1,025 = 125,450.

[447] *See* proposed amended Form ADV–NR; proposed General Instruction 18.

[448] *See supra* note 377 and accompanying text.

[449] *See supra* note 422 and accompanying text.

[450] From September 1, 2009 through September 1, 2010, 20 Form ADV–NRs were filed with us for an annual rate for all SEC-registered advisers of 0.17%. (20 Form ADV–NR filings/11,850 advisers registered as of Sept. 1, 2010)

[451] 0.17% (rate of filing) x (9,150 estimated registered investment advisers + 2,000 estimated exempt reporting advisers) × 1 hour per ADV–NR filing = 19.

[452] *See* proposed rule 203A–2(a)(1).

register with the Commission. Those pension consultants providing consulting services to plans of less than $200 million would be required to file a notice of withdrawal of their registration in accordance with rule 203–2 on Form ADV–W (OMB Control No. 3235–0313). The collection of information on Form ADV–W is mandatory and is not kept confidential. The currently approved collection of information for Form ADV–W is 500 hours for 1,000 responses.

Based on IARD data as of September 1, 2010, there are 353 advisers relying on the pension consultant exemption from registration. We estimate that approximately 15%, or 50, of the current advisers relying on this exemption from the prohibition on registration would no longer be eligible to rely on the exemption if adopted as proposed. This estimate is based on our understanding that a typical pension consultant would have plan assets far in excess of the proposed higher threshold, in light of the fact that most pension plans contain a significant amount of assets.

The estimated 50 advisers no longer eligible to rely on the exemption, however, would have to file a notice of withdrawal on Form ADV–W in accordance with rule 203–2 under the Advisers Act and withdraw their registration based on the proposed amendment to rule 203A–2(b).[453] In addition, as noted above, we estimate that approximately 4,100 advisers also will have to withdraw their Commission registration as a result of the Dodd-Frank Act. Because these advisers are registered today, we further anticipate that these advisers will be switching from SEC to State registration, and as a result will be filing a "partial" Form ADV–W. We have estimated for purposes of our current approved burden under the PRA for rule 203–2 and Form ADV–W, that a partial withdrawal imposes an average burden of approximately 0.25 hours for an adviser.[454] Thus, we estimate that the proposed amendment to rule 203A–2(b) associated with filing Form ADV–W would generate a burden of 1,038 additional hours [455] in addition to the approved burden of 500 hours for a total of 1,538 hours.

F. Form ADV–H

Proposed rule 204–4(e) would provide a temporary hardship exemption for an exempt reporting adviser having unanticipated technical difficulties that prevent submission of a filing to the IARD system.[456] Currently, rule 203–3(a) provides a similar temporary hardship exemption for registered advisers that file an application on Form ADV–H (OMB Control No. 3235–0538).[457] Like rule 203–3(a), proposed rule 204–4(e) would require advisers relying on the temporary hardship exemption to file an application on Form ADV–H in paper format no later than one business day after the filing that is the subject of the Form ADV–H was due, and submit the filing on Form ADV in electronic format with IARD no later than seven business days after the filing was due.[458] If rule 204–4 is adopted as proposed, respondents to the collection of information on Form ADV–H would be exempt reporting advisers, in addition to registered advisers, who are currently respondents to this collection of information. The collection of information on Form ADV–H is mandatory for registered advisers relying on a temporary hardship exemption and would be mandatory for exempt reporting advisers relying on a temporary hardship exemption if rule 204–4 is adopted as proposed. The information collected on Form ADV–H is not kept confidential.

To estimate the currently approved total burden associated with Form ADV–H, we estimated that registered advisers file approximately 11 responses to Form ADV–H per year, which, given the estimated 11,850 advisers currently registered with the Commission, means that approximately 1 response is filed per 1,000 advisers.[459] We further estimated that the average burden per response is approximately 1 hour. Therefore the total approved burden for Form ADV–H is approximately 11 hours per year.[460] Based on the proportion of annual responses to the number of registered advisers, we estimate that exempt reporting advisers would file approximately 2 responses to Form ADV–H annually if rule 204–4 is adopted.[461] We also estimate that Form ADV–H would impose the same average burden per response of 1 hour on exempt reporting advisers. Thus, proposed rule 204–4 would result in an increase in the total hour burden associated with Form ADV–H of 2 hours.[462] However, as discussed above, the number of registered advisers will decrease due to the Dodd-Frank Act's amendments to sections 203A and 203(b)(3) from 11,850 to 9,150.[463] Given the reduction in registered advisers, we estimate that Form ADV–H will receive 9 annual responses from registered advisers, for a total annual burden for registered advisers of 9 hours.[464] Thus, if rule 204–4 is adopted as proposed, the total burden associated with Form ADV–H would continue to be 11 hours.[465]

G. Rule 204–2

Rule 204–2 (OMB Control No. 3235–0278) requires investment advisers registered, or required to be registered under section 203 of the Act, to keep certain books and records relating to their advisory business.[466] The collection of information under rule 204–2 is necessary for the Commission staff to use in its examination and oversight program, and the information is generally kept confidential.[467] The collection of information is mandatory.

We are proposing to amend rule 204–2 to update the rule's "grandfathering provision" for investment advisers that are currently exempt from registration under the "private adviser" exemption, but will be required to register when the Dodd-Frank Act's elimination of the "private adviser" exemption becomes effective on July 21, 2011.[468] Under the proposed amended grandfathering provision, an adviser that was exempt from registration under section 203(b)(3) of the Advisers Act prior to July 21, 2011 would not be required to maintain

[453] *See supra* note 318 (discussing the fact that advisers filing Form ADV–W due to our proposed amendment to rule 203A–2(b) would likely file partial withdrawals).

[454] *See supra* note 304.

[455] (4,100 + 50) responses on Form ADV–W × 0.25 hours = 1,038 hours.

[456] Proposed rule 204–4(e).

[457] Rule 203–3(a); 17 CFR 279.3 (Form ADV–H). *See supra* note 125 and accompanying text.

[458] Proposed rule 204–4(e).

[459] 11,850 registered advisers ÷ 11 responses = approximately 1 response per 1,000 registered advisers)

[460] 11 responses × 1 hour = 11 hours.

[461] We estimate that approximately 2,000 exempt reporting advisers would file reports on Form ADV in accordance with proposed rule 204–4. Thus, we estimate 2 responses to Form ADV–H in accordance with proposed rule 204–4 (2,000 exempt reporting advisers × 1 response per 1000 advisers = 2 responses).

[462] 2 responses x 1 hour = 2 hours.

[463] *See supra* note 377.

[464] 9,150 registered advisers x 1 response per 1,000 advisers = 9 responses. 9 responses × 1 hour = 9 hours.

[465] 9 hours for registered advisers + 2 hours for exempt reporting advisers = 11 hours.

[466] Rule 204–2.

[467] *See* section 210(b) of the Advisers Act.

[468] *See* proposed rule 204–2(e)(3)(ii); *supra* section II.D.2.b of this Release. In addition, we are proposing to amend rule 204–2(e)(3)(ii) to cross-reference the new definition of "private fund" added to the Advisers Act by the Dodd-Frank Act where that term is used in rule 204–2. However, this proposed amendment is technical, and would not increase or decrease the collection burden on advisers. We also intend to rescind rule 204–2(l) because that section was vacated by the Federal appeals court in *Goldstein.*

certain books and records concerning performance or rate of return of a private fund or other account for any period prior to July 21, 2011, provided the adviser was not registered with the Commission.[469] Most, if not all, advisers likely gather the records and documents necessary to support the calculation of performance or rate of return as those records or documents are produced or at the time a calculation is made. Thus, we do not believe that the proposed amendment to the grandfathering provision would reduce our current approved average annual hourly burden per adviser under rule 204–2.

Although we do not anticipate that our proposed amendments to rule 204–2 would affect the per adviser burden imposed by the rule, the Dodd-Frank Act's amendments to sections 203A and 203(b)(3) will change our estimates of the total annual burden associated with the rule.[470] The current approved burden for rule 204–2 is based on an estimate of 11,607 registered advisers subject to rule 204–2 and an estimated average burden of 181.45 burden hours each year per adviser, for a total of 2,106,046 hours.[471] We estimate that the Dodd-Frank Act will reduce the number of registered advisers to 9,150.[472] Thus, we estimate that the total burden under rule 204–2 will be 1,660,268,[473] a reduction of 445,778 hours.[474]

The reduction in the number of advisers subject to the rule will also reduce the total non-labor cost burden of the rule. The current approved non-labor cost burden associated with rule 204–2 is $14,581,509, or an average of approximately $1,256 per adviser.[475] Due to the reduction in the number of advisers subject to rule 204–2, we estimate that the new total non-labor cost burden will be $11,492,400,[476] a reduction of $3,089,109. [477]

H. Request for Comment

Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to: (i) Evaluate whether the proposed amendments to the collection 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 collection of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) determine whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons desiring to submit comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Room 10102, New Executive Office Building, Washington, DC 20503, and also should send a copy of their comments to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090 with reference to File No. S7–36–10. Requests for materials submitted to OMB by the Commission with regard to this collection of information should be in writing, refer to File No. S7–36–10, and be submitted to the Securities and Exchange Commission, Office of Investor Education and Advocacy, 100 F Street, NE., Washington, DC 20549–0213. OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication of this Release. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days after publication of this release.

VI. Initial Regulatory Flexibility Analysis

The Commission has prepared the following Initial Regulatory Flexibility Analysis ("IRFA") regarding our proposed rules and rule amendments to give effect to the Dodd-Frank Act's amendments to the Advisers Act in accordance with section 3(a) of the Regulatory Flexibility Act.[478] It relates to proposed new rules 203A–5 and 204–4, proposed amendments to rules 0–7, 203A–1, 203A–2, 203A–3, 203A–4, 204–1, 204–2, 206(4)5, 222–1, 222–2, and proposed amendments to Form ADV, Form ADV–NR and Form ADV–H under the Advisers Act.

A. Need for the New Rules and Rule Amendments

The proposed new rules and rule amendments are necessary to give effect to provisions of the Dodd-Frank Act which, among other things, amend certain provisions of the Advisers Act, and to respond to a number of other changes to the Advisers Act made by the Dodd-Frank Act, including the Commission's pay to play rule. In addition, in light of our increased responsibility for oversight of private fund advisers, we are proposing to require advisers to those funds to provide us with additional information about the operation of those funds, which would permit us to provide better oversight of these advisers by focusing our examination and enforcement resources on those advisers to private funds that appear to present greater compliance risks. We also are proposing to require all registered advisers to provide us with additional information on their operations to allow us to more efficiently allocate our examination resources, to better prepare for on-site examinations, and to provide us with a better understanding of the investment advisory industry to assist our evaluation of the implications of policy choices we must make in administering the Advisers Act.

B. Objectives and Legal Basis

The primary objective of the proposed new rules and rule amendments is to give effect to provisions of Title IV of the Dodd-Frank Act that: (i) Reallocate responsibility for oversight of investment advisers by delegating generally to the states responsibility over certain mid-sized advisers; (ii) repeal the "private adviser exemption" contained in section 203(b)(3) of the

[469] Proposed rule 204–2(e)(3)(ii). Rule 204–2 requires registered advisers to make and keep books and records necessary to support the calculation of the performance or rate of return of any or all managed accounts or securities recommendations in any notice, circular, advertisement, newspaper article, investment letter, bulletin or other communication that the investment adviser circulates or distributes, directly or indirectly, to 10 or more persons. Rule 204–2(a)(16). It requires that advisers maintain and preserve these records in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on such records, the first two years in an appropriate office of the investment adviser. Rule 204–2(e)(1). Our proposed grandfathering provision would assure that advisers newly subject to the rule due to elimination of the "private adviser" exemption in existing section 203(b)(3) do not face a retroactively-imposed recordkeeping requirement. However, the proposed grandfathering provision would require these advisers to continue to preserve any books and records in their possession that pertain to the performance or rate of return of a private fund or other account for the two and five year periods.

[470] Exempt reporting advisers are not subject to rule 204–2, and therefore there is no offsetting increase in the number of advisers subject to the rule.

[471] In the Pay to Play Release, we estimated that the average burden for advisers imposed by rule 204–2 to be 181.45 hours. *See* section V.A. of the Pay to Play Release.

[472] *See supra* note 377 and accompanying text.

[473] 9,150 registered advisers × 181.45 hours = approximately 1,660,268.

[474] 2,106,046 hours − 1,660,268 hours = 445,778 hours.

[475] $14,581,509 ÷ 11,607 advisers = approximately $1,256.

[476] 9,150 × $1,256 = $11,492,400.

[477] $14,581,509 − $11,492,400 = $3,089,109.

[478] 5 U.S.C. 603(a).

Advisers Act; and (iii) provide for reporting from advisers to certain types of private funds that are exempt from registration.[479] Proposed new rule 203A–5 and amendments to rules 203A–1, 203A–2, 203A–3, and 203A–4 are intended to provide us a means of identifying advisers that must transition to State regulation, clarify the application of the new statutory provisions under the Dodd-Frank Act, and extend certain of the exemptions we have adopted under section 203A of the Act to mid-sized advisers. Proposed new rule 204–4 and amendments to rule 204–1 are intended to require exempt reporting advisers to submit, and to periodically update, reports to us by completing several items on Form ADV. The proposed amendments to rule 204–2 are intended to account for the Dodd-Frank Act's elimination of the "private adviser" exemption under section 203(b)(3) of the Advisers Act and its addition of a definition of "private fund" to the Advisers Act.[480] The proposed amendments to Form ADV would permit the form to serve as a reporting, as well as a registration, form and to specify the seven items exempt reporting advisers must complete. The proposed amendments to Form ADV would also provide additional information on the operations of registered investment advisers. The proposed amendments to Forms ADV–NR and ADV–H would revise the forms for use by exempt reporting advisers. Additionally, we are proposing amendments to the Advisers Act pay to play rule, rule 206(4)–5.[481]

The Commission is proposing new rule 203A–5 and amendments to rules 203A–1, 203A–2, 203A–3, and 203A–4 under the Advisers Act pursuant to the authority set forth in sections 203A(c), and 211(a) of the Investment Advisers Act of 1940 [15 U.S.C. 80b–3A(c) and 80b–11(a)]; new rule 204–4 and amendments to rules 204–1 and 204–2 pursuant to the authority set forth in sections 204 and 211(a) of the Advisers Act [15 U.S.C. 80b–4 and 80b–11(a)]; amendments to rule 206(4)–5 pursuant to authority set forth in sections 206(4) and 211(a) of the Advisers Act [15 U.S.C. 80b–6(4) and 80b–11(a)]; amendments to rules 0–7, 222–1, and 222–2 pursuant to authority set forth in section 211(a) of the Advisers Act [15 U.S.C. 80b–11(a)]; and to amend Form ADV under section 19(a) of the Securities Act of 1933 [15 U.S.C. 77s(a)], sections 23(a) and 28(e)(2) of the Securities Exchange Act of 1934 [15 U.S.C. 78w(a) and 78bb(e)(2)], section 319(a) of the Trust Indenture Act of 1939 [15 U.S.C. 77sss(a)], section 38(a) of the Investment Company Act of 1940 [15 U.S.C. 78a–37(a)], and sections 203(c)(1), 204, and 211(a) of the Investment Advisers Act of 1940 [15 U.S.C. 80b–3(c)(1), 80b–4, and 80b–11(a)]; Form ADV–NR under section 19(a) of the Securities Act of 1933 [15 U.S.C. 77s(a)], section 23(a) of the Securities Exchange Act of 1934 [15 U.S.C. 78w(a)], section 319(a) of the Trust Indenture Act of 1939 [15 U.S.C. 77sss(a)], section 38(a) of the Investment Company Act of 1940 [15 U.S.C. 78a–37(a)], and sections 203(c)(1), 204, and 211(a) of the Investment Advisers Act of 1940 [15 U.S.C. 80b–3(c)(1), 80b–4, and 80b–11(a)]; and Form ADV–H pursuant to the authority set forth in sections 203(c)(1), 204, and 211(a) of the Advisers Act [15 U.S.C. 80b–3(c)(1), 80b–4, 80b–11(a)]. Section 203A(c) gives us authority to permit registration with the Commission of any person or class of persons to which the application of section 203A(a) would be unfair, a burden on interstate commerce, or otherwise inconsistent with the purposes of section 203A. Section 206(4) gives us authority to prescribe means reasonably designed to prevent fraudulent, deceptive, or manipulative acts or practices. Section 211 gives us authority to classify, by rule, persons and matters within our jurisdiction and to prescribe different requirements for different classes of persons, as necessary or appropriate to the exercise of our authority under the Act. Section 204 gives us authority to prescribe, by rule, such records and reports that an adviser must make, keep for prescribed periods, or disseminate, as necessary or appropriate in the public interest or for the protection of investors.

C. Small Entities Subject to Rules and Rule Amendments

In developing these proposals, we have considered their potential impact on small entities that would be subject to the proposed rule and form amendments. The proposed rule and form amendments would affect all advisers registered with the Commission and exempt reporting advisers, including small entities. Under Commission rules, for the purposes of the Advisers Act and the Regulatory Flexibility Act, an investment adviser generally is a small entity if it: (i) Has assets under management having a total value of less than $25 million; (ii) did not have total assets of $5 million or more on the last day of its most recent fiscal year; and (iii) does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of $25 million or more, or any person (other than a natural person) that had total assets of $5 million or more on the last day of its most recent fiscal year.[482]

Our rule and form amendments would not affect most advisers that are small entities ("small advisers") because they are generally registered with one or more State securities authorities and not with us. Under section 203A of the Advisers Act, most small advisers are prohibited from registering with the Commission and are regulated by State regulators.[483] We estimate that as of September 1, 2010, approximately 620 advisers that were small entities were registered with the Commission.[484] Because these advisers are registered, they would be subject to proposed new rule 203A–5 and amendments to rules 0–7, 204–2, 203A–1, 203A–2, 203A–3, and 203A–4, and Forms ADV and ADV–NR. In addition, we estimate that due to the Dodd-Frank Act's elimination of the "private adviser" exemption in section 203(b)(3), an additional 2 advisers that are small entities will become subject to these rules.[485] Further, as a result of our proposed amendments to rule 203A–2, we estimate that 15 additional multi-State advisers would register with us and be subject to these rules,[486] and 21 pension consultants that are small entity advisers would be required to withdraw from registration with us and would no longer be subject to these rules.[487] We

[479] *See supra* section I of this Release.

[480] *See supra* section II.D.2.b. We also intend to rescind section 204–2(l), which was vacated by the Federal appeals court in *Goldstein*.

[481] *See* proposed rule 206(4)–5; *supra* section II.D.1. of this Release.

[482] Rule 0–7(a) [17 CFR 275.0–7(a)].

[483] *See supra* section II.A.7.a.

[484] Based on IARD data as of September 1, 2010.

[485] We believe that the only small entities that would become subject to registration as a result of the elimination of the private adviser exemption in section 203(b)(3) would be advisers to private funds that maintain their principal office and place of business in Wyoming. Based on IARD data as of September 1, 2010, we estimate that 36 SEC-registered small entity advisers are required to be registered with us because they have a principal office and place of business in Wyoming, which is 0.3% of all SEC-registered advisers (36 ÷ 11,850 SEC-registered advisers = approximately 0.3%). We estimate that a similar proportion of the approximately 750 advisers to private funds that will register with the Commission due to the elimination of the private adviser exemption in section 203(b)(3) would be small Wyoming-based advisers. As a result, we estimate that approximately 2 small entity advisers to private funds will register with the Commission (750 private fund advisers × 0.3% = approximately 2).

[486] *See supra* note 324.

[487] Based on IARD data as of September 1, 2010, 142 of the advisers that would be considered small entities rely on the pension consultant exemption from registration. We estimate that approximately 15%, or 21, of these advisers would no longer be eligible to rely on the exemption if adopted as

estimate that 6 exempt reporting advisers that are small entities would be subject to proposed rule 204–4, and the proposed amendments to rule 204–1, Form ADV, Form ADV–NR and Form ADV–H to give effect to the Dodd-Frank Act's reporting requirements by exempt reporting advisers.[488] We also estimate that 6 exempt reporting advisers that are small entities would be subject to the proposed amendments to rule 206(4)–5. Finally, all investment advisers, whether they are small entities or not, would be subject to the proposed technical amendments to rules 222–1 and 222–2. The small entities subject to these amendments include approximately 6 exempt reporting advisers and approximately 14,700 State-registered advisers.[489]

D. Reporting, Recordkeeping and Other Compliance Requirements

The proposed rules and rule and form amendments would impose certain reporting, recordkeeping, and compliance requirements on advisers, including small advisers. The proposals would require all of the small advisers registered with us to file an amended Form ADV, would require some to file Form ADV–W, and would require some to file reports as exempt reporting advisers. The amendments also would cause the adviser to be subject to the existing recordkeeping and compliance requirements for SEC-registered advisers. These requirements and the burdens on small advisers are discussed below.[490]

Transition to State Registration

Proposed rule 203A–5 would impose costs on all investment advisers, including small advisers, by requiring *each* investment adviser registered with us to file an amendment to its Form ADV no later than August 20, 2011 (30 days after the July 21, 2011 effective date of the amendments to section 203A), and withdraw from Commission registration by October 19, 2011 (60 days after the required filing of Form ADV), if no longer eligible.[491] We estimate that all of the 620 small advisers currently registered with the Commission would file Form ADV, but none would withdraw registration because the Dodd-Frank Act does not change the eligibility requirements for small advisers registered with us because they rely on one or more of the exemptions from the prohibition on registration.[492]

Switching Between State and Commission Registration

The proposed amendments to rule 203A–1 would eliminate the $5 million buffer in current rule 203A–1(a), which permits but does not require an adviser to register with the Commission if the adviser has between $25 million and $30 million of assets under management.[493] By definition, a small adviser under the Advisers Act has less than $25 million in assets under management, so elimination of this rule should have no impact on small advisers.[494]

Exemptions From the Prohibition on Registration with the Commission

The amendments we are proposing to two of the three exemptions from the prohibition on registration in rule 203A–2 would cause small advisers to be subject to new reporting, recordkeeping, and other compliance requirements.[495] The proposed amendment to the exemption from the prohibition on registration available to pension consultants in rule 203A–2(b) would increase the minimum value of plan assets from $50 million to $200 million.[496] We estimate that this may cause approximately 21 small adviser pension consultants to be required to withdraw from registration with us by filing Form ADV–W and thus no longer be subject to Commission rules.[497] These advisers would likely need to register with one or more states, and comply with the states' recordkeeping and other regulatory requirements. This would have a negative impact on competition for these advisers compared to pension consultants with more than $200 million of plan assets that would remain registered with the Commission.

The proposed amendment to the multi-State adviser exemption in rule 203A–2(e) would permit investment advisers required to register as an investment adviser with 15 or more states, instead of 30 or more states under the current rule, to register with the Commission.[498] An investment adviser relying on this exemption would continue to report certain information on Form ADV[499] and maintain a record of the states in which the investment adviser has determined it would, but for the exemption, be required to register. This would promote efficiency and

proposed. This ratio is consistent with our estimate for the PRA burden. *See supra* section V.E. of this Release.

[488] The only small entity exempt reporting advisers that would be subject to the proposed rule and proposed amendments would be exempt reporting advisers that maintain their principal office and place of business in Wyoming. As discussed *supra* in note 98 and accompanying and preceding text, the current practical effect of section 203A(a)(1) is to prohibit U.S. advisers with less than $25 million in assets under management from registering with the Commission *unless* they maintain their principal office or place of business in Wyoming. Proposed new rule 204–4 requires an adviser relying on an exemption under new sections 203(l) or (m) of the Advisers Act to complete and file reports on Form ADV. *See* proposed rule 204–4; *supra* section II.B.1. of this Release. The exemptions from registration in sections 203(l) and (m) apply to advisers solely to venture capital funds and advisers solely to private funds with less than $150 million in assets under management, respectively. Small Wyoming-based advisers to venture capital funds or private funds may be required to register with the Commission but for the exemptions in section 203(l) or (m). Thus, these advisers would be subject to proposed rule 204–4 and the proposed amendments to rule 204–1, Form ADV, and Form ADV–H to give effect to the Dodd-Frank Act's mandate for reporting by exempt reporting advisers. Assuming that the proportion of registered Wyoming-based small advisers to registered advisers is similar to the proportion of small Wyoming-based exempt reporting advisers to exempt reporting advisers generally, we estimate that approximately 6 exempt reporting advisers that are small entities would be subject to proposed rule 204–4 and the proposed amendments to rule 204–1, Form ADV, and Form ADV–H (2,000 exempt reporting advisers × 0.3% = 6 small Wyoming-based exempt reporting advisers).

[489] Based on IARD data as of July 1, 2010, we estimate that there were approximately 14,700 State-registered advisers. Because section 203A currently precludes most advisers with less than $25 million in assets under management from registering with the Commission, we assume that nearly all of the 14,700 State-registered advisers are small entities. Therefore, 14,700 small entities (registered with the states as of July 1, 2010) + 21 small entities (registering with the states due to the proposed amendment to the pension consultant exemption in rule 203A–2(b))—2 small entities (registering due to elimination of the private adviser exemption in section 203(b)(3))—15 small entities (de-registering with the states and registering with the Commission due to the proposed amendment to the multi-State adviser exemption in rule 203A–2(e)) = approximately 14,704 State-registered advisers that are small entities.

[490] *Supra* sections I through II of this Release, describe these requirements in more detail.

[491] Proposed rule 203A–5(a), (b). *See supra* section II.A.1. of this Release.

[492] *See* section 410 of the Dodd-Frank Act.

[493] *See* proposed rule 203A–1; *supra* section II.A.4. of this Release.

[494] *See* rule 0–7(a)(1).

[495] *See* proposed rule 203A–2; *supra* section II.A.5. of this Release. The proposed elimination of the exemption from the prohibition on Commission registration for NRSROs in rule 203A–2(a) would not affect small advisers because based on IARD data as of September 1, 2010 only one NRSRO remains registered under the Act and it reports that it has more than $100 million of assets under management. Therefore, it would neither be a small adviser nor rely on the exemption.

[496] We also propose to renumber the rule as rule 203A–2(a). *See* proposed rule 203A–2(a); *supra* section II.A.5.b. of this Release.

[497] *See supra* notes 318–321 and accompanying text; *supra* note 487 and accompanying text.

[498] We also propose to renumber the rule as rule 203A–2(d). *See* proposed rule 203A–2(d); *supra* section II.A.5.c. of this Release.

[499] Advisers would be required to: (i) Include a representation on Schedule D of Form ADV that the investment adviser has concluded that it must register as an investment adviser with 15 or more states; and (ii) undertake to withdraw from registration with the Commission if the adviser indicates on an annual updating amendment to Form ADV that the investment adviser would be required by the laws of fewer than 15 states to register as an investment adviser with those states. *See* proposed rule 203A–2(d)(2).

competition by making the standards for the multi-State exemption consistent for small and mid-sized advisers. We estimate that, in addition to the approximately 23 small advisers that rely on the exemption currently, approximately 15 would begin relying on the exemption if amended as proposed.[500] Advisers newly relying on the proposed amended exemption would incur costs associated with completing and filing Form ADV for purposes of registration with the Commission, and all of the advisers relying on the exemption will incur the costs associated with keeping records sufficient to demonstrate that they would be required to register with 15 or more states.[501] In addition, these advisers will incur costs of complying with the Advisers Act and our rules, but they may see an absolute reduction in compliance costs by registering with the Commission instead of 15 or more states.[502]

Elimination of Safe Harbor

The proposed elimination of rule 203A–4, which provides a safe harbor from Commission registration for an investment adviser based on a reasonable belief that it is prohibited from registering with the Commission because it does not have at least $30 million of assets under management, would not create new requirements for small advisers.[503] These advisers would not have at least $30 million of assets under management, and advisers have not, in our experience, asserted the availability of this safe harbor.

Mid-Sized Advisers

Our proposal to incorporate into Form ADV an explanation of how we construe the determination of whether a mid-sized adviser is "required to be registered" or is "subject to examination" by a particular State securities authority for purposes of section 203A(a)(2)'s prohibition on mid-sized advisers from registering with the Commission would not create new reporting requirements for small advisers.[504] The mid-sized adviser requirements would only apply to advisers with assets under management between $25 million and $100 million and would therefore not apply to small advisers.

Exempt Reporting Advisers

Proposed rule 204–4 and the proposed amendments to rules 204–1, Form ADV, and Form ADV–H to require exempt reporting advisers to file reports with the Commission electronically on Form ADV would impose reporting requirements on an estimated 6 small advisers.[505] As discussed above, we estimate that completing and filing Form ADV will cost $1,764 for each exempt reporting adviser.[506] In addition, small exempt reporting advisers would be required to pay an estimated filing fee of $200 annually,[507] for a total of $1,200 for the estimated 6 small exempt reporting advisers.[508] Finally, under rule 204–4 exempt reporting advisers that seek a temporary hardship exemption from electronic filing would be required to complete and file Form ADV–H.[509] To the extent that either of the estimated two small exempt reporting advisers file Form ADV–H, we have estimated that it would require 1 burden hour at a total cost of $204.[510]

Amendments to Form ADV

Proposed amendments to Form ADV would require registered advisers to report different or additional information than what is currently required. Approximately 620 small advisers currently registered with us, and two advisers currently relying on the private adviser exemption that we expect will register with us, would be subject to these requirements.[511] We expect these 620 advisers would spend, on average, 4.5 hours to respond to the new and amended questions we are proposing today, other than the private fund reporting requirements.[512] We expect the aggregate cost associated with this process would be $703,080.[513] The two anticipated newly registering advisers would spend, in the aggregate, about 82 hours total to complete the form (Part 1 except for the private fund reporting requirements, and Part 2) as well as to amend the form periodically, to prepare brochure supplements, and to deliver codes of ethics to clients,[514] for a total cost of $20,664.[515] In addition, of these approximately 620 registered advisers, we estimate that 200 advise one or more private funds and would have to complete the private fund reporting requirements we are proposing today.[516] We expect this will take 600 hours,[517] in the aggregate, for a total cost of $151,200.[518] The total estimated labor costs associated with our amendments that we expect will be borne by small advisers, therefore, are $874,944. Additionally, we estimate that one of the newly registering advisers would use outside legal services to assist them in preparing their Part 2 brochure, for a total non-labor cost of $3,200.[519]

Amendments to Pay to Play Rule

Our proposed amendment to rule 206(4)–5 to make it apply to exempt reporting advisers and foreign private advisers would not create new reporting, recordkeeping, or other compliance requirements on these advisers.[520] Rather, we are proposing this amendment to ensure that the rule

[500] *See supra* note 324.

[501] *See supra* notes 325–327 and accompanying text.

[502] *See supra* note 323 and accompanying text.

[503] Rule 203A–4. *See supra* section II.A.6. of this Release.

[504] *See* proposed Form ADV: Instructions for Part 1A, instr. 2.b.; *supra* section II.A.7. of this Release.

[505] *See supra* note 488.

[506] *See supra* note 338 and accompanying text. $3,528,000/2,000 = $1,764.

[507] *See supra* section IV.B.2. of this Release (discussing the potential filing fee).

[508] $200 × 6 small exempt reporting advisers = $1,200.

[509] Proposed rule 204–4(e).

[510] *See supra* section IV.B.2. of this Release.

[511] *See supra* notes 484–485 and accompanying text.

[512] *See supra* text preceding note 388. We are calculating costs only of the increased burden because we have previously assessed the costs of the other items of Form ADV for registered advisers and for new advisers attributed to annual growth. The amendments we are proposing today would increase neither the burden associated with these items on Form ADV, nor the external costs associated with certain Part 2 requirements.

[513] We expect that the performance of this function will most likely be equally allocated between a senior compliance examiner and a compliance manager. Data from the SIFMA Management and Earnings Report, modified to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead, suggest that costs for these positions are $210 and $294 per hour, respectively. 620 advisers × 4.5 hours = 2,790 hours. [1,395 hours × $210 = $292,950] + [1,395 hours × $294 = $410,130] = $703,080.

[514] 2 advisers × 40.74 hours per adviser to complete the entire form (except private fund reporting requirements) = 81.48 hours.

[515] [41 hours × $210 = $8,610] + [41 hours × $294 = $12,054] = $20,664. As noted above, we expect that the performance of this function will most likely be equally allocated between a senior compliance examiner and a compliance manager. *See supra* note 354.

[516] *See supra* note 404.

[517] We expect these advisers are likely to advise 3 funds each. *See* text accompanying note 405. We estimated above that private fund reporting would take an adviser approximately 1 hour per fund to complete. 200 advisers × 3 hours = 600 hours.

[518] [300 hours × $210 = $63,000] + [300 hours × $294 = $88,200] = $151,200. As noted above, we expect that the performance of this function will most likely be equally allocated between a senior compliance examiner and a compliance manager. *See supra* note 354.

[519] The currently approved burden associated with Form ADV already accounts for similar estimated costs to be incurred by current registrants. The non-labor costs for Form ADV are based on an estimate that 50% of small advisers will retain either legal services (at $3,200) or compliance consulting services (at $3,000) to assist in the preparation of Form ADV. *See supra* note 420 and accompanying text.

[520] *See supra* section II.D.1 of this Release (discussing these amendments).

continues to apply to these advisers and to prevent the unintended narrowing of the rule.[521] Our proposed amendment to permit an adviser to pay any registered municipal advisor subject to a pay to play rule adopted by MSRB to solicit government entities on its behalf may create new recordkeeping and compliance requirements on investment advisers that are small entities subject to the rule to the extent that they have to verify and document that placement agents that they hire to solicit government entities are indeed registered municipal advisors.[522] Finally, our technical amendment to rule 206(4)–5's definition of a "covered associate"[523] of an investment adviser to clarify that a legal entity, not just a natural person, that is a general partner or managing member of an investment adviser would meet the definition, would not create any new reporting, recordkeeping, or other compliance requirements.[524]

Other Amendments

Our proposed amendments to rule 204–2's grandfathering provision are meant to ensure that private fund advisers that are required to register as a result of the Dodd-Frank Act's elimination of the private fund exemption in section 203(b)(3) would not face a retroactive recordkeeping requirement.[525] Our proposed technical amendment to rule 204–2(e)(3)(ii) would add a cross-reference to the new definition of a private fund in section 202(a)(29) of the Advisers Act.[526] These amendments would not create reporting, recordkeeping, and other compliance requirements for small entities independent of the reporting, recordkeeping, and other compliance requirements imposed by current rule 204–2.[527]

We do not believe that our proposed technical amendments to rules 0–7, 222–1, and 222–2 would impose reporting, recordkeeping, and other compliance requirements on small advisers.

E. Duplicative, Overlapping, or Conflicting Federal Rules

We believe that there are no proposed rules that duplicate, overlap, or conflict with the proposed rules and rule and form amendments.

F. Significant Alternatives

The Regulatory Flexibility Act directs the Commission to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. In connection with the proposed rule amendments, the Commission considered the following alternatives: (i) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (ii) the clarification, consolidation, or simplification of compliance and reporting requirements under the rules for such small entities; (iii) the use of performance rather than design standards; and (iv) an exemption from coverage of the rules, or any part thereof, for such small entities.

Regarding the first and fourth alternatives, we do not believe that differing compliance or reporting requirements or an exemption from coverage of the new rules or rule amendments, or any part thereof, for small entities, would be appropriate or consistent with investor protection or with Congress's mandate in the Dodd-Frank Act, to the extent the new rule or amendment is being proposed due to a Congressional mandate. Because the protections of the Advisers Act are intended to apply equally to clients of both large and small advisory firms, it would be inconsistent with the purposes of the Act to specify different requirements for small entities under the proposed rules and amendments unless expressly required to do so by Congress.

Regarding the second alternative, proposed rule 203A–5 would enable small advisers to easily and efficiently identify whether they are subject to our regulatory authority after the Dodd-Frank Act's amendment to section 203A becomes effective, and would also help minimize any potential uncertainty about the effects of the Dodd-Frank Act on their registration status by providing a simple, efficient means of determining their post-Dodd-Frank registration status as of a specific date. The proposed amendments to rule 203A–1 eliminate the $5 million buffer because it seems unnecessary in light of Congress's determination to require many (although not all) advisers having between $30 million and $100 million of assets under management to be registered with the states,[528] and makes the registration requirements for advisers with assets under management between $25 million and $30 million uniform with the requirements for advisers with assets under management between $30 million and $100 million. Our proposal to amend the multi-State adviser exemption in rule 203A–2(e) also would consolidate and simplify compliance for small advisers by aligning the rule with the multi-State exemption Congress built into the mid-sized adviser provision under section 410 of the Dodd-Frank Act and by requiring one standard for advisers relying on the exemption.[529] This amendment also would reduce the compliance burdens on advisers required to be registered with at least 15 states, but less than 30, by allowing them to register with a single securities regulator—the Commission. Furthermore, our proposal to use an existing form, Form ADV, and an existing filing system, IARD, for reporting and registration purposes will clarify and simplify the processes of registering and/or reporting for small entities because: (i) All of the information collection requirements for both registration and reporting would be consolidated in a single form; (ii) a small exempt reporting adviser would be able to use the same form and filing system both for reporting and for purposes of registering with one or more State securities authorities; and (iii) a small exempt reporting adviser may find that it can no longer rely on an exemption from registration with the Commission and would be able to register simply by filing an amendment to its current Form ADV to apply for registration.[530]

Regarding the third alternative, we do not consider using performance rather than design standards to be consistent with our statutory mandate of investor protection or with Congress's mandate in the Dodd-Frank Act.

G. Solicitation of Comments

We encourage written comments on matters discussed in this IRFA. In

[521] *See id.*

[522] *See id.*

[523] *See id.*

[524] *See id.*

[525] *See supra* note 231 and accompanying text.

[526] *See supra* section II.D.2.b of this Release.

[527] The Dodd-Frank Act's removal of the private adviser exemption in section 203(b)(3) may require additional small advisers to register with the Commission. Therefore these small entities would become subject to rule 204–2 with its reporting, recordkeeping, and other compliance burdens. However, subjecting these entities to rule 204–2 is a function of the Dodd-Frank Act's removal of the private adviser exemption in section 203(b)(3), not our proposed amendments to rule 204–2.

[528] *See supra* note 67.

[529] *See* proposed rule 203A–2(d); *supra* section IV.A.1. of this Release. Under rule 203A–2(e), the prohibition on registration with the Commission does not apply to an investment adviser that is required to register with 30 or more states. Once registered with the Commission, the adviser remains eligible for Commission registration as long as it would be obligated, absent the exemption, to register with at least 25 states. We propose to amend rule 203A–2(e) to permit all investment advisers required to register as an investment adviser with 15 or more states to register with the Commission.

[530] *See supra* section II.C. of this Release.

particular, the Commission seeks comment on:

- The number of small entities subject to the proposed rules and rule and form amendments; and
- Whether the effect of the proposed rules and rule and form amendments on small entities would be economically significant.

Commenters are asked to describe the nature of any effect and provide empirical data supporting the extent of the effect.

VII. Effects on Competition, Efficiency and Capital Formation

The Commission is proposing to adopt certain new rules and to amend others pursuant to its authority under section 204(a) of the Advisers Act,[531] and sections 23(a) and 28(e)(2) of the Exchange Act.[532] Section 204(a) of the Advisers Act and section 28(e)(2) of the Exchange Act require the Commission, when engaging in rulemaking under the authority provided in those sections, to consider whether the rule is "necessary or appropriate in the public interest or for the protection of investors."[533] Section 202(c) of the Advisers Act requires the Commission, when engaging in rulemaking that requires it to consider or determine whether an action is necessary or appropriate in the public interest, to consider, "in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation."[534] Section 3(f) of the Exchange Act requires the Commission, when engaging in rulemaking that requires it to consider or determine whether an action is necessary or appropriate in the public interest to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.[535] Section 23(a) of the Exchange Act requires the Commission, in adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition, and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[536]

The Commission is proposing to adopt rule 204–4 and to amend rules 204–1 and 204–2 and Forms ADV, ADV–NR, and ADV–H.[537] The proposed new rule and rule and form amendments are designed to give effect to provisions of Title IV of the Dodd-Frank Act.[538] We are proposing new rule 204–4 to require exempt reporting advisers to file reports with the Commission electronically on Form ADV.[539] We are also proposing amendments to Form ADV to improve our risk-assessment capabilities and so that it can serve the dual purpose of both an SEC reporting form for exempt reporting advisers and, as it is used today, a registration form for both State and SEC-registered firms.[540] In addition to requiring that exempt reporting advisers use Form ADV, proposed rule 204–4 would require these advisers to submit reports through the IARD and to pay a filing fee.[541] We are also proposing to amend rule 204–1, which addresses when and how advisers must amend their Form ADV, to add a requirement that exempt reporting advisers file updating amendments to reports filed on Form ADV.[542]

A. Proposed Exempt Reporting Adviser Reporting Requirements

The Dodd-Frank Act provides that the Commission shall require reporting by exempt reporting advisers, but it does not indicate the information we should collect or the filing method by which it should be collected. Our choices, in proposing rule 204–4 to require these advisers to complete a sub-set of items contained in Form ADV and to file through the IARD, and in proposing to amend rule 204–1 to impose periodic updating requirements of those filings, would impose costs on exempt reporting advisers,[543] but would also create efficiencies that benefit both us and filers by taking advantage of an established and proven adviser filing system and avoiding the expense and delay of developing a new form and filing system. Additionally, we believe this proposal may create efficiencies to the extent exempt reporting advisers may be required to register on Form ADV with one or more State securities authorities because they would be using the existing form and filing system that is also used by the states, which should reduce regulatory burdens.[544] Similarly, regulatory burdens would be diminished for an exempt reporting adviser that later finds it can no longer rely on an exemption and would be required to register with us because the adviser would simply file an amendment to its current Form ADV to apply for Commission registration.[545]

Using Form ADV and IARD would also enable investors to access information on our Web site that may have previously been unavailable or not easily attainable, such as whether a prospective exempt reporting adviser has reported disciplinary events and whether its relationships with affiliates present conflicts of interest or potential efficiencies. Public access to this information, which may previously have been undisclosed, may promote competition to the extent that it would allow private fund investors to make informed decisions about these advisers, avoiding the burdens and costs associated with selling private funds to switch advisers at a later date, and thereby potentially creating efficiency gains in the marketplace and improving allocation of client assets among investment advisers. The availability of disciplinary information, in particular, about these advisers and their supervised persons may also enhance competition if, for example, firms and personnel with better disciplinary records outcompete those with worse records. Alternatively, the choices that we have made about the information these advisers would report (and that we would make publicly available), such as the identification of owners of the adviser or disciplinary information, could impose costs on advisers, including the potential loss of business to competitors (who may or may not report to us or be registered with us), as

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[531] 15 U.S.C. 80b–4(a).

[532] 15 U.S.C. 78w(a) and 78bb(e)(2).

[533] 15 U.S.C. 80b–4(a) and 78bb(e)(2).

[534] 15 U.S.C. 80b–2(c).

[535] 15 U.S.C. 78c(f).

[536] 15 U.S.C. 78w(a)(2).

[537] In contrast, we are proposing new rule 203A–5 and amendments to rules 203A–1, 203A–2, 203A–3, and 203A–4 pursuant to our authority set forth in sections 203A(c) and 211(a), amendments to rules 0–7, 222–1, and 222–2 pursuant to our authority set forth in section 211(a), and amendments to rule 206(4)–5 pursuant to our authority set forth in sections 206(4) and 211(a). For a discussion of the effects of this proposed new rule and rule amendments on competition, efficiency, and capital formation, *see supra* sections IV., V., and VI. of this Release.

[538] For a discussion of the overall objectives of our proposals, *see supra* section I of this Release.

[539] Proposed rule 204–4. *See supra* section II.B.1. of this Release.

[540] *See supra* sections II.B. and II.C. of this Release.

[541] Proposed rule 204–4(b). Proposed rule 204–4(e) would also allow exempt reporting advisers having unanticipated technical difficulties that prevent submission of a filing to the IARD system to request a temporary hardship exemption from electronic filing requirements by filing Form ADV–H. We are also proposing technical amendments to Form ADV–H for this purpose.

[542] *See* proposed rule 204–1; *supra* section II.B.3. of this Release.

[543] For a discussion of the costs of the reporting obligations we are proposing to apply to exempt reporting advisers, *see* section IV.B.2, of this Release.

[544] *See supra* section IV.A.2. of this Release.

[545] *See* proposed General Instruction 14 (providing procedural guidance to advisers that no longer meet the definition of exempt reporting adviser). *See also supra* note 128 and accompanying text. Certain items in Form ADV Part 1 are also linked to Form B–D, which would create efficiencies if the exempt reporting adviser ever applies for broker-dealer registration.

this information may not typically be made available to others.

Access to the information we propose to require exempt reporting advisers to report may also increase clients' and prospective clients' trust in investment advisers, which may encourage them to seek professional investment advice and encourage them to invest their financial assets. This may enhance capital formation by making more funds available for investment and enhancing the allocation of capital generally. On the other hand, to the extent that the information we propose to collect and the filing method by which we propose to collect it imposes costs on exempt reporting advisers that are then passed on to clients, this may deter clients from seeking professional investment advice and investing their financial assets. This may result in inefficiencies in the market for advisory services and hinder capital formation.

B. Proposed Risk-Assessment Amendments to Form ADV

The amendments to Form ADV we are proposing today are designed to improve advisers' disclosure of their business practices (particularly, those relating to advising private funds), non-advisory activities and financial industry affiliations, and other conflicts of interest. Private fund reporting, in particular, would benefit private fund investors and other market participants and would provide us and other policy makers with better data. Better data would enhance our ability to form and frame regulatory policies regarding the private fund industry and fund advisers, and to evaluate the effect of our policies and programs on this sector. Private fund reporting would provide us with important information about this rapidly growing segment of the U.S. financial system. Additionally, data about which advisers have $1 billion or more of assets would enable us to identify the advisers that are covered by section 956 of the Dodd-Frank Act addressing certain incentive-based compensation arrangements.

As acknowledged above with respect to exempt reporting advisers, there may also be competitive impacts between registered investment advisers as a result of the collection of the proposed additional information on Form ADV. For instance, information regarding the amount of assets under management by specific types of clients could be used by competitors when marketing their own advisory services. Another example includes the information concerning private funds that we propose to require registered and exempt reporting advisers to submit on Form ADV, which could assist private fund investors in assessing investment choices or screen funds based on certain parameters such as the identification of certain fund service providers or gatekeepers. Similarly, this information could be used by other financial service providers (such as banks or broker-dealers) that do not provide similar information publicly. Increased competition among investment advisers (both exempt reporting and registered) and other financial service providers may result in capital being allocated more efficiently, benefiting clients and certain advisers.

Better disclosure may increase clients' and prospective clients' trust in investment advisers, which may encourage them to seek professional investment advice and encourage them to invest their financial assets. This also may enhance capital formation by making more funds available for investment and enhancing the allocation of capital generally. On the other hand, if the rule amendments increase costs for investment advisers and these cost increases are passed on to clients, this may deter clients from seeking professional investment advice and investing their financial assets. This may result in inefficiencies in the market for advisory services and hinder capital formation.

C. Other Proposed Amendments

Finally, we are proposing to amend rule 204–2 to cross-reference the new definition of private fund and add a grandfathering provision relieving firms that were exempt from registration prior to the effectiveness of the Dodd-Frank Act's elimination of the "private adviser" exemption from certain recordkeeping obligations applicable to registered advisers.[546] We also are amending Forms ADV–NR and Form ADV–H to provide for their use by exempt reporting advisers. The proposed amendments to rule 204–2, Form ADV–NR, and Form ADV–H are technical in nature. We do not anticipate that they would have any bearing on efficiency, competition, or capital formation.

D. Request for Comment

The Commission requests comment whether the proposed rule and rule amendments would, if adopted, promote efficiency, competition, and capital formation. Commenters are requested to provide empirical data to support their views.

[546] *See* proposed rule 204–2; *supra* section II.D.2.b of this Release. We also intend to rescind rule 204–2(l) because that section was vacated by the Federal appeals court in *Goldstein*.

VIII. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or "SBREFA," [547] 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: (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers or individual industries; or (3) significant adverse effects on competition, investment, or innovation.

We request comment on the potential impact of the proposed new rule and proposed rule amendments on the economy on an annual basis. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

IX. Statutory Authority

The Commission is proposing new rule 203A–5 and amendments to rules 203A–1, 203A–2, 203A–3, and 203A–4 under the Advisers Act pursuant to the authority set forth in sections 203A(c), and 211(a) of the Investment Advisers Act of 1940 [15 U.S.C. 80b–3A(c) and 80b–11(a)]; new rule 204–4 and amendments to rules 204–1 and 204–2 pursuant to the authority set forth in sections 204 and 211(a) of the Advisers Act [15 U.S.C. 80b–4 and 80b–11(a)]; amendments to rule 206(4)-5 pursuant to authority set forth in sections 206(4) and 211(a) of the Advisers Act [15 U.S.C. 80b–6(4) and 80b–11(a)]; amendments to rules 0–7, 222–1, and 222–2 pursuant to authority set forth in section 211(a) of the Advisers Act [15 U.S.C. 80b-11(a)]; and to amend Form ADV under section 19(a) of the Securities Act of 1933 [15 U.S.C. 77s(a)], sections 23(a) and 28(e)(2) of the Securities Exchange Act of 1934 [15 U.S.C. 78w(a) and 78bb(e)(2)], section 319(a) of the Trust Indenture Act of 1939 [15 U.S.C. 77sss(a)], section 38(a) of the Investment Company Act of 1940 [15 U.S.C. 78a–37(a)], and sections 203(c)(1), 204, and 211(a) of the Investment Advisers Act of 1940 [15 U.S.C. 80b–3(c)(1), 80b–4, and 80b–11(a)]; Form ADV–NR under section 19(a) of the Securities Act of 1933 [15 U.S.C. 77s(a)], section 23(a) of the Securities Exchange Act of 1934 [15 U.S.C. 78w(a)], section 319(a) of the Trust Indenture Act of 1939 [15 U.S.C. 77sss(a)], section 38(a) of the Investment Company Act of 1940 [15 U.S.C. 78a–

[547] Public Law 104–121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. and 15 U.S.C., and as a note to 5 U.S.C. 601).

37(a)], and sections 203(c)(1), 204, and 211(a) of the Investment Advisers Act of 1940 [15 U.S.C. 80b–3(c)(1), 80b–4, and 80b–11(a)]; and Form ADV–H pursuant to the authority set forth in sections 203(c)(1), 204, and 211(a) of the Advisers Act [15 U.S.C. 80b–3(c)(1), 80b–4, 80b–11(a)].

List of Subjects in 17 CFR Parts 275 and 279

Reporting and recordkeeping requirements; Securities.

Text of Rule and Form Amendments

For the reasons set out in the preamble, Title 17 Chapter II of the Code of Federal Regulations is proposed to be amended as follows.

PART 275—RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

1–2. The authority citation for Part 275 is amended by revising the general authority and by adding authority for sections 275.203A–5, 275.204–1 and 275.204–4 to read as follows:

Authority: 15 U.S.C. 80b–2(a)(11)(G), 80b–2(a)(11)(H), 80b–2(a)(17), 80b–3, 80b–4, 80b–4a, 80b–6(4), 80b–6a, and 80b–11, unless otherwise noted.

* * * * *

Section 275.203A–5 is also issued under 15 U.S.C. 80b–3a.

Section 275.204–1 is also issued under sec. 407 and 408, Pub. L. 111–203, 124 Stat. 1376.

Section 275.204–4 is also issued under sec. 407 and 408, Pub. L. 111–203, 124 Stat. 1376.

3. Section 275.0–7 is amended by revising the reference to "Section 203A(a)(2)" in paragraph (a)(1) to read "Section 203A(a)(3)."

4. Section 275.203A–1 is revised to read as follows:

§ 275.203A–1 Switching to or from SEC registration.

(a) *State-registered advisers—switching to SEC registration.* If you are registered with a State securities authority, you must apply for registration with the Commission within 90 days of filing an annual updating amendment to your Form ADV reporting that you are eligible for SEC registration and are not relying on an exemption from registration under sections 203(l) or 203(m) of the Act (15 U.S.C. 80b–3(l), (m)).

(b) *SEC-registered advisers—switching to State registration.* If you are registered with the Commission and file an annual updating amendment to your Form ADV reporting that you are not eligible for SEC registration and are not relying on an exemption from registration under sections 203(l) or 203(m) of the Act (15 U.S.C. 80b–3(l), (m)), you must file Form ADV–W (17 CFR 279.2) to withdraw your SEC registration within 180 days of your fiscal year end (unless you then are eligible for SEC registration). During this period while you are registered with both the Commission and one or more State securities authorities, the Act and applicable State law will apply to your advisory activities.

5. Section 275.203A–2 is amended by:

a. Removing paragraph (a);

b. Redesignating paragraphs (b) through (f) as paragraphs (a) through (e);

c. Revising newly designated paragraph (a)(1);

d. Revising the reference to "paragraph (b) of this section" in newly designated paragraph (a)(2) to read "paragraph (a) of this section";

e. Revising newly designated paragraph (c)(1);

f. Revising the reference in newly designated paragraph (c)(3) to "§ 275.203A–1(b)(2)" to read "§ 275.203A–1(b)";

g. Revising newly designated paragraph (d)(1);

h. Further redesignating newly designated paragraphs (d)(2) and (d)(3) as paragraphs (d)(2)(i) and (d)(2)(ii);

i. Adding new introductory text to paragraph (d)(2) and revising newly designated paragraphs (d)(2)(i) and (d)(2)(ii);

j. Further redesignating newly designated paragraph (d)(4) as paragraph (d)(3);

k. Revising the reference to "paragraph (f) of this section" in newly designated paragraphs (e)(1)(ii), (e)(1)(iii), and (e)(2) to read "paragraph (e) of this section";

l. Revising the reference to "paragraph (f)(1)(i) of this section" in newly designated paragraph (e)(1)(ii) to read "paragraph (e)(1)(i) of this section";

m. Revising the reference "paragraph (c) of this section" in newly designated paragraph (e)(1)(iii) to read "paragraph (b) of this section"; and

n. Revising the reference "§ 275.203(b)(3)-1" in newly designated paragraph (e)(3) to read "§ 275.202(a)(30)-1".

The revisions and additions read as follows:

§ 275.203A–2 Exemptions from prohibition on Commission registration.

(a) *Pension Consultants.* (1) An investment adviser that is a "pension consultant," as defined in this section, with respect to assets of plans having an aggregate value of at least $200,000,000.

* * * * *

(c) * * *

(1) Immediately before it registers with the Commission, is not registered or required to be registered with the Commission or a State securities authority of any State and has a reasonable expectation that it would be eligible to register with the Commission within 120 days after the date the investment adviser's registration with the Commission becomes effective;

* * * * *

(d) * * *

(1) Upon submission of its application for registration with the Commission, is required by the laws of 15 or more States to register as an investment adviser with the State securities authority in the respective States, and thereafter would, but for this section, be required by the laws of at least 15 States to register as an investment adviser with the State securities authority in the respective States;

(2) Elects to rely on paragraph (d) of this section by:

(i) Indicating on Schedule D of its Form ADV that the investment adviser has reviewed the applicable State and Federal laws and has concluded that, in the case of an application for registration with the Commission, it is required by the laws of 15 or more States to register as an investment adviser with the State securities authorities in the respective States or, in the case of an amendment to Form ADV, it would be required by the laws of at least 15 States to register as an investment adviser with the State securities authorities in the respective States, within 90 days prior to the date of filing Form ADV; and

(ii) Undertaking on Schedule D of its Form ADV to withdraw from registration with the Commission if the adviser indicates on an annual updating amendment to Form ADV that the investment adviser would be required by the laws of fewer than 15 States to register as an investment adviser with the State securities authority in the respective States, and that the investment adviser would be prohibited by section 203A(a) of the Act (15 U.S.C. 80b–3a(a)) from registering with the Commission, by filing a completed Form ADV–W within 180 days of the adviser's fiscal year end (unless the adviser then has at least $100 million of assets under management or is otherwise eligible for SEC registration); and

* * * * *

6. Section 275.203A–3 is amended by revising paragraph (a)(4) and adding paragraphs (d) and (e) to read as follows:

§ 275.203A–3 Definitions.

* * * * *

(a) * * *

(4) Supervised persons may rely on the definition of "client" in § 275.202(a)(30)–1 to identify clients for purposes of paragraph (a)(1) of this section, except that supervised persons need not count clients that are not residents of the United States.

* * * * *

(d) *Assets under management.* Determine "assets under management" by calculating the securities portfolios with respect to which an investment adviser provides continuous and regular supervisory or management services as reported on the investment adviser's Form ADV (17 CFR 279.1).

(e) *State securities authority.* "State securities authority" means the securities commissioner or commission (or any agency, office or officer performing like functions) of any State.

7. Section 275.203A–4 is removed and reserved.

8. Section 275.203A–5 is added to read as follows:

§ 275.203A–5 Transition rules.

(a) Every investment adviser registered with the Commission on July 21, 2011 shall file an other-than-annual amendment to Form ADV (17 CFR 279.1) no later than August 20, 2011 and shall determine its assets under management based on the current market value of the assets as determined within 30 days prior to the date of filing the Form ADV.

(b) If an investment adviser registered with the Commission on July 21, 2011 would be prohibited from registering with the Commission under section 203A(a)(2) of the Act (15 U.S.C. 80b–3a(a)(2)), and is not otherwise exempted by § 275.203A–2 from such prohibition, such investment adviser shall withdraw from registration with the Commission by filing Form ADV–W (17 CFR 279.2) no later than October 19, 2011. During this period while an investment adviser is registered with both the Commission and one or more State securities authorities, the Act and applicable State law will apply to the investment adviser's advisory activities.

(c) If, prior to the effective date of the withdrawal from registration of an investment adviser on Form ADV–W, the Commission has instituted a proceeding pursuant to section 203(e) of the Act (15 U.S.C. 80b–3(e)) to suspend or revoke registration, or pursuant to section 203(h) of the Act (15 U.S.C. 80b–3(h)) to impose terms or conditions upon withdrawal, the withdrawal from registration shall not become effective except at such time and upon such terms and conditions as the Commission deems necessary or appropriate in the public interest or for the protection of investors.

9. Section 275.204–1 is amended by revising the heading, paragraphs (b) and (c) to read as follows:

§ 275.204–1 Amendments to Form ADV.

* * * * *

(b) *Electronic filing of amendments.*

(1) Subject to paragraph (c), you must file all amendments to Part 1A of Form ADV and Part 2A of Form ADV electronically with the IARD, unless you have received a continuing hardship exemption under § 275.203–3. You are not required to file with the Commission amendments to brochure supplements if required by Part 2B of Form ADV.

(2) If you have received a continuing hardship exemption under § 275.203–3, you must, when you are required to amend your Form ADV, file a completed Part 1A and Part 2A of Form ADV on paper with the SEC by mailing it to FINRA.

Note to paragraphs (a) and (b): Information on how to file with the IARD is available on our Web site at *http://www.sec.gov/iard.* For the annual updating amendment: Summaries of material changes that are not included in the adviser's brochure must be filed with the Commission as an exhibit to Part 2A in the same electronic file; and if you are not required to prepare a brochure, a summary of material changes, or an annual updating amendment to your brochure, you are not required to file them with the Commission. See the instructions for Part 2A of Form ADV.

(c) *Transition to electronic filing.* If you are required to file a brochure and your fiscal year ends on or after December 31, 2010, you must amend your Form ADV by electronically filing with the IARD one or more brochures that satisfy the requirements of Part 2A of Form ADV (as amended effective October 12, 2010) as part of the next annual updating amendment that you are required to file.

* * * * *

10. Section 275.204–2 is amended by removing paragraph (l), and revising paragraph (e)(3)(ii) to read as follows:

§ 275.204–2 Books and records to be maintained by investment advisers.

* * * * *

(e) * * *

(3) * * *

(ii) *Transition rule.* If you are an investment adviser that was, prior to July 21, 2011, exempt from registration under section 203(b)(3) of the Act (15 U.S.C. 80b–3(b)(3)), as in effect on July 20, 2011, paragraph (e)(3)(i) of this section does not require you to maintain or preserve books and records that would otherwise be required to be maintained or preserved under the provisions of paragraph (a)(16) of this section to the extent those books and records pertain to the performance or rate of return of such private fund (as defined in section 202(a)(29) of the Act (15 U.S.C. 80b–2(a)(29)), or other account you advise for any period ended prior to July 21, 2011, provided that you were not registered with the Commission as an investment adviser during such period, and provided further that you continue to preserve any books and records in your possession that pertain to the performance or rate of return of such private fund or other account for such period.

* * * * *

11. Section 275.204–4 is added to read as follows:

§ 275.204–4 Reporting by exempt reporting advisers.

(a) *Exempt reporting advisers.* If you are an investment adviser relying on the exemption from registering with the Commission under section 203(l) or (m) of the Act (15 U.S.C. 80b–3(l) or 80b–3(m)), you must complete and file reports on Form ADV (17 CFR 279.1) by following the instructions in the Form, which specify the information that an exempt reporting adviser must provide.

(b) *Electronic filing.* You must file Form ADV electronically with the Investment Adviser Registration Depository (IARD) unless you have received a hardship exemption under paragraph (e) of this section.

Note to paragraph (b): Information on how to file with the IARD is available on the Commission's Web site at *http://www.sec.gov/iard.*

(c) *When filed.* Each Form ADV is considered filed with the Commission upon acceptance by the IARD.

(d) *Filing fees.* You must pay FINRA (the operator of the IARD) a filing fee. The Commission has approved the amount of the filing fee. No portion of the filing fee is refundable. Your completed Form ADV will not be accepted by FINRA, and thus will not be considered filed with the Commission, until you have paid the filing fee.

(e) *Temporary hardship exemption.*

(1) *Eligibility for exemption.* If you have unanticipated technical difficulties that prevent submission of a filing to the IARD system, you may request a temporary hardship exemption from the requirements of this chapter to file electronically.

(2) *Application procedures.* To request a temporary hardship exemption, you must:

(i) File Form ADV–H (17 CFR 279.3) in paper format no later than one

business day after the filing that is the subject of the ADV–H was due; and

(ii) Submit the filing that is the subject of the Form ADV–H in electronic format with the IARD no later than seven business days after the filing was due.

(3) *Effective date—upon filing.* The temporary hardship exemption will be granted when you file a completed Form ADV–H.

(f) *Final report.* You must file a final report in accordance with instructions in Form ADV when:

(1) You cease operation as an investment adviser;

(2) You no longer meet the definition of exempt reporting adviser under paragraph (a); or

(3) You apply for registration with the Commission.

Note to paragraph (f): You do not have to pay a filing fee to file a final report on Form ADV through the IARD.

12. Section 275.206(4)–5 is amended by:

a. In paragraph (f)(2)(i), removing the term "individual" and adding in its place the term "person"; and

b. Revising paragraphs (a)(1), (a)(2) introductory text, (a)(2)(i), (d), and (f)(9) to read as follows:

§ 275.206(4)–5 Political contributions by certain investment advisers.

(a) * * *

(1) For any investment adviser registered (or required to be registered) with the Commission, or unregistered in reliance on the exemption available under section 203(b)(3) of the Advisers Act (15 U.S.C. 80b–3(b)(3)), or that is an exempt reporting adviser, as defined in § 275.204–4(a), to provide investment advisory services for compensation to a government entity within two years after a contribution to an official of the government entity is made by the investment adviser or any covered associate of the investment adviser (including a person who becomes a covered associate within two years after the contribution is made); and

(2) For any investment adviser registered (or required to be registered) with the Commission, or unregistered in reliance on the exemption available under section 203(b)(3) of the Advisers Act (15 U.S.C. 80b–3(b)(3)), or that is an exempt reporting adviser, or any of the investment adviser's covered associates:

(i) To provide or agree to provide, directly or indirectly, payment to any person to solicit a government entity for investment advisory services on behalf of such investment adviser unless such person is:

(A) A regulated municipal advisor; or

(B) An executive officer, general partner, managing member (or, in each case, a person with a similar status or function), or employee of the investment adviser; and

* * * * *

(d) *Further prohibition.* As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts, practices, or courses of business within the meaning of section 206(4) of Advisers Act (15 U.S.C. 80b–6(4)), it shall be unlawful for any investment adviser registered (or required to be registered) with the Commission, or unregistered in reliance on the exemption available under section 203(b)(3) of the Advisers Act (15 U.S.C. 80b-3(b)(3)), or that is an exempt reporting adviser, or any of the investment adviser's covered associates to do anything indirectly which, if done directly, would result in a violation of this section.

* * * * *

(f) * * *

(9) *Regulated municipal advisor* means a municipal advisor registered with the Commission under section 15B of that Act and subject to rules of the Municipal Securities Rulemaking Board that:

(i) Prohibit municipal advisors from engaging in distribution or solicitation activities if certain political contributions have been made; and

(ii) The Commission, by order, finds:

(A) Impose substantially equivalent or more stringent restrictions on municipal advisors than this section imposes on investment advisers; and

(B) Are consistent with the objectives of this section.

* * * * *

13. Section 275.222–1 is amended by revising the phrase "Principal place of business" to read "Principal office and place of business" in both the heading and the first sentence of paragraph (b).

14. Section 275.222–2 is revised to read as follows:

§ 275.222–2 Definition of "client" for purposes of the national de minimis standard.

For purposes of section 222(d)(2) of the Act (15 U.S.C. 80b–18a(d)(2)), an investment adviser may rely upon the definition of "client" provided by § 275.202(a)(30)–1, without giving regard to paragraph (b)(4) of that section, provided that an investment adviser is not required to count as a client any person for whom the investment adviser provides advisory services without compensation.

PART 279—FORMS PRESCRIBED UNDER THE INVESTMENT ADVISERS ACT OF 1940

15. The authority citation for Part 279 continues to read as follows:

Authority: The Investment Advisers Act of 1940, 15 U.S.C. 80b–1, et seq.

§ 279.1 [Amended]

16. Form ADV [referenced in § 279.1] is amended by:

a. In the instructions to the form, revising the section entitled "Form ADV: General Instructions." The revised version of Form ADV: General Instructions is attached as Appendix A;

b. In the instructions to the form, revising the section entitled "Form ADV: Instructions for Part 1A." The revised version of Form ADV: Instructions for Part 1A is attached as Appendix B;

c. In the instructions to the form, revising the section entitled "Form ADV: Glossary of Terms." The revised version of Form ADV: Glossary of Terms is attached as Appendix C;

d. In the form, revising Part 1A. The revised version of Form ADV, Part 1A is attached as Appendix D;

e. In the form, revising the reference to "proceeding" in Item 3.D. of Part 2B to read "hearing or formal adjudication"; and

f. In the form, revising the section entitled "Form ADV: Domestic Investment Adviser Execution Page." The revised version of Form ADV: Domestic Investment Adviser Execution Page is attached as Appendix E.

The revisions read as follows:

Note: The text of Form ADV does not and the amendments will not appear in the Code of Federal Regulations.

* * * * *

Form ADV: Part 2B

* * * * *

Item 3. * * *

D. Any other hearing or formal adjudication in which a professional attainment, designation, or license of the supervised person was revoked or suspended because of a violation of rules relating to professional conduct. If the supervised person resigned (or otherwise relinquished the attainment, designation, or license) in anticipation of such a hearing or formal adjudication (and the adviser knows, or should have known, of such resignation or relinquishment), disclose the event.

* * * * *

§ 279.3 [Amended]

17. Form ADV–H [referenced in § 279.3] is amended by revising the form. The revised version of Form ADV–H is attached as Appendix F.

Note: The text of Form ADV–H does not and the amendments will not appear in the Code of Federal Regulations.

§ 279.4 [Amended]

18. Form ADV–NR [referenced in § 279.4] is amended by revising the form. The revised version of Form ADV–NR is attached as Appendix G.

Note: The text of Form ADV–NR does not and the amendments will not appear in the Code of Federal Regulations.

By the Commission.

November 19, 2010.

Elizabeth M. Murphy,

Secretary.

BILLING CODE P

APPENDIX A

FORM ADV (Paper Version)

- **UNIFORM APPLICATION FOR INVESTMENT ADVISER REGISTRATION AND**
- **REPORT FORM BY EXEMPT REPORTING ADVISERS**

Form ADV: General Instructions

Read these instructions carefully before filing Form ADV. Failure to follow these instructions, properly complete the form, or pay all required fees may result in your application or report being delayed or rejected.

In these instructions and in Form ADV, "you" means the investment adviser (*i.e.*, the advisory firm). If you are a "separately identifiable department or division" (SID) of a bank, "you" means the SID, rather than your bank, unless the instructions or the form provide otherwise. Terms that appear in *italics* are defined in the Glossary of Terms to Form ADV.

Special One-time Dodd-Frank Transition Filing for SEC-Registered Advisers:

- Form ADV Amendment: If you are registered or have an application for registration pending with the SEC on July 21, 2011, you must file an amendment to Form ADV no later than August 20, 2011. You must update your responses to all items and corresponding sections of Schedules A, B, C and D, including the reporting of your assets under management determined within 30 days of the filing. See SEC rule 203A-5(a). If you are no longer eligible for Commission registration, you must mark Item 2.A.(13) of Form ADV, Part 1A. You should amend your *brochure* if any information has become materially inaccurate. See Form ADV, Part 2A, Instructions 4 and 6.

- Form ADV-W Filing: If you are no longer eligible for Commission registration, you must withdraw your Commission registration by filing Form ADV-W no later than October 19, 2011. See SEC rule 203A-5(b). You should consult state law or the *state securities authority* for the states in which you are doing business as soon as possible to determine if you are required to register in these states and to begin the registration process. See General Instruction 1. Until you file your Form ADV-W with the SEC, you will remain subject to SEC regulation, and you also will be subject to regulation in any states where you register. See SEC rule 203A-1(b).

Failure to amend your Form ADV or file Form ADV-W, as required by this instruction, is a violation of SEC rules and could lead to your registration being revoked.

1. Where can I get more information on Form ADV, electronic filing, and the IARD?

The SEC provides information about its rules and the Advisers Act on its website: <http://www.sec.gov/iard>.

NASAA provides information about state investment adviser laws and state rules, and how to contact a *state securities authority*, on its website: <http://www.nasaa.org>.

FINRA provides information about the IARD and electronic filing on the IARD website: <http://www.iard.com>.

2. What is Form ADV used for?

Investment advisers use Form ADV to:

- Register with the Securities and Exchange Commission
- Register with one or more *state securities authorities*
- Amend those registrations;

- Report to the SEC as an *exempt reporting adviser*
- Report to one or more *state securities authorities* as an *exempt reporting adviser*
- Amend those reports; and
- Submit a final report as an *exempt reporting adviser*

3. How is Form ADV organized?

Form ADV contains four parts:

- Part 1A asks a number of questions about you, your business practices, the *persons* who own and *control* you, and the *persons* who provide investment advice on your behalf.
    - All advisers registering with the SEC or any of the *state securities authorities* must complete Part 1A.
    - *Exempt reporting advisers* (that are not also registering with any *state securities authority*) must complete only the following items of Part 1A: 1, 2, 3, 6, 7, 10, and 11, as well as corresponding schedules. *Exempt reporting advisers* that are registering with any *state securities authority* must complete all of Form ADV.

  Part 1A also contains several supplemental schedules. The items of Part 1A let you know which schedules you must complete.

    - Schedule A asks for information about your direct owners and executive officers.
    - Schedule B asks for information about your indirect owners.
    - Schedule C is used by paper filers to update the information required by Schedules A and B (see Instruction 16).
    - Schedule D asks for additional information for certain items in Part 1A.
    - Disclosure Reporting Pages (or DRPs) are schedules that ask for details about disciplinary events involving you or your *advisory affiliates*.

- Part 1B asks additional questions required by *state securities authorities*. Part 1B contains three additional DRPs. If you are applying for SEC registration or are registered only with the SEC, you do not have to complete Part 1B. (If you are filing electronically and you do not have to complete Part 1B, you will not see Part 1B.)

- Part 2A requires advisers to create narrative *brochures* containing information about the advisory firm. The requirements in Part 2A apply to all investment advisers registered with or applying for registration with the SEC, but do not apply to *exempt reporting advisers*.

- Part 2B requires advisers to create *brochure supplements* containing information about certain *supervised persons*. The requirements in Part 2B apply to all investment advisers registered with or applying for registration with the SEC , but do not apply to *exempt reporting advisers*.

4. When am I required to update my Form ADV?

- SEC- and State-Registered Advisers:

  - Annual Updating Amendments: You must amend your Form ADV each year by filing an *annual updating amendment* within 90 days after the end of your fiscal year. When you submit your *annual updating amendment*, you must update your responses to all items, including corresponding sections of Schedules A, B, C and D. You must submit your summary of material changes required by Item 2 of Part 2A either in the *brochure* (cover page or the page immediately thereafter) or as an exhibit to your *brochure*.

  - Other-than-Annual Amendments: In addition to your *annual updating amendment*, if you are registered with the SEC or a *state securities authority*, you must amend your Form ADV by filing additional amendments (other-than-annual amendments) promptly if:

    - information you provided in response to Items 1, 3, 9 (except 9.A.(2), 9.B.(2), 9.E., and 9.F.), or 11 of Part 1A or Items 1, 2.A. through 2.F., or 2.I. of Part 1B becomes inaccurate in any way;
    - information you provided in response to Items 4, 8, or 10 of Part 1A or Item 2.G. of Part 1B becomes materially inaccurate; or
    - information you provided in your *brochure* becomes materially inaccurate (see note below for exceptions)

  Notes: Part 1: If you are submitting an other-than-annual amendment, you are not required to update your responses to Items 2, 5, 6, 7, 9.A.(2), 9.B.(2), 9.E., 9.F., or 12 of Part 1A or Items 2.H. or 2.J. of Part 1B even if your responses to those items have become inaccurate.

Part 2: You must amend your *brochure supplements* (see Form ADV, Part 2B) promptly if any information in them becomes materially inaccurate. If you are submitting an other-than-annual amendment to your *brochure*, you are not required to update your summary of material changes as required by Item 2. You are not required to update your *brochure* between annual amendments solely because the amount of *client* assets you manage has changed or because your fee schedule has changed. However, if you are updating your *brochure* for a separate reason in between annual amendments, and the amount of *client* assets you manage listed in response to Item 4.E or your fee schedule listed in response to Item 5.A has become materially inaccurate, you should update that item(s) as part of the interim amendment.

- If you are an SEC-registered adviser, you are required to file your *brochure* amendments electronically through IARD. You are not required to file amendments to your *brochure supplements* with the SEC, but you must maintain a copy of them in your files.
- If you are a state-registered adviser, you are required to file your *brochure* amendments and *brochure supplement* amendments with the appropriate *state securities authorities* through IARD.

- Exempt reporting advisers:

  - Annual Updating Amendments: You must amend your Form ADV each year by filing an *annual updating amendment* within 90 days after the end of your fiscal year. When you submit your *annual updating amendment*, you must update your responses to all required items, including corresponding sections of Schedules A, B, C and D.

  - Other-than-Annual Amendments: In addition to your *annual updating amendment*, you must amend your Form ADV by filing additional amendments (other-than-annual amendments) promptly if:

    - information you provided in response to Items 1, 3, or 11 becomes inaccurate in any way; or
    - information you provided in response to Item 10 becomes materially inaccurate.

Failure to update your Form ADV, as required by this instruction, is a violation of SEC rules or similar state rules and could lead to your registration being revoked.

5. Part 2 of Form ADV was amended recently. When do I have to comply with the new requirements?

If you are applying for registration with the SEC: As of January 1, 2011, every application for registration must include a narrative *brochure* prepared in accordance with the requirements of (amended) Part 2A of Form ADV. See SEC rule 203-1. The SEC will no longer accept any application that does not include a *brochure*(s) that satisfies the requirements of (amended) Part 2 of Form ADV.

If you already are registered with the SEC: Until you file your first *annual updating amendment* for your fiscal year that ended on or after December 31, 2010, you may (but are not required to) submit a narrative *brochure* that meets the requirements of (amended) Part 2A of Form ADV. If you do not do this, you must continue to comply with the requirements for preparing, delivering, and offering "old" Part II of Form ADV. Your first *annual updating amendment* must contain a narrative *brochure* that meets the requirements of (amended) Part 2A of Form ADV.

Note: Until you are required to meet the requirements of (amended) Part 2, you can satisfy the requirements related to "old" Part II by updating the information in your "old" Part II whenever it becomes materially inaccurate. You must deliver "old" Part II or a *brochure* containing at least the information contained in "old" Part II to prospective *clients* and annually offer it to current *clients*. You are not required to file "old" Part II with the SEC, but you must keep a copy in your files, and provide it to the SEC staff upon request.

If you are applying for registration or are registered with one or more *state securities authorities*, contact the appropriate *state securities authorities* or check <http://www.nasaa.org> for more information about the implementation deadline for the amended Part 2.

6. Where do I sign my Form ADV application or amendment?

You must sign the appropriate Execution Page. There are three Execution Pages at the end of the form. Your initial application, your initial report (in the case of an *exempt reporting adviser*), and all amendments to Form ADV must include at least one Execution Page.

- If you are applying for or are amending your SEC registration, or if you are reporting as an *exempt reporting adviser* or amending your report, you must sign and submit either a:
    - Domestic Investment Adviser Execution Page, if you (the advisory firm) are a resident of the United States; or
    - *Non-Resident* Investment Adviser Execution Page, if you (the advisory firm) are not a resident of the United States.
- If you are applying for or are amending your registration with a *state securities authority*, you must sign and submit the State-Registered Investment Adviser Execution Page.

7. Who must sign my Form ADV or amendment?

The individual who signs the form depends upon your form of organization:

- For a sole proprietorship, the sole proprietor.
- For a partnership, a general partner.
- For a corporation, an authorized principal officer.
- For a "separately identifiable department or division" (SID) of a bank, a principal officer of your bank who is directly engaged in the management, direction, or supervision of your investment advisory activities.
- For all others, an authorized individual who participates in managing or directing your affairs.

The signature does not have to be notarized, and in the case of an electronic filing, should be a typed name.

8. How do I file my Form ADV?

Complete Form ADV electronically using the Investment Adviser Registration Depository (IARD) if:

- You are filing with the SEC (and submitting *notice filings* to any of the *state securities authorities*), or

- You are filing with a *state securities authority* that requires or permits advisers to submit Form ADV through the IARD.

  Note: SEC rules require advisers that are registered or applying for registration with the SEC, or that are reporting to the SEC as an *exempt reporting adviser* to file electronically through the IARD system. See SEC rules 203-1 and 204-4.

To file electronically, go to the IARD website (<www.iard.com>), which contains detailed instructions for advisers to follow when filing through the IARD.

Complete Form ADV (Paper Version) on paper if:

- You are filing with the SEC or a *state securities authority* that requires electronic filing, but you have been granted a continuing hardship exemption. Hardship exemptions are described in Instruction 16.

- You are filing with a *state securities authority* that permits (but does not require) electronic filing and you do not file electronically.

9. How do I get started filing electronically?

- First, get a copy of the IARD Entitlement Package from the following web site: <http://www.iard.com/GetStarted.asp>. Second, request access to the IARD system for your firm by completing and submitting the IARD Entitlement Package. The IARD Entitlement Package must be submitted on paper. Mail the forms to: FINRA Entitlement Group, P.O. Box 9495, Gaithersburg, MD 20898-9495.

- When FINRA receives your Entitlement Package, they will assign a *CRD* number (identification number for your firm) and a user I.D. code and password (identification number and system password for the individual(s) who will submit Form ADV filings for your firm). Your firm may request an I.D. code and password for more than one individual. FINRA also will create a financial account for you from which the IARD will deduct filing fees and any state fees you are required to pay. If you already have a *CRD* account with FINRA, it will also serve as your IARD account; a separate account will not be established.

- Once you receive your *CRD* number, user I.D. code and password, and you have funded your account, you are ready to file electronically.

- Questions regarding the Entitlement Process should be addressed to FINRA at 240.386.4848.

10. If I am applying for registration with the SEC, or amending my SEC registration, how do I make *notice filings* with the *state securities authorities*?

If you are applying for registration with the SEC or are amending your SEC registration, one or more *state securities authorities* may require you to provide them with copies of your SEC filings. We call these filings "*notice filings*." Your *notice filings* will be sent electronically to the states that you check on Item 2.B. of Part 1A. The *state securities authorities* to which you send *notice filings* may charge fees, which will be deducted from the account you establish with FINRA. To determine which *state securities authorities* require SEC-registered advisers to submit *notice filings* and to pay fees, consult the relevant state investment adviser law or *state securities authority*. See General Instruction 1.

If you are granted a continuing hardship exemption to file Form ADV on paper, FINRA will enter your filing into the IARD and your *notice filings* will be sent electronically to the *state securities authorities* that you check on Item 2.B. of Part 1A.

11. I am registered with a state. When must I switch to SEC registration?

If at the time of your *annual updating amendment* you meet at least one of the requirements for SEC registration in Item 2.A.(1) to (12) of Part 1A, you must register with the SEC within 90 days after you file the *annual updating amendment*. Once you register with the SEC, you are subject to SEC regulation, regardless of whether you remain registered with one or more states. See SEC rule 203A-1(b). Each of your *investment adviser representatives*, however, may be subject to registration in those states in which the representative has a place of business. See Advisers Act section 203A(b)(1); SEC rule 203A-3(a). For additional information, consult the investment adviser laws or the *state securities authority* for the particular state in which you are "doing business." See General Instruction 1.

12. I am registered with the SEC. When must I switch to registration with a *state securities authority*?

If you check box 13 in Item 2.A. of Part 1A to report on your *annual updating amendment* that you are no longer eligible to register with the SEC, you must withdraw from SEC registration within 180 days after the end of your fiscal year by filing Form ADV-W. See SEC rule 203A-1(b). You should consult state law or the *state securities authority* for the states in which you are doing business to determine if you are required to register in these states. See General Instruction 1. Until you file your Form ADV-W with the SEC, you will remain subject to SEC regulation, and you also will be subject to regulation in any states where you register. See SEC rule 203A-1(b).

13. I am an *exempt reporting adviser*. Is it possible that I might be required to also register with or submit a report to a *state securities authority*?

Yes, you may be required to register with or submit a report to one or more *state securities authorities*. If you are required to register with one or more *state securities authorities*, you must complete all of Form ADV. See General Instruction 3. If you are required to submit a report to one or more *state securities authorities*, check the box(es) in Item 2.B. of Part 1A next to the state(s) you would like to receive the report. Each of your *investment adviser representatives* may also be subject to registration requirements. For additional information about the requirements that may apply to you, consult the investment adviser laws or the *state securities authority* for the particular state in which you are "doing business." See General Instruction 1.

14. What do I do if I no longer meet the definition of an "*exempt reporting adviser*"?

An investment adviser may no longer be an *exempt reporting adviser*. For example, it may (i) cease to do business or become eligible for an exemption from registration that does not require reporting, or (ii) be required to register as an investment adviser with the Commission. In either case, you must submit an amendment to your Form ADV by checking the box at the start of the filing that you are submitting a final report as an *exempt reporting adviser*. In order to also register with the Commission, you must also check the box that you are applying for registration with the Commission. You will be deemed in compliance with the Form ADV

filing and reporting requirements for 45 days from filing your application or until your application is approved or denied by the Commission. If your application is approved, you will be able to continue business as a registered adviser.

Note: If you are an *exempt reporting adviser* and were relying on Section 203(m) of the Advisers Act because you solely advised *private funds* of less than $150 million, under SEC rule 203(m)-1(d), you have three months from the end of the quarter in which you no longer qualified for the exemption because your *private fund* assets are $150 million or more to file your final report and your application for registration. You must file your amendment to Form ADV indicating that you are submitting a final report as an *exempt reporting adviser* and, if you intend to register with the Commission, apply for registration no later than the end of that three month period.

To determine state registration or *notice filing* requirements, consult the investment adviser laws or the *state securities authority* for the particular state in which you are "doing business." See General Instruction 1.

15. Are there filing fees?

Yes. These fees go to support and maintain the IARD. The IARD filing fees are in addition to any registration or other fee that may be required by state law. You must pay an IARD filing fee for your initial application, your initial report, and each *annual updating amendment*. There is no filing fee for an other-than-annual amendment, a final report as an *exempt reporting adviser*, or Form ADV-W. The IARD filing fee schedule is published at <http://www.sec.gov/iard>; <http://www.nasaa.org>; and <http://www.iard.com>.

If you are submitting a paper filing under a continuing hardship exemption (see Instruction 16), you are required to pay an additional fee. The amount of the additional fee depends on whether you are filing Form ADV or Form ADV-W. (There is no additional fee for filings made on Form ADV-W.) The hardship filing fee schedule is available by contacting FINRA at 240.386.4848.

16. What if I am not able to file electronically?

If you are required to file electronically but cannot do so, you may be eligible for one of two types of hardship exemptions from the electronic filing requirements.

- A **temporary hardship exemption** is available if you file electronically, but you encounter unexpected difficulties that prevent you from making a timely filing with the IARD, such as a computer malfunction or electrical outage. This exemption does not permit you to file on paper; instead, it extends the deadline for an electronic filing for seven business days. See SEC rules 203-3(a) and 204-4(e).

- A **continuing hardship exemption** may be granted if you are a small business and you can demonstrate that filing electronically would impose an undue hardship. You are a small business, and may be eligible for a continuing hardship exemption, if you are

required to answer Item 12 of Part 1A (because you have assets under management of less than $25 million) and you are able to respond "no" to each question in Item 12. See SEC rule 0-7.

If you have been granted a continuing hardship exemption, you must complete and submit the paper version of Form ADV to FINRA. FINRA will enter your responses into the IARD. As discussed in General Instruction 15, FINRA will charge you a fee to reimburse it for the expense of data entry.

17. I am eligible to file on paper. How do I make a paper filing?

When filing on paper, you must:

- Type all of your responses.
- Include your name (the same name you provide in response to Item 1.A. of Part 1A) and the date on every page.
- If you are amending your Form ADV:
  - complete page 1 and circle the number of any item for which you are changing your response.
  - include your SEC 801-number (if you have one), or your 802-number (if you have one), and your *CRD* number (if you have one) on every page.
  - complete the amended item in full and circle the number of the item for which you are changing your response.
  - to amend Schedule A or Schedule B, complete and submit Schedule C.

Where you submit your paper filing depends on why you are eligible to file on paper:

- If you are filing on paper because you have been granted a continuing hardship exemption, submit one manually signed Form ADV and one copy to: IARD Document Processing, FINRA, P.O. Box 9495, Gaithersburg, MD 20898-9495.

  If you complete Form ADV on paper and submit it to FINRA but you do not have a continuing hardship exemption, the submission will be returned to you.

- If you are filing on paper because a state in which you are registered or in which you are applying for registration allows you to submit paper instead of electronic filings, submit one manually signed Form ADV and one copy to the appropriate *state securities authorities*.

18. Who is required to file Form ADV-NR?

Every *non-resident* general partner and *managing agent* of all SEC-registered advisers and *exempt reporting advisers*, whether or not the adviser is resident in the United States, must file Form ADV-NR in connection with the adviser's initial application or report. A general partner or *managing agent* of an SEC-registered adviser or *exempt reporting adviser* who becomes a *non-resident* after the adviser's initial application or report has been submitted

must file Form ADV-NR within 30 days. Form ADV-NR must be filed on paper (it cannot be filed electronically).

Submit Form ADV-NR to the SEC at the following address:

Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549; Attn: Branch of Registrations and Examinations.

Failure to file Form ADV-NR promptly may delay SEC consideration of your initial application.

Federal Information Law and Requirements

Sections 203 and 204 of the Advisers Act [15 U.S.C. §§ 80b-3(c) and 80b-4] authorize the SEC to collect the information required by Form ADV. The SEC collects the information for regulatory purposes, such as deciding whether to grant registration. Filing Form ADV is mandatory for advisers who are required to register with the SEC and for *exempt reporting advisers*. The SEC maintains the information submitted on this form and makes it publicly available. The SEC may return forms that do not include required information. Intentional misstatements or omissions constitute federal criminal violations under 18 U.S.C. § 1001 and 15 U.S.C. § 80b-17.

SEC's Collection of Information

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. The Advisers Act authorizes the SEC to collect the information on Form ADV from investment *advisers*. See 15 U.S.C. §§ 80b-3 and 80b-4. Filing the form is mandatory.

The form enables the SEC to register investment advisers and to obtain information from and about *exempt reporting advisers*. Every applicant for registration with the SEC as an adviser, and every *exempt reporting adviser*, must file the form. See 17 C.F.R. § 275.203-1 and 204-4. By accepting a form, however, the SEC does not make a finding that it has been completed or submitted correctly. The form is filed annually by every adviser, no later than 90 days after the end of its fiscal year, to amend its registration or its report. It is also filed promptly during the year to reflect material changes. See 17 C.F.R. § 275.204-1. The SEC maintains the information on the form and makes it publicly available through the IARD.

Anyone may send the SEC comments on the accuracy of the burden estimate on page 1 of the form, as well as suggestions for reducing the burden. The Office of Management and Budget has reviewed this collection of information under 44 U.S.C. § 3507.

The information contained in the form is part of a system of records subject to the Privacy Act of 1974, as amended. The SEC has published in the Federal Register the Privacy Act System of Records Notice for these records.

APPENDIX B

FORM ADV (Paper Version)

- **UNIFORM APPLICATION FOR INVESTMENT ADVISER REGISTRATION AND**
- **REPORT BY EXEMPT REPORTING ADVISERS**

Form ADV: Instructions for Part 1A

These instructions explain how to complete certain items in Part 1A of Form ADV.

1. Item 1: Identifying Information

a. **Separately Identifiable Department or Division of a Bank.** If you are a "separately identifiable department or division" (SID) of a bank, answer Item 1.A. with the full legal name of your bank, and answer Item 1.B. with your own name (the name of the department or division) and all names under which you conduct your advisory business. In addition, your *principal office and place of business* in Item 1.F. should be the principal office at which you conduct your advisory business. In response to Item 1.I., the website addresses you list on Schedule D should be sites that provide information about your own activities, rather than general information about your bank.

b. **Item 1.O.: Assets.** For purposes of Item 1.O. only, "assets" refers to your total assets, rather than the assets you manage on behalf of clients. Determine your total assets using the total assets shown on the balance sheet for your most recent fiscal year end.

2. Item 2: SEC Registration and SEC Report by *Exempt Reporting Advisers*

If you are registered or applying for registration with the SEC, you must indicate in Item 2.A. why you are eligible to register with the SEC by checking at least one of the boxes.

a. **Item 2.A.(1): Adviser with Regulatory Assets Under Management of $100 Million or More.** You may check box 1 only if your response to Item 5.F(2)(c) is $100 million or more. You must register with the SEC if your regulatory assets under management are $100 million or more. If you are a state-registered adviser and you report on your *annual updating amendment* that your regulatory assets under management increased to $100 million or more, you must register with the SEC within 90 days after you file that *annual updating amendment*. See SEC rule 203A-1(a) and Form ADV General Instruction 11. Part 1A Instruction 5.b. explains how to calculate your regulatory assets under management.

b. **Item 2.A.(2): Mid-Sized Adviser.** You may check box 2 only if your response to Item 5.F(2)(c) is $25 million or more but less than $100 million, and you satisfy one of the requirements below. Part 1A Instruction 5.b. explains how to calculate your regulatory assets under management.

You must register with the SEC if you meet at least one of the following requirements:

- You are not required to be registered as an investment adviser with the *state securities authority* of the state where you maintain your *principal office and place of business* pursuant to that state's investment adviser laws. If you are exempt from registration with that state or are excluded from the definition of investment adviser in that state, you must register with the SEC. You should consult the investment adviser laws or the *state securities authority* for the particular state in which you maintain your *principal office and place of business* to determine if you are required to register in that state. See General Instruction 1.

- You are not subject to examination by the *state securities authority* of the state where you maintain your *principal office and place of business*. To determine whether such *state securities authority* does not conduct such examinations, see: [insert SEC.gov website address TBD].

See section 203A(a)(2) of the Advisers Act.

c. **Item 2.A.(5): Adviser to an Investment Company.** You may check box 5 only if you currently provide advisory services under an investment advisory contract to an investment company registered under the Investment Company Act of 1940 and the investment company is operational (i.e., has assets and shareholders, other than just the organizing shareholders). See sections 203A(a)(1)(B) and 203A(a)(2)(A) of the Advisers Act. Advising investors about the merits of investing in mutual funds or recommending particular mutual funds does not make you eligible to check this box.

d. **Item 2.A.(6): Adviser to a Business Development Company.** You may check box 6 only if your response to Item 5.F(2)(c) is $25 million or more of regulatory assets under management, and you currently provide advisory services under an investment advisory contract to a company that has elected to be a business development company pursuant to section 54 of the Investment Company Act of 1940, that has not withdrawn the election, and that is operational (i.e., has assets and shareholders, other than just the organizing shareholders). See section 203A(a)(2)(A) of the Advisers Act. Part 1A Instruction 5.b. explains how to calculate your regulatory assets under management.

e. **Item 2.A.(7): Pension Consultant.** You may check box 7 only if you are eligible for the pension consultant exemption from the prohibition on SEC registration.

- You are eligible for this exemption if you provided investment advice to employee benefit plans, governmental plans, or church plans with respect to assets having an aggregate value of $200 million or more during the 12-month period that ended

within 90 days of filing this Form ADV. You are not eligible for this exemption if you only advise plan participants on allocating their investments within their pension plans. See SEC rule 203A-2(a).

- To calculate the value of assets for purposes of this exemption, aggregate the assets of the plans for which you provided advisory services at the end of the 12-month period. If you provided advisory services to other plans during the 12-month period, but your employment or contract terminated before the end of the 12-month period, you also may include the value of those assets.

f. **Item 2.A.(8): Related Adviser.** You may check box 8 only if you are eligible for the related adviser exemption from the prohibition on SEC registration. See SEC rule 203A-2(b). You are eligible for this exemption if you *control*, are *controlled by*, or *are under common control with* an investment adviser that is registered with the SEC, and you have the same *principal office and place of business* as that other investment adviser. Note that you may not rely on the SEC registration of an Internet investment adviser under rule 203A-2(e) in establishing eligibility for this exemption. See SEC rule 203A-2(e)(iii). If you check box 8, you also must complete Section 2.A.(8) of Schedule D.

g. **Item 2.A.(9): Newly-Formed Adviser.** You may check box 9 only if you are eligible for the newly-formed-adviser exemption from the prohibition on SEC registration. See SEC rule 203A-2(c). You are eligible for this exemption if:

- immediately before you file your application for registration with the SEC, you were not registered or required to be registered with the SEC or a *state securities authority;* and

- at the time of your formation, you have a reasonable expectation that within 120 days of registration you will be eligible for SEC registration.

If you check box 9, you also must complete Section 2.A.(9) of Schedule D.

You must file an amendment to Part 1A of your Form ADV that updates your response to Item 2.A. within 120 days after the SEC declares your registration effective. You may not check box 9 on your amendment; since this exemption is available only if you are not registered, you may not "re-rely" on this exemption. If you indicate on that amendment (by checking box 13) that you are not eligible to register with the SEC, you also must file a Form ADV-W to withdraw your SEC registration no later than 120 days after your registration was declared effective. You should contact the appropriate *state securities authority* to determine how long it may take to become state-registered

sufficiently in advance of when you are required to file Form ADV-W to withdraw from SEC registration.

h. **Item 2.A.(10): Multi-State Adviser.** You may check box 10 only if you are eligible for the multi-state adviser exemption from the prohibition on SEC registration. See SEC rule 203A-2(d). You are eligible for this exemption if you are required to register as an investment adviser with the *state securities authorities* of 15 or more states. If you check box 10, you must complete Section 2.A.(10) of Schedule D. You must complete Section 2.A.(10) of Schedule D in each *annual updating amendment* you submit.

If you check box 10, you also must:

- create and maintain a list of the *states* in which, but for this exemption, you would be required to register;
- update this list each time you submit an *annual updating amendment* in which you continue to represent that you are eligible for this exemption; and
- maintain the list in an easily accessible place for a period of not less than five years from each date on which you indicate that you are eligible for the exemption.

If, at the time you file your *annual updating amendment*, you are required to register in less than 15 *states* and you are not otherwise eligible to register with the SEC, you must check box 13 in Item 2.A. You also must file a Form ADV-W to withdraw your SEC registration. See Part 1A Instruction 2.j.

i. **Item 2.A.(11): Internet Investment Adviser**. You may check box 11 only if you are eligible for the Internet adviser exemption from the prohibition on SEC registration. See SEC rule 203A-2(e). You are eligible for this exemption if:

- you provide investment advice to your *clients* through an interactive website. An interactive website means a website in which computer software-based models or applications provide investment advice based on personal information each *client* submits through the website. Other forms of online or Internet investment advice do not qualify for this exemption;

- you provide investment advice to all of your *clients* exclusively through the interactive website, except that you may provide investment advice to fewer than 15 *clients* through other means during the previous 12 months; and

- you maintain a record demonstrating that you provide investment advice to your *clients* exclusively through an interactive website in accordance with these limits.

j. **Item 2.A.(13): Adviser No Longer Eligible to Remain Registered with the SEC.** You must check box 13 if:

- you are registered with the SEC;
- you are filing an *annual updating amendment* to Form ADV in which you indicate in response to Item 5.F(2)(c) that you have regulatory assets under management of less than $100 million; and
- you are not eligible to check any other box (other than box 13) in Item 2.A. (and are therefore no longer eligible to remain registered with the SEC).

You must withdraw from SEC registration within 180 days after the end of your fiscal year by filing Form ADV-W. Until you file your Form ADV-W, you will remain subject to SEC regulation, and you also will be subject to regulation in the *states* in which you register. See SEC rule 203A-1.

k. **Item 2.C.: Reporting by Exempt Reporting Advisers.** You may check box 2.C.(1) only if you qualify for the exemption from SEC registration as an adviser solely to one or more venture capital funds. See SEC rule 203(l)-1. You may check box 2.C.(2) only if you qualify for the exemption from SEC registration because you act solely as an adviser to *private funds* and have assets under management in the United States of less than $150 million. See SEC rule 203(m)-1. If you check box 2.C.(2), you also must complete Section 2.C. of Schedule D. You may check both boxes to indicate that you qualify for both exemptions.

3. Item 3: Form of Organization

If you are a "separately identifiable department or division" (SID) of a bank, answer Item 3.A. by checking "other." In the space provided, specify that you are a "SID of" and indicate the form of organization of your bank. Answer Items 3.B. and 3.C. with information about your bank.

4. Item 4: Successions

a. **Succession of an SEC-Registered Adviser.** If you (1) have taken over the business of an investment adviser or (2) have changed your structure or legal status (e.g., form of organization or state of incorporation), a new organization has been created, which has registration obligations under the Advisers Act. There are different ways to fulfill these obligations. You may rely on the registration provisions discussed in the General Instructions, or you may be able to rely on special registration provisions for "successors" to SEC-registered advisers, which may ease the transition to the successor adviser's registration.

To determine if you may rely on these provisions, review "Registration of Successors to Broker-Dealers and Investment Advisers," Investment Advisers Act Release No. 1357 (Dec. 28, 1992). If you have taken over an adviser, follow Part 1A Instruction 4.a(1), Succession by Application. If you have changed your structure or legal status, follow Part 1A Instruction 4.a(2), Succession by Amendment. If either (1) you are a "separately identifiable department or division" (SID) of a bank that is currently registered as an investment adviser, and you are taking over your bank's advisory business; or (2) you are a SID currently registered as an investment adviser, and your bank is taking over your advisory business, then follow Part 1A Instruction 4.a(1), Succession by Application.

(1) **Succession by Application.** If you are not registered with the SEC as an adviser, and you are acquiring or assuming substantially all of the assets and liabilities of the advisory business of an SEC-registered adviser, file a new application for registration on Form ADV. You will receive new registration numbers. You must file the new application within 30 days after the succession. On the application, make sure you check "yes" to Item 4.A., enter the date of the succession in Item 4.B., and complete Section 4 of Schedule D.

Until the SEC declares your new registration effective, you may rely on the registration of the adviser you are acquiring, but only if the adviser you are acquiring is no longer conducting advisory activities. Once your new registration is effective, a Form ADV-W must be filed with the SEC to withdraw the registration of the acquired adviser.

(2) **Succession by Amendment.** If you are a new investment adviser formed solely as a result of a change in form of organization, a reorganization, or a change in the composition of a partnership, and there has been no practical change in *control* or management, you may amend the registration of the registered investment adviser to reflect these changes rather than file a new application. You will keep the same registration numbers, and you should not file a Form ADV-W. On the amendment, make sure you check "yes" to Item 4.A., enter the date of the succession in Item 4.B., and complete Section 4 of Schedule D. You must submit the amendment within 30 days after the change or reorganization.

b. **Succession of a State-Registered Adviser.** If you (1) have taken over the business of an investment adviser or (2) have changed your structure or legal status (e.g., form of organization or state of incorporation), a new organization has been created, which has registration obligations under state investment adviser laws. There may be different ways to fulfill these obligations. You should contact each state in which you are

registered to determine that state's requirements for successor registration. See Form ADV General Instruction 1.

5. Item 5: Information About Your Advisory Business

a. **Newly-Formed Advisers:** Several questions in Item 5 that ask about your advisory business assume that you have been operating your advisory business for some time. Your response to these questions should reflect your current advisory business (i.e., at the time you file your Form ADV), with the following exceptions:

- base your response to Item 5.E. on the types of compensation you expect to accept;
- base your response to Item 5.G. and Item 5.J. on the types of advisory services you expect to provide during the next year; and
- skip Item 5.H.

b. **Item 5.F: Calculating Your Regulatory Assets Under Management.** In determining the amount of your regulatory assets under management, include the securities portfolios for which you provide continuous and regular supervisory or management services as of the date of filing this Form ADV.

(1) **Securities Portfolios**. An account is a securities portfolio if at least 50% of the total value of the account consists of securities. For purposes of this 50% test, you may treat cash and cash equivalents (i.e., bank deposits, certificates of deposit, bankers acceptances, and similar bank instruments) as securities. You must include securities portfolios that are:

(a) your family or proprietary accounts;

(b) accounts for which you receive no compensation for your services; and

(c) accounts of *clients* who are not *United States persons*.

For purposes of this definition, treat all of the assets of a *private fund* as a securities portfolio, regardless of the nature of such assets. For accounts of *private funds*, moreover, include in the securities portfolio any uncalled commitment pursuant to which a *person* is obligated to acquire an interest in, or make a capital contribution to, the *private fund*.

(2) **Value of Portfolio**. Include the entire value of each securities portfolio for which you provide continuous and regular supervisory or management services. If you provide continuous and regular supervisory or management services for only a portion of a securities portfolio, include as regulatory assets under management only

that portion of the securities portfolio for which you provide such services. Exclude, for example, the portion of an account:

(a) under management by another *person*; or

(b) that consists of real estate or businesses whose operations you "manage" on behalf of a *client* but not as an investment.

Do not deduct any outstanding indebtedness or other accrued but unpaid liabilities.

(3) **Continuous and Regular Supervisory or Management Services.**

General Criteria. You provide continuous and regular supervisory or management services with respect to an account if:

(a) you have *discretionary authority* over and provide ongoing supervisory or management services with respect to the account; or

(b) you do not have *discretionary authority* over the account, but you have ongoing responsibility to select or make recommendations, based upon the needs of the *client*, as to specific securities or other investments the account may purchase or sell and, if such recommendations are accepted by the *client*, you are responsible for arranging or effecting the purchase or sale.

Factors. You should consider the following factors in evaluating whether you provide continuous and regular supervisory or management services to an account.

(a) **Terms of the advisory contract.** If you agree in an advisory contract to provide ongoing management services, this suggests that you provide these services for the account. Other provisions in the contract, or your actual management practices, however, may suggest otherwise.

(b) **Form of compensation.** If you are compensated based on the average value of the *client's* assets you manage over a specified period of time, that suggests that you provide continuous and regular supervisory or management services for the account. If you receive compensation in a manner similar to either of the following, that suggests you do not provide continuous and regular supervisory or management services for the account --

(i) you are compensated based upon the time spent with a *client* during a *client* visit; or

(ii) you are paid a retainer based on a percentage of assets covered by a financial plan.

(c) **Management practices.** The extent to which you actively manage assets or provide advice bears on whether the services you provide are continuous and regular supervisory or management services. The fact that you make infrequent trades (e.g., based on a "buy and hold" strategy) does not mean your services are not "continuous and regular."

Examples. You may provide continuous and regular supervisory or management services for an account if you:

(a) have *discretionary authority* to allocate *client* assets among various mutual funds;

(b) do not have *discretionary authority*, but provide the same allocation services, and satisfy the criteria set forth in Instruction 5.b(3);

(c) allocate assets among other managers (a "manager of managers"), but only if you have *discretionary authority* to hire and fire managers and reallocate assets among them; or

(d) you are a broker-dealer and treat the account as a brokerage account, but only if you have *discretionary authority* over the account.

You do not provide continuous and regular supervisory or management services for an account if you:

(a) provide market timing recommendations (i.e., to buy or sell), but have no ongoing management responsibilities;

(b) provide only *impersonal investment advice* (e.g., market newsletters);

(c) make an initial asset allocation, without continuous and regular monitoring and reallocation; or

(d) provide advice on an intermittent or periodic basis (such as upon *client* request, in response to a market event, or on a specific date (e.g., the account is reviewed and adjusted quarterly)).

(4) **Value of Regulatory Assets Under Management**. Determine your regulatory assets under management based on the current market value of the assets as determined within 90 days prior to the date of filing this Form ADV. Determine market value using the same method you used to report account values to *clients* or to calculate fees for investment advisory services.

In the case of a *private fund*, determine the current market value (or fair value) of the *private fund*'s assets and the contractual amount of any uncalled commitment pursuant to which a person is obligated to acquire an interest in, or make a capital contribution to, the *private fund*.

(5) **Example.** This is an example of the method of determining whether an account of a *client* other than a *private fund* may be included as regulatory assets under management.

The *client's* portfolio consists of the following:

$ 6,000,000	stocks and bonds
$ 1,000,000	cash and cash equivalents
$ 3,000,000	non-securities (collectibles, commodities, real estate, etc.)
$10,000,000	Total Assets

First, is the account a securities portfolio? The account is a securities portfolio because securities as well as cash and cash equivalents (which you have chosen to include as securities) ($6,000,000 + $1,000,000 = $7,000,000) comprise at least 50% of the value of the account (here, 70%). (See Instruction 5.b(1)).

Second, does the account receive continuous and regular supervisory or management services? The entire account is managed on a *discretionary* basis and is provided ongoing supervisory and management services, and therefore receives continuous and regular supervisory or management services. (See Instruction 5.b(3)).

Third, what is the entire value of the account? The entire value of the account ($10,000,000) is included in the calculation of the adviser's total regulatory assets under management.

6. Item 7: Financial Industry Affiliations and Private Fund Reporting

Item 7.B. and Section 7.B. of Schedule D ask questions about the *private funds* that you advise. You are required to complete a Section 7.B.1. of Schedule D for each *private fund* that you advise, except in certain circumstances described under Item 7.B. and below.

a. If your *principal office and place of business* is outside the United States, for purposes of Item 7 and Section 7.B. of Schedule D you may disregard any *private fund* that during your last fiscal year was neither a *United States person* nor offered to, or beneficially owned by, any *United States person*.

b. When filing Section 7.B.1 of Schedule D for a *private fund*, you must acquire an identification number for the fund. You must continue to use the same identification number whenever you amend Section 7.B.1 for that fund. If you file a Section 7.B.1 for a *private fund* for which an identification number has already been acquired by another adviser, you must not acquire a new identification number, but must instead utilize the existing number. If you choose to complete a single Section 7.B.1 for a master-feeder arrangement under instruction 6.d. below, you must acquire an identification number also for each feeder fund.

c. If any *private fund* has issued two or more series (or classes) of equity interests whose values are determined with respect to separate portfolios of securities and other assets, then each such series (or class) should be regarded as a separate *private fund*. In Section 7.B.1 and 7.B.2 of Schedule D, next to the name of the *private fund*, list the name and identification number of the specific series (or class) for which you are filing the sections. This only applies with respect to series (or classes) that you manage as if they were separate funds and not a fund's side pockets or similar arrangements.

d. In the case of a master-feeder arrangement (*see* questions 6-7 of Section 7.B.1 of Schedule D), instead of completing a Section 7.B.1 for each of the master fund and each feeder fund, you may complete a single Section 7.B.1 for the master-feeder arrangement under the name of the master fund, if the answers to questions 8, 10, 23, 25, 26, 27, 28, 29 are the same for all of the feeder funds (and also if the feeder funds do not use a prime broker or custodian). If you choose to complete a single Section 7.B.1, you should disregard the feeder funds, except for the following:

(1) Question 11: State the gross and net assets for the master-feeder arrangement as a whole.

(2) Question 13: List the lowest minimum investment commitment applicable to any of the master fund and the feeder funds.

(3) Questions 14-18: Answer by aggregating all investors in the master-feeder arrangement.

(4) Questions 21-22: For purposes of these questions, the *private fund* means any of the master fund or the feeder funds. In answering the questions, moreover, disregard the feeder funds' investment in the master fund.

(5) Question 24: List all of the Form D SEC file numbers of any of the master fund and feeder funds.

e. Additional Instructions:

(1) **Question 9: Investment in Registered Investment Companies:** For purposes of this question, disregard any open-end management investment company regulated as a money market fund under rule 2a-7 under the Investment Company Act, if the *private fund* invests in such a company in reliance on rule 12d1-1 under the same Act.

(2) **Question 10: Type of Private Fund:** For purposes of this question the following definitions apply:

"Hedge fund" means any *private fund* that:

a. Has a performance fee or allocation calculated by taking into account unrealized gains;

b. May borrow an amount in excess of one-half of its net asset value (including any committed capital) or may have gross notional exposure in excess of twice its net asset value (including any committed capital); or

c. May sell securities or other assets short.

A commodity pool is categorized as a hedge fund solely for purposes of this question. For purposes of this definition, do not net long and short positions. Include any borrowings or notional exposure of another person that are guaranteed by the *private fund* or that the *private fund* may otherwise be obligated to satisfy.

"Liquidity fund" means any *private fund* that seeks to generate income by investing in a portfolio of short term obligations in order to maintain a stable net asset value per unit or minimize principal volatility for investors.

"Private equity fund" means any *private fund* that is not a hedge fund, liquidity fund, real estate fund, securitized asset fund, or venture capital fund and does not provide investors with redemption rights in the ordinary course.

"Real estate fund" means any *private fund* that is not a hedge fund, that does not provide investors with redemption rights in the ordinary course and that invests primarily in real estate and real estate related assets.

"Securitized asset fund" means any *private fund* that is not a hedge fund and that issues asset backed securities and whose investors are primarily debt-holders.

"Venture capital fund" means any *private fund* meeting the definition of venture capital fund in rule 203(l)-1 under the Advisers Act.

"Other *private fund*" means any *private fund* that is not a hedge fund, liquidity fund, private equity fund, real estate fund, securitized asset fund, or venture capital fund.

(3) **Question 11(a): Gross Assets.** Report the assets of the *private fund* that you would include in calculating your regulatory assets under management according to instruction 5.b above.

(4) **Question 11(b): Net Assets**. The *private fund*'s net assets are equal to the gross assets reported in response to Question 11(a) minus any outstanding indebtedness or other accrued but unpaid liabilities.

(5) **Questions 21-22: Other clients' investments.** For purposes of these questions, disregard any feeder fund's investment in its master fund. (*See* questions 6-7 for the definition of "master fund" and "feeder fund.")

9. Item 10: ***Control Persons***

If you are a "separately identifiable department or division" (SID) of a bank, identify on Schedule A your bank's executive officers who are directly engaged in managing, directing, or supervising your investment advisory activities, and list any other *persons* designated by your bank's board of directors as responsible for the day-to-day conduct of your investment advisory activities, including supervising *employees* performing investment advisory activities.

10. Additional Information.

If you believe your response to an item in Form ADV Part 1A requires further explanation, or if you wish to provide additional information, you may do so on Schedule D, in the Miscellaneous section. Completion of this section is optional.

APPENDIX C

GLOSSARY OF TERMS

1. **Advisory Affiliate:** Your advisory affiliates are (1) all of your officers, partners, or directors (or any ***person*** performing similar functions); (2) all ***persons*** directly or indirectly ***controlling*** or ***controlled*** by you; and (3) all of your current ***employees*** (other than ***employees*** performing only clerical, administrative, support or similar functions).

   If you are a "separately identifiable department or division" (SID) of a bank, your ***advisory affiliates*** are: (1) all of your bank's ***employees*** who perform your investment advisory activities (other than clerical or administrative ***employees***); (2) all ***persons*** designated by your bank's board of directors as responsible for the day-to-day conduct of your investment advisory activities (including supervising the ***employees*** who perform investment advisory activities); (3) all ***persons*** who directly or indirectly ***control*** your bank, and all ***persons*** whom you ***control*** in connection with your investment advisory activities; and (4) all other ***persons*** who directly manage any of your investment advisory activities (including directing, supervising or performing your advisory activities), all ***persons*** who directly or indirectly ***control*** those management functions, and all ***persons*** whom you ***control*** in connection with those management functions. *[Used in: Part 1A, Items 7, 11, DRPs; Part 1B, Item 2]*

2. **Annual Updating Amendment:** Within 90 days after your firm's fiscal year end, your firm must file an "annual updating amendment," which is an amendment to your firm's Form ADV that reaffirms the eligibility information contained in Item 2 of Part 1A and updates the responses to any other item for which the information is no longer accurate. *[Used in: General Instructions; Part 1A Instructions, Introductory Text, Item 2; Part 2A, Instructions, Appendix 1 Instructions; Part 2B, Instructions]*

3. **Brochure:** A written disclosure statement that you must provide to ***clients*** and prospective ***clients***. See SEC rule 204-3; Form ADV, Part 2A. *[Used in: General Instructions; Used throughout Part 2]*

4. **Brochure Supplement:** A written disclosure statement containing information about certain of your ***supervised persons*** that your firm is required by Part 2B of Form ADV to provide to ***clients*** and prospective ***clients***. See SEC rule 204-3; Form ADV, Part 2B. *[Used in: General Instructions; Used throughout Part 2]*

5. **Charged:** Being accused of a crime in a formal complaint, information, or indictment (or equivalent formal charge). *[Used in: Part 1A, Item 11; DRPs]*

6. **Client:** Any of your firm's investment advisory clients. This term includes clients from which your firm receives no compensation, such as members of your family. If your firm also provides other services (e.g., accounting services), this term does not include clients that are not investment advisory clients. *[Used throughout Form ADV and Form ADV-W]*

7. **Control:** The power, directly or indirectly, to direct the management or policies of a ***person***, whether through ownership of securities, by contract, or otherwise.

   - Each of your firm's officers, partners, or directors exercising executive responsibility (or ***persons*** having similar status or functions) is presumed to control your firm.

   - A ***person*** is presumed to control a corporation if the ***person***: (i) directly or indirectly has the right to vote 25 percent or more of a class of the corporation's voting securities; or (ii) has the power to sell or direct the sale of 25 percent or more of a class of the corporation's voting securities.

   - A ***person*** is presumed to control a partnership if the ***person*** has the right to receive upon dissolution, or has contributed, 25 percent or more of the capital of the partnership.

   - A ***person*** is presumed to control a limited liability company ("LLC") if the ***person***: (i) directly or indirectly has the right to vote 25 percent or more of a class of the interests of the LLC; (ii) has the right to receive upon dissolution, or has contributed, 25 percent or more of the capital of the LLC; or (iii) is an elected manager of the LLC.

   - A ***person*** is presumed to control a trust if the ***person*** is a trustee or ***managing agent*** of the trust.

   [Used in: General Instructions; Part 1A, Instructions, Items 2, 7, 10, 11, 12, Schedules A, B, C, D; DRPs]

8. **Custody:** Holding, directly or indirectly, client funds or securities, or having any authority to obtain possession of them. You have custody if a ***related person*** holds, directly or indirectly, client funds or securities, or has any authority to obtain possession of them, in connection with advisory services you provide to clients. Custody includes:

   - Possession of client funds or securities (but not of checks drawn by clients and made payable to third parties) unless you receive them inadvertently and you return them to the sender promptly, but in any case within three business days of receiving them;

   - Any arrangement (including a general power of attorney) under which you are authorized or permitted to withdraw client funds or securities maintained with a custodian upon your instruction to the custodian; and

   - Any capacity (such as general partner of a limited partnership, managing member of a limited liability company or a comparable position for another type of pooled investment vehicle, or trustee of a trust) that gives you or your supervised person legal ownership of or access to client funds or securities. *[Used in: Part 1A, Item 9; Part 1B, Instructions, Item 2; Part 2A, Items 15, 18]*

9. **Discretionary Authority or Discretionary Basis:** Your firm has discretionary authority or manages assets on a discretionary basis if it has the authority to decide which securities to purchase and sell for the ***client***. Your firm also has discretionary authority if it has the authority to decide which investment advisers to retain on behalf of the ***client***. *[Used in: Part 1A, Instructions, Item 8; Part 1B, Instructions; Part 2A, Items 4, 16, 18; Part 2B, Instructions]*

10. **Employee:** This term includes an independent contractor who performs advisory functions on your behalf. *[Used in: Part 1A, Instructions, Items 1, 5, 11; Part 2B, Instructions]*

11. **Enjoined:** This term includes being subject to a mandatory injunction, prohibitory injunction, preliminary injunction, or a temporary restraining ***order***. *[Used in: Part 1A, Item 11; DRPs]*

12. **Exempt Reporting Adviser:** An investment adviser that qualifies for the exemption from registration under section 203(l) of the Advisers Act because it is an adviser solely to one or more venture capital funds, or under rule 203(m) of the Advisers Act because it is an adviser solely to ***private funds*** and has assets under management in the United States of less than $150 million. *[Used in: Throughout Part 1A; General Instructions; Form ADV-H; Form ADV-NR]*

13. **Felony:** For jurisdictions that do not differentiate between a felony and a ***misdemeanor***, a felony is an offense punishable by a sentence of at least one year imprisonment and/or a fine of at least $1,000. The term also includes a general court martial. *[Used in: Part 1A, Item 11; DRPs; Part 2A, Item 9; Part 2B, Item 3]*

14. **FINRA CRD** or **CRD:** The Web Central Registration Depository ("CRD") system operated by FINRA for the registration of broker-dealers and broker-dealer representatives. *[Used in: General Instructions, Part 1A, Item 1, Schedules A, B, C, D, DRPs; Form ADV-W, Item 1]*

15. **Foreign Financial Regulatory Authority:** This term includes (1) a foreign securities authority; (2) another governmental body or foreign equivalent of a ***self-regulatory organization*** empowered by a foreign government to administer or enforce its laws relating to the regulation of ***investment-related*** activities; and (3) a foreign membership organization, a function of which is to regulate the participation of its members in the activities listed above. *[Used in: Part 1A, Items 1, 11; DRPs; Part 2A, Item 9; Part 2B, Item 3]*

16. **Found:** This term includes adverse final actions, including consent decrees in which the respondent has neither admitted nor denied the findings, but does not include agreements, deficiency letters, examination reports, memoranda of understanding, letters of caution, admonishments, and similar informal resolutions of matters. *[Used in: Part 1A, Item 11; Part 1B, Item 2; Part 2A, Item 9; Part 2B, Item 3]*

17. **Government Entity:** Any state or political subdivision of a state, including (i) any agency, authority, or instrumentality of the state or political subdivision; (ii) a plan or pool of assets ***controlled*** by the state or political subdivision or any agency, authority, or instrumentality thereof; and (iii) any officer, agent, or employee of the state or political subdivision or any agency, authority, or instrumentality thereof, acting in their official capacity. *[Used in: Part 1A, Item 5]*

18. **High Net Worth Individual:** An individual who is a "qualified client" under rule 205-3 of the Advisers Act or who is a "qualified purchaser" as defined in section 2(a)(51)(A) of the Investment Company Act of 1940. *[Used in: Part 1A, Item 5; Schedule D]*

19. **Home State:** If your firm is registered with a ***state securities authority***, your firm's "home state" is the state where it maintains its ***principal office and place of business***. *[Used in: Part 1B, Instructions]*

20. **Impersonal Investment Advice:** Investment advisory services that do not purport to meet the objectives or needs of specific individuals or accounts. *[Used in: Part 1A, Instructions; Part 2A, Instructions; Part 2B, Instructions]*

21. **Independent Public Accountant:** A public accountant that meets the standards of independence described in rule 2-01(b) and (c) of Regulation S-X (17 CFR 210.2-01(b) and (c)). *[Used in: Item 9; Schedule D]*

22. **Investment Adviser Representative:** *Any of your firm's* ***supervised persons*** *(except* those that provide only ***impersonal investment advice***) is an investment adviser representative, if --

    - the ***supervised person*** regularly solicits, meets with, or otherwise communicates with your firm's ***clients***,

    - the ***supervised person*** has more than five ***clients*** who are natural persons and not ***high net worth individuals***, and

    - more than ten percent of the ***supervised person's*** clients are natural persons and not ***high net worth individuals.***

    NOTE: If your firm is registered with the ***state securities authorities*** and not the SEC, your firm may be subject to a different state definition of "investment adviser representative." Investment adviser representatives of SEC-registered advisers may be required to register in each state in which they have a place of business.

    [Used in: General Instructions; Part 1A, Item 7; Part 2B, Item 1]

23. **Investment-Related:** Activities that pertain to securities, commodities, banking, insurance, or real estate (including, but not limited to, acting as or being associated with an investment adviser, broker-dealer, municipal securities dealer, government securities broker or dealer, issuer, investment company, futures sponsor, bank, or savings association). *[Used in: Part 1A, Items, 7, 11, DRPs; Part 1B, Item 2; Part 2A, Items 9 and 19; Part 2B, Items 3, 4 and 7]*

24. **Involved:** Engaging in any act or omission, aiding, abetting, counseling, commanding, inducing, conspiring with or failing reasonably to supervise another in doing an act. *[Used in: Part 1A, Item 11; Part 2A, Items 9 and 19; Part 2B, Items 3 and 7]*

25. **Management Persons:** Anyone with the power to exercise, directly or indirectly, a ***controlling*** influence over your firm's management or policies, or to determine the general investment advice given to the ***clients*** of your firm.

    Generally, all of the following are management persons:

    - Your firm's principal executive officers, such as your chief executive officer, chief financial officer, chief operations officer, chief legal officer, and chief compliance officer; your directors, general partners, or trustees; and other individuals with similar status or performing similar functions;

    - The members of your firm's investment committee or group that determines general investment advice to be given to ***clients***; and

    - If your firm does not have an investment committee or group, the individuals who determine general investment advice provided to ***clients*** (if there are more than five people, you may limit your firm's response to their supervisors).

    [Used in: Part 1B, Item 2; Part 2A, Items 9, 10 and 19]

26. **Managing Agent:** A managing agent of an investment adviser is any ***person***, including a trustee, who directs or manages (or who participates in directing or managing) the affairs of any unincorporated organization or association that is not a partnership. *[Used in: General Instructions; Form ADV-NR; Form ADV-W, Item 8]*

27. **Minor Rule Violation:** A violation of a ***self-regulatory organization*** rule that has been designated as "minor" pursuant to a plan approved by the SEC. A rule violation may be designated as "minor" under a plan if the sanction imposed consists of a fine of $2,500 or less, and if the sanctioned ***person*** does not contest the fine. (Check with the appropriate ***self-regulatory organization*** to determine if a particular rule violation has been designated as "minor" for these purposes.) *[Used in: Part 1A, Item 11]*

28. **Misdemeanor:** For jurisdictions that do not differentiate between a ***felony*** and a misdemeanor, a misdemeanor is an offense punishable by a sentence of less than one year imprisonment and/or a fine of less than $1,000. The term also includes a special court martial. *[Used in: Part 1A, Item 11; DRPs; Part 2A, Item 9; Part 2B, Item 3]*

29. **Non-Resident:** (a) an individual who resides in any place not subject to the jurisdiction of the United States; (b) a corporation incorporated in or that has its ***principal office and place of business*** in any place not subject to the jurisdiction of the United States; and (c) a partnership or other unincorporated organization or association that is formed in or has its ***principal office and place of business*** in any place not subject to the jurisdiction of the United States. *[Used in: General Instructions; Form ADV-NR]*

30. **Notice Filing:** SEC-registered advisers may have to provide ***state securities authorities*** with copies of documents that are filed with the SEC. These filings are referred to as "notice filings." *[Used in: General Instructions; Part 1A, Item 2; Execution Page(s); Form ADV-W]*

31. **Order:** A written directive issued pursuant to statutory authority and procedures, including an order of denial, exemption, suspension, or revocation. Unless included in an order, this term does not include special stipulations, undertakings, or agreements relating to payments, limitations on activity or other restrictions. *[Used in: Part 1A, Items 2 and 11; Schedule D; DRPs; Part 2A, Item 9; Part 2B, Item 3]*

32. **Performance-Based Fee:** An investment advisory fee based on a share of capital gains on, or capital appreciation of, ***client*** assets. A fee that is based upon a percentage of assets that you manage is not a performance-based fee. *[Used in: Part 1A, Item 5; Part 2A, Items 6 and 19]*

33. **Person:** A natural person (an individual) or a company. A company includes any partnership, corporation, trust, limited liability company ("LLC"), limited liability partnership ("LLP"), sole proprietorship, or other organization. *[Used throughout Form ADV and Form ADV-W]*

34. **Principal Office and Place of Business:** Your firm's executive office from which your firm's officers, partners, or managers direct, ***control***, and coordinate the activities of your firm. *[Used in: Part 1A, Instructions, Items 1 and 2; Schedule D; Form ADV-W, Item 1]*

35. **Private Fund:** An issuer that would be an investment company as defined in section 3 of the Investment Company Act of 1940 but for sections 3(c)(1) or 3(c)(7) of that Act. *[Used in: Part 1A, Items 2, 5, 7, and 9; Schedule D; General Instructions; Part 1A, Instructions]*

36. **Proceeding:** This term includes a formal administrative or civil action initiated by a governmental agency, ***self-regulatory organization*** or ***foreign financial regulatory authority***; a ***felony*** criminal indictment or information (or equivalent formal charge); or a ***misdemeanor*** criminal information (or equivalent formal charge). This term does not include other civil

litigation, investigations, or arrests or similar charges effected in the absence of a formal criminal indictment or information (or equivalent formal charge). *[Used in: Part 1A, Item 11; DRPs; Part 1B, Item 2; Part 2A, Item 9; Part 2B, Item 3]*

37. **Related Person:** Any ***advisory affiliate*** and any ***person*** that is under common ***control*** with your firm. *[Used in: Part 1A, Items 7, 8, 9; Schedule D; Form ADV-W, Item 3; Part 2A, Items 10, 11, 12, 14; Part 2A, Appendix 1, Item 6]*

38. **Self-Regulatory Organization** or **SRO:** Any national securities or commodities exchange, registered securities association, or registered clearing agency. For example, the Chicago Board of Trade ("CBOT"), FINRA and New York Stock Exchange ("NYSE") are self-regulatory organizations. *[Used in: Part 1A, Item 11; DRPs; Part 1B, Item 2; Part 2A, Items 9 and 19; Part 2B, Items 3 and 7]*

39. **Sponsor:** A sponsor of a ***wrap fee program*** sponsors, organizes, or administers the program or selects, or provides advice to ***clients*** regarding the selection of, other investment advisers in the program. *[Used in: Part 1A, Item 5; Schedule D; Part 2A, Instructions, Appendix 1 Instructions]*

40. **State Securities Authority:** The securities commissioner or commission (or any agency, office or officer performing like functions) of any state of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, or any other possession of the United States. *[Used throughout Form ADV]*

41. **Supervised Person:** Any of your officers, partners, directors (or other ***persons*** occupying a similar status or performing similar functions), or ***employees***, or any other ***person*** who provides investment advice on your behalf and is subject to your supervision or ***control***. *[Used throughout Part 2]*

42. **United States person:** This term has the same meaning as in rule 203(m)-1 under the Advisers Act, which includes any natural person that is resident in the United States. *[Used in: Part 1A, Instructions; Item 5; Schedule D]*

43. **Wrap Brochure** or **Wrap Fee Program Brochure:** The written disclosure statement that ***sponsors*** of ***wrap fee programs*** must provide to each of their ***wrap fee program clients***. *[Used in: Part 2, General Instructions; Used throughout Part 2A, Appendix 1]*

44. **Wrap Fee Program:** Any advisory program under which a specified fee or fees not based directly upon transactions in a ***client's*** account is charged for investment advisory services (which may include portfolio management or advice concerning the selection of other investment advisers) and the execution of ***client*** transactions. *[Used in: Part 1, Item 5; Schedule D; Part 2A, Instructions, Item 4, used throughout Appendix 1; Part 2B, Instructions]*

APPENDIX D

FORM ADV (Paper Version)

- **UNIFORM APPLICATION FOR INVESTMENT ADVISER REGISTRATION AND**
- **REPORT BY EXEMPT REPORTING ADVISERS**

PART 1A

WARNING: Complete this form truthfully. False statements or omissions may result in denial of your application, revocation of your registration, or criminal prosecution. You must keep this form updated by filing periodic amendments. See Form ADV General Instruction 4.

Check the box that indicates what you would like to do (check all that apply):

SEC or State Registration:
☐ Submit an initial application to register as an investment adviser with the SEC.
☐ Submit an initial application to register as an investment adviser with one or more states.
☐ Submit an *annual updating amendment* to your registration for your fiscal year ended _____.
☐ Submit an other-than-annual amendment to your registration.

SEC Report by *Exempt Reporting Advisers*:
☐ Submit an initial report to the SEC.
☐ Submit an *annual updating amendment* to your report for your fiscal year ended _____.
☐ Submit an other-than-annual amendment to your report.
☐ Submit a final report.

State Report by *Exempt Reporting Advisers*:
☐ Submit a report to one or more *state securities authorities* for an *exempt reporting adviser*.

Item 1 Identifying Information

Responses to this Item tell us who you are, where you are doing business, and how we can contact you.

A. Your full legal name (if you are a sole proprietor, your last, first, and middle names):

_____

B. Name under which you primarily conduct your advisory business, if different from Item 1.A.

_____

List on Section 1.B. of Schedule D any additional names under which you conduct your advisory business.

C. If this filing is reporting a change in your legal name (Item 1.A.) or primary business name (Item 1.B.), enter the new name and specify whether the name change is of ☐ your legal name or ☐ your primary business name:

_____

D. (1) If you are registered with the SEC as an investment adviser, your SEC file number: 801-_____

(2) If you report to the SEC as an *exempt reporting adviser*, your SEC file number: 802-_____

E. If you have a number ("*CRD* Number") assigned by the *FINRA's CRD* system or by the IARD system, your *CRD* number:

_____

If your firm does not have a CRD number, skip this Item 1.E. Do not provide the CRD number of one of your officers, employees, or affiliates.

F. *Principal Office and Place of Business*

(1) Address (do not use a P.O. Box):

_____
(number and street)

_____
(city) (state/country) (zip+4/postal code)

If this address is a private residence, check this box: ☐

List on Section 1.F. of Schedule D any office, other than your principal office and place of business, at which you conduct investment advisory business. If you are applying for registration, or are registered, with one or more state securities authorities, you must list all of your offices in the state or states to which you are applying for registration or with whom you are registered. If you are applying for SEC registration, if you are registered only with the SEC, or if you are reporting to the SEC as an exempt reporting adviser, list the largest five offices in terms of numbers of employees.

(2) Days of week that you normally conduct business at your *principal office and place of business*:

☐ Monday - Friday ☐ Other: _____

Normal business hours at this location: _____

(3) Telephone number at this location: _____
(area code) (telephone number)

(4) Facsimile number at this location: _____
(area code) (telephone number)

G. Mailing address, if different from your *principal office and place of business* address:

_____
(number and street)

_____
(city) (state/country) (zip+4/postal code)

If this address is a private residence, check this box: ☐

H. If you are a sole proprietor, state your full residence address, if different from your *principal office and place of business* address in Item 1.F.:

_____
(number and street)

_____
(city) (state/country) (zip+4/postal code)

FORM ADV Part 1A Page 3 of 20	Your Name _____ Date _____	*CRD* Number _____ SEC 801- or 802- Number _____

I. Do you have one or more websites? Yes ☐ No ☐

If "yes," list all website addresses on Section 1.I. of Schedule D. If a website address serves as a portal through which to access other information you have published on the web, you may list the portal without listing addresses for all of the other information. Some advisers may need to list more than one portal address. Do not provide individual electronic mail (e-mail) addresses in response to this Item.

J. Provide the name and contact information of your Chief Compliance Officer: If you are an *exempt reporting adviser*, you must provide the contact information for your Chief Compliance Officer, if you have one. If not, you must complete Item 1.K. below.

_____
(name)

_____
(other titles, if any)

_____ _____
(area code) (telephone number) (area code) (facsimile number)

_____
(number and street)

_____
(city) (state/country) (zip+4/postal code)

_____
(electronic mail (e-mail) address, if Chief Compliance Officer has one)

K. Additional Regulatory Contact Person: If a person other than the Chief Compliance Officer is authorized to receive information and respond to questions about this Form ADV, you may provide that information here.

_____
(name)

_____
(titles)

_____ _____
(area code) (telephone number) (area code) (facsimile number)

_____
(number and street)

_____
(city) (state/country) (zip+4/postal code)

_____
(electronic mail (e-mail) address, if contact person has one)

L. Do you maintain some or all of the books and records you are required to keep under Section 204 of the Advisers Act, or similar state law, somewhere other than your *principal office and place of business*?

Yes ☐ No ☐

If "yes," complete Section 1.L. of Schedule D.

M. Are you registered with a *foreign financial regulatory authority*? Yes ☐ No ☐

Answer "no" if you are not registered with a foreign financial regulatory authority, even if you have an affiliate that is registered with a foreign financial regulatory authority. If "yes," complete Section 1.M. of Schedule D.

N. Are you a public reporting company under Sections 12 or 15(d) of the Securities Exchange Act of 1934?

Yes ☐ No ☐

If "yes," provide your CIK number (Central Index Key number that the SEC assigns to each public reporting company): _____

O. Did you have $1 billion or more in assets on the last day of your most recent fiscal year?

Yes ☐ No ☐

Item 2

SEC Registration

Responses to this Item help us (and you) determine whether you are eligible to register with the SEC. Complete this Item 2.A. only if you are applying for SEC registration or submitting an *annual updating amendment* to your SEC registration.

A. To register (or remain registered) with the SEC, you must check **at least one** of the Items 2.A.(1) through 2.A.(12), below. If you are submitting an *annual updating amendment* to your SEC registration and you are no longer eligible to register with the SEC, check Item 2.A.(13). Part 1A Instruction 2 provides information to help you determine whether you may affirmatively respond to each of these items.

You (the adviser):

☐ (1) are a large advisory firm that has regulatory assets under management of $100 million (in U.S. dollars) or more;

☐ (2) are a mid-sized advisory firm that has regulatory assets under management of $25 million (in U.S. dollars) or more but less than $100 million (in U.S. dollars) and you are either:

(a) not required to be registered as an adviser with the *state securities authority* of the state where you maintain your *principal office and place of business*, or

(b) not subject to examination by the *state securities authority* of the state where you maintain your *principal office and place of business*;

Click HERE for a list of states in which an investment adviser, if registered, would not be subject to examination by the state securities authority.

☐ (3) have your *principal office and place of business* in Wyoming (which does not regulate advisers);

☐ (4) have your *principal office and place of business* outside the United States;

☐ (5) are an investment adviser (or sub-adviser) to an investment company registered under the Investment Company Act of 1940;

☐ (6) are an investment adviser to a company which has elected to be a business development company pursuant to section 54 of the Investment Company Act of 1940 and has not withdrawn the election, and you have at least $25 million of regulatory assets under management;

☐ (7) are a pension consultant with respect to assets of plans having an aggregate value of at least $200,000,000 that qualifies for the exemption in rule 203A-2(a);

☐ (8) are a related adviser under rule 203A-2(b) that *controls,* is *controlled* by, or is under common *control* with, an investment adviser that is registered with the SEC, and your *principal office and place of business* is the same as the registered adviser;

If you check this box, complete Section 2.A.(8) of Schedule D.

☐ (9) are a newly formed adviser relying on rule 203A-2(c) because you expect to be eligible for SEC registration within 120 days;

If you check this box, complete Section 2.A.(9) of Schedule D.

☐ (10) are a multi-state adviser that is required to register in 15 or more states and is relying on rule 203A-2(d);

If you check this box, complete Section 2.A.(10) of Schedule D.

☐ (11) are an Internet adviser relying on rule 203A-2(e);

☐ (12) have received an SEC order exempting you from the prohibition against registration with the SEC;

If you check this box, complete Section 2.A.(12) of Schedule D.

☐ (13) are no longer eligible to remain registered with the SEC.

State Securities Authority Notice Filings and State Reporting by *Exempt Reporting Advisers*

B. Under state laws, SEC-registered advisers may be required to provide to *state securities authorities* a copy of the Form ADV and any amendments they file with the SEC. These are called *notice filings*. In addition, *exempt reporting advisers* may be required to provide *state securities authorities* with a copy of reports and any amendments they file with the SEC. If this is an initial application or report, check the box(es) next to the state(s) that you would like to receive notice of this and all subsequent filings or reports you submit to the SEC. If this is an amendment to direct your *notice filings* or reports to additional state(s), check the box(es) next to the state(s) that you would like to receive notice of this and all subsequent filings or reports you submit to the SEC. If this is an amendment to your registration to stop your *notice filings* or reports from going to state(s) that currently receive them, uncheck the box(es) next to those state(s).

☐ AL	☐ CT	☐ HI	☐ KY	☐ MN	☐ NH	☐ OH	☐ SC	☐ VI	
☐ AK	☐ DE	☐ ID	☐ LA	☐ MS	☐ NJ	☐ OK	☐ SD	☐ VA	
☐ AZ	☐ DC	☐ IL	☐ ME	☐ MO	☐ NM	☐ OR	☐ TN	☐ WA	
☐ AR	☐ FL	☐ IN	☐ MD	☐ MT	☐ NY	☐ PA	☐ TX	☐ WV	
☐ CA	☐ GA	☐ IA	☐ MA	☐ NE	☐ NC	☐ PR	☐ UT	☐ WI	
☐ CO	☐ GU	☐ KS	☐ MI	☐ NV	☐ ND	☐ RI	☐ VT		

If you are amending your registration to stop your notice filings or reports from going to a state that currently receives them and you do not want to pay that state's notice filing or report filing fee for the coming year, your amendment must be filed before the end of the year (December 31).

SEC Reporting by *Exempt Reporting Advisers*

C. Complete this Item 2.C. only if you are reporting to the SEC as an *exempt reporting adviser.* Check all that apply. You:

☐ (1) qualify for the exemption from registration as an adviser solely to one or more venture capital funds;

☐ (2) qualify for the exemption from registration because you act solely as an adviser to *private funds* and have assets under management in the United States of less than $150 million.

If you check this box (2), complete Section 2.C. of Schedule D.

Item 3 Form of Organization

A. How are you organized?

☐ Corporation ☐ Sole Proprietorship ☐ Limited Liability Partnership (LLP)
☐ Partnership ☐ Limited Liability Company (LLC) ☐ Limited Partnership (LP)
☐ Other (specify):_____

If you are changing your response to this Item, see Part 1A Instruction 4.

B. In what month does your fiscal year end each year? _____

C. Under the laws of what state or country are you organized? _____

If you are a partnership, provide the name of the state or country under whose laws your partnership was formed. If you are a sole proprietor, provide the name of the state or country where you reside.

If you are changing your response to this Item, see Part 1A Instruction 4.

Item 4 Successions

A. Are you, at the time of this filing, succeeding to the business of a registered investment adviser?

☐ Yes ☐ No

If "yes," complete Item 4.B. and Section 4 of Schedule D.

B. Date of Succession: _____
(mm/dd/yyyy)

If you have already reported this succession on a previous Form ADV filing, do not report the succession again. Instead, check "No." See Part 1A Instruction 4.

Item 5 Information About Your Advisory Business

Responses to this Item help us understand your business, assist us in preparing for on-site examinations, and provide us with data we use when making regulatory policy. Part 1A Instruction 5.a. provides additional guidance to newly formed advisers for completing this Item 5.

Employees

If you are organized as a sole proprietorship, include yourself as an employee in your responses to Item 5.A and Items 5.B(1), (2), (3), (4) and (5). If an employee performs more than one function, you should count that employee in each of your responses to Items 5.B(1), (2), (3), (4) and (5).

A. Approximately how many *employees* do you have? Include full- and part-time *employees* but do not include any clerical workers.

_____

B.

(1) Approximately how many of the *employees* reported in 5.A. perform investment advisory functions (including research)?

_____

(2) Approximately how many of the *employees* reported in 5.A. are registered representatives of a broker-dealer?

_____

(3) Approximately how many of the *employees* reported in 5.A. are registered with one or more *state securities authorities* as *investment adviser representatives*?

_____

(4) Approximately how many of the *employees* reported in 5.A. are registered with one or more *state securities authorities* as *investment adviser representatives* for an investment adviser other than you?

_____

(5) Approximately how many of the *employees* reported in 5.A. are licensed agents of an insurance company or agency?

_____

(6) Approximately how many firms or other *persons* solicit advisory *clients* on your behalf?

_____

In your response to Item 5.B(6), do not count any of your employees and count a firm only once – do not count each of the firm's employees that solicit on your behalf.

FORM ADV Part 1A Page 8 of 20	Your Name _____ *CRD* Number _____ Date _____ SEC 801- or 802- Number _____

Clients

In your responses to Items 5.C. and 5.D. do not include as "clients" the investors in a private fund you advise, unless you have a separate advisory relationship with those investors.

C. (1) To approximately how many *clients* did you provide investment advisory services during your most recently completed fiscal year?

☐ 0 ☐ 1-10 ☐ 11-25 ☐ 26-100

If more than 100, how many? _____ (round to the nearest 100)

(2) Approximately what percentage of your *clients* are non-*United States persons*? _____%

D. What types of *clients* do you have? Indicate the approximate percentage that each type of *client* comprises of your total number of *clients*. Also indicate the approximate amount of your regulatory assets under management (reported in Item 5.F. below) attributable to each type of *client*.

	None	Up to 10%	11-25%	26-50%	51-75%	76-99%	100%	Amount of AUM
(1) Individuals (other than *high net worth individuals*)	☐	☐	☐	☐	☐	☐	☐	_____
(2) *High net worth individuals*	☐	☐	☐	☐	☐	☐	☐	_____
(3) Banking or thrift institutions	☐	☐	☐	☐	☐	☐	☐	_____
(4) Investment companies	☐	☐	☐	☐	☐	☐	☐	_____
(5) Business development companies	☐	☐	☐	☐	☐	☐	☐	_____
(6) Pooled investment vehicles	☐	☐	☐	☐	☐	☐	☐	_____
(7) (a) Pension and profit sharing plans subject to ERISA (but not the plan participants)	☐	☐	☐	☐	☐	☐	☐	_____
(b) Other pension and profit sharing plans (but not the plan participants)	☐	☐	☐	☐	☐	☐	☐	_____
(8) Charitable organizations	☐	☐	☐	☐	☐	☐	☐	_____
(9) Corporations or other businesses not listed above	☐	☐	☐	☐	☐	☐	☐	_____
(10) State or municipal *government entities*	☐	☐	☐	☐	☐	☐	☐	_____
(11) Other investment advisers	☐	☐	☐	☐	☐	☐	☐	_____
(12) Insurance companies	☐	☐	☐	☐	☐	☐	☐	_____
(13) Other: _____	☐	☐	☐	☐	☐	☐	☐	_____

The category "individuals" includes trusts, estates, 401(k) plans and IRAs of individuals and their family members, but does not include businesses organized as sole proprietorships.

The category "business development companies" consists of companies that have made an election pursuant to section 54 of the Investment Company Act of 1940.

Unless you provide advisory services pursuant to an investment advisory contract to an investment company registered under the Investment Company Act of 1940, check "None" in response to Item 5.D(4).

Compensation Arrangements

E. You are compensated for your investment advisory services by (check all that apply):

- ☐ (1) A percentage of assets under your management
- ☐ (2) Hourly charges
- ☐ (3) Subscription fees (for a newsletter or periodical)
- ☐ (4) Fixed fees (other than subscription fees)
- ☐ (5) Commissions
- ☐ (6) *Performance-based fees*
- ☐ (7) Other (specify): _____

Regulatory Assets Under Management

F. (1) Do you provide continuous and regular supervisory or management services to securities portfolios? ☐ Yes ☐ No

(2) If yes, what is the amount of your regulatory assets under management and total number of accounts?

	U.S. Dollar Amount	Total Number of Accounts
Discretionary:	(a) $_____.00	(d) _____
Non-Discretionary:	(b) $_____.00	(e) _____
Total:	(c) $_____.00	(f) _____

Part 1A Instruction 5.b. explains how to calculate your regulatory assets under management. You must follow these instructions carefully when completing this Item.

Advisory Activities

G. What type(s) of advisory services do you provide? Check all that apply.

- ☐ (1) Financial planning services
- ☐ (2) Portfolio management for individuals and/or small businesses
- ☐ (3) Portfolio management for investment companies
- ☐ (4) Portfolio management for pooled investment vehicles
- ☐ (5) Portfolio management for businesses or institutional *clients* (other than pooled investment vehicles and registered investment companies)
- ☐ (6) Pension consulting services
- ☐ (7) Selection of other advisers
- ☐ (8) Publication of periodicals or newsletters
- ☐ (9) Security ratings or pricing services
- ☐ (10) Market timing services
- ☐ (11) Educational seminars/workshops
- ☐ (12) Other (specify): _____

Do not check Item 5.G(3) unless you provide advisory services pursuant to an investment advisory contract to an investment company registered under the Investment Company Act of 1940. If you check Item 5.G(3), report the 811 number of the investment company or investment companies to which you provide advice in Section 5.G. of Schedule D.

FORM ADV Part 1A Page 10 of 20	Your Name _____ *CRD* Number _____ Date _____ SEC 801- or 802- Number _____

H. If you provide financial planning services, to how many *clients* did you provide these services during your last fiscal year?

☐ 0 ☐ 1-10 ☐ 11-25 ☐ 26-50 ☐ 51-100 ☐ 101-250 ☐ 251 – 500
☐ More than 500 If more than 500, how many? _____ (round to the nearest 500)

In your responses to this Item 5.H., do not include as "clients" the investors in a private fund you advise, unless you have a separate advisory relationship with those investors.

I. If you participate in a *wrap fee program*, do you (check all that apply):

☐ (1) *sponsor* the *wrap fee program*?
☐ (2) act as a portfolio manager for the *wrap fee program*?

If you are a portfolio manager for a wrap fee program, list the names of the programs and their sponsors in Section 5.I(2) of Schedule D.

If your involvement in a wrap fee program is limited to recommending wrap fee programs to your clients, or you advise a mutual fund that is offered through a wrap fee program, do not check either Item 5.I(1) or 5.I(2).

J. During the previous fiscal year, about what type(s) of investments did you provide advice? Check all that apply.

- ☐ (1) equity securities
  - ☐ (a) domestic issuers
  - ☐ (b) foreign issuers
  - ☐ (c) preferred stock
  - ☐ (d) private investment in public equities (PIPEs)
- ☐ (2) warrants
- ☐ (3) securitized products
  - ☐ (a) ABS (asset-backed securities)
  - ☐ (b) CLOs (collateralized loan obligations)
  - ☐ (c) CDOs (collateralized debt obligations)
  - ☐ (d) CMOs (collateralized mortgage obligations)
  - ☐ (e) CBOs (collateralized bond obligations)
- ☐ (4) swaps
  - ☐ (a) single name CDS (credit default swaps)
  - ☐ (b) other CDS (*e.g.*, basket, index, funded, loan only, etc.)
  - ☐ (c) security-based swaps
  - ☐ (d) commodity-based swaps
  - ☐ (e) swaptions
- ☐ (5) commercial paper
- ☐ (6) bank loan participations
- ☐ (7) corporate debt securities (other than commercial paper)
  - ☐ (a) investment grade
  - ☐ (b) high-yield
- ☐ (8) certificates of deposit
- ☐ (9) repurchase agreements

- ☐ (10) registered investment company securities
  - ☐ (a) variable life insurance
  - ☐ (b) variable annuities
  - ☐ (c) open-end funds (other than exchange-traded funds)
  - ☐ (d) closed-end funds
  - ☐ (e) ETFs (exchange-traded funds)
- ☐ (11) business development company securities
- ☐ (12) pooled investment vehicle securities
- ☐ (13) municipal securities
- ☐ (14) US government securities
- ☐ (15) option contracts
  - ☐ (a) securities-based
  - ☐ (b) commodities-based
- ☐ (16) futures contracts
  - ☐ (a) securities-based
  - ☐ (b) commodities-based
- ☐ (17) forward contracts
- ☐ (18) interests in entities that primarily invest in
  - ☐ (a) real estate
  - ☐ (b) oil and gas interest
  - ☐ (c) other commodities
- ☐ (19) real estate
- ☐ (20) any other type of investment that constitutes more than 10% of your total regulatory assets under management (calculated in response to Item 5.F.(2)(c))
  (please explain) _____

Item 6 Other Business Activities

In this Item, we request information about your other business activities.

A. You are actively engaged in business as a (check all that apply):

- ☐ (1) Broker-dealer
- ☐ (2) Registered representative of a broker-dealer
- ☐ (3) Commodity pool operator or commodity trading advisor (whether registered or exempt from registration)
- ☐ (4) Futures commission merchant
- ☐ (5) Real estate broker, dealer, or agent
- ☐ (6) Insurance broker or agent
- ☐ (7) Bank (including a separately identifiable department or division of a bank)
- ☐ (8) Trust company
- ☐ (9) Registered municipal advisor
- ☐ (10) Registered security-based swap dealer
- ☐ (11) Major security-based swap participant
- ☐ (12) Other financial product salesperson (specify): _____
- ☐ (13) Accountant or accounting firm
- ☐ (14) Lawyer or law firm

If you engage in other business using a name that is different from the names reported in Items 1.A. or 1.B, complete Section 6.A. of Schedule D.

B. (1) Are you actively engaged in any other business not listed in Item 6.A. (other than giving investment advice)? ☐ Yes ☐ No

(2) If yes, is this other business your primary business? ☐ Yes ☐ No

If "yes," describe this other business on Section 6.B. of Schedule D and if you engage in this business under a different name, provide that name.

C. Do you sell products or provide services other than investment advice to your advisory *clients*?
☐ Yes ☐ No

Item 7 Financial Industry Affiliations and *Private Fund* Reporting

In this Item, we request information about your financial industry affiliations and activities. This information identifies areas in which conflicts of interest may occur between you and your *clients*.

Item 7 requires you to provide information about you and your *related persons*, including foreign affiliates. Your *related persons* are all of your *advisory affiliates* and any *person* that is under common *control* with you.

A. You have a *related person* that is a (check all that apply):

☐ (1) broker-dealer, municipal securities dealer, or government securities broker or dealer
☐ (2) other investment adviser (including financial planners)
☐ (3) registered municipal advisor
☐ (4) registered security-based swap dealer
☐ (5) major security-based swap participant
☐ (6) commodity pool operator or commodity trading advisor (whether registered or exempt from registration)
☐ (7) futures commission merchant
☐ (8) banking or thrift institution
☐ (9) trust company
☐ (10) accountant or accounting firm
☐ (11) lawyer or law firm
☐ (12) insurance company or agency
☐ (13) pension consultant
☐ (14) real estate broker or dealer
☐ (15) sponsor or syndicator of limited partnerships (or equivalent), excluding pooled investment vehicles
☐ (16) sponsor, general partner, managing member (or equivalent) of pooled investment vehicles

For each related person, including foreign affiliates, complete Section 7.A. of Schedule D.

B. (1) Are you an adviser to any *private fund*? ☐ Yes ☐ No

If "yes," for each private fund, complete Section 7.B.1. of Schedule D. If another adviser reports this information with respect to any such private fund in Section 7.B.1. of Schedule D of its Form ADV (e.g., if you are a subadviser), do not complete Section 7.B.1. of Schedule D with respect to that private fund. You must, instead, complete Section 7.B.2. of Schedule D.

In either case, if you seek to preserve the anonymity of a private fund client by maintaining its identity in your books and records in numerical or alphabetical code, or similar designation, pursuant to rule 204-2(d), you may identify the private fund in section 7.B.1. or 7.B.2. of Schedule D using the same code or designation.

Item 8 Participation or Interest in *Client* Transactions

In this Item, we request information about your participation and interest in your *clients'* transactions. This information identifies additional areas in which conflicts of interest may occur between you and your *clients*.

Like Item 7, Item 8 requires you to provide information about you and your *related persons*, including foreign affiliates.

Proprietary Interest in *Client* Transactions

A. Do you or any *related person*:	Yes	No
(1) buy securities for yourself from advisory *clients*, or sell securities you own to advisory *clients* (principal transactions)?	☐	☐
(2) buy or sell for yourself securities (other than shares of mutual funds) that you also recommend to advisory *clients*?	☐	☐
(3) recommend securities (or other investment products) to advisory *clients* in which you or any *related person* has some other proprietary (ownership) interest (other than those mentioned in Items 8.A.(1) or (2))?	☐	☐

Sales Interest in *Client* Transactions

B. Do you or any *related person*:	Yes	No
(1) as a broker-dealer or registered representative of a broker-dealer, execute securities trades for brokerage customers in which advisory *client* securities are sold to or bought from the brokerage customer (agency cross transactions)?	☐	☐
(2) recommend purchase of securities to advisory *clients* for which you or any *related person* serves as underwriter, general or managing partner, or purchaser representative?	☐	☐
(3) recommend purchase or sale of securities to advisory *clients* for which you or any *related person* has any other sales interest (other than the receipt of sales commissions as a broker or registered representative of a broker-dealer)?	☐	☐

Investment or Brokerage Discretion

C. Do you or any *related person* have *discretionary authority* to determine the:	Yes	No
(1) securities to be bought or sold for a *client's* account?	☐	☐
(2) amount of securities to be bought or sold for a *client's* account?	☐	☐
(3) broker or dealer to be used for a purchase or sale of securities for a *client's* account?	☐	☐
(4) commission rates to be paid to a broker or dealer for a *client's* securities transactions?	☐	☐

		Yes	No
D.	If you answer "yes" to C.(3) above, are any of the brokers or dealers *related persons*?	☐	☐
E.	Do you or any *related person* recommend brokers or dealers to *clients*?	☐	☐
F.	If you answer "yes" to E above, are any of the brokers or dealers *related persons*?	☐	☐
G. (1)	Do you or any *related person* receive research or other products or services other than execution from a broker-dealer or a third party ("soft dollar benefits") in connection with *client* securities transactions?	☐	☐
(2)	If "yes" to G.(1) above, are all the "soft dollar benefits" you or any *related persons* receive eligible "research or brokerage services" under section 28(e) of the Securities Exchange Act of 1934?	☐	☐
H.	Do you or any *related person*, directly or indirectly, compensate any *person* for *client* referrals?	☐	☐
I.	Do you or any *related person*, directly or indirectly, receive compensation from any *person* for *client* referrals?	☐	☐

In responding to Items 8.H and 8.I., consider all cash and non-cash compensation that you or a related person gave to (in answering Item 8.H) or received from (in answering Item 8.I) any person in exchange for client referrals, including any bonus that is based, at least in part, on the number or amount of client referrals.

Item 9 Custody

In this Item, we ask you whether you or a *related person* has *custody* of *client* assets and about your custodial practices.

		Yes	No
A. (1)	Do you have *custody* of any advisory *clients'*:		
(a)	cash or bank accounts?	☐	☐
(b)	securities?	☐	☐

If you are registering or registered with the SEC, answer "No" to Item 9.A.(1)(a) and (b) if you have custody solely because (i) you deduct your advisory fees directly from your clients' accounts, or (ii) a related person maintains client funds or securities as a qualified custodian but you have overcome the presumption that you are not operationally independent (pursuant to Advisers Act rule 206(4)(2)-(d)(5)) from the related person.

(2) If you checked "yes" to Item 9.A.(1)(a) or (b), what is the amount of *client* funds and securities and total number of *clients* for which you have *custody*:

U.S. Dollar Amount	Total Number of *Clients*
(a) $_____	(b) _____

If your related person serves as qualified custodian of client assets, do not include the amount of those assets and the number of those clients in your response to Item 9.A.(2). Instead, include that information in your response to Item 9.B.(2).

B. (1) Do any of your *related persons* have *custody* of any of your advisory *clients'*:

	Yes	No
(a) cash or bank accounts?	☐	☐
(b) securities?	☐	☐

You are required to answer this item regardless of how you answered Item 9.A.(1)(a) or (b).

(2) If you checked "yes" to Item 9.B.(1)(a) or (b), what is the amount of *client* funds and securities and total number of *clients* for which your *related persons* have *custody*:

U.S. Dollar Amount	Total Number of *Clients*
(a) $_____	(b) _____

C. If you or your *related persons* have *custody* of *client* funds or securities, check all the following that apply:

☐ (1) A qualified custodian(s) sends account statements at least quarterly to the investors in the pooled investment vehicle(s) you manage.

☐ (2) An *independent public accountant* audits annually the pooled investment vehicle(s) that you manage and the audited financial statements are distributed to the investors in the pools.

☐ (3) An *independent public accountant* conducts an annual surprise examination of *client* funds and securities.

☐ (4) An *independent public accountant* prepares an internal control report with respect to custodial services when you or your *related persons* are qualified custodians for *client* funds and securities.

If you checked Item 9.C.(2), C.(3) or C.(4), list in Section 9.C. of Schedule D the accountants that are engaged to perform the audit or examination or prepare an internal control report. (If you checked Item 9.C.(2), you do not have to list auditor information in Section 9.C. of Schedule D if you already provided this information with respect to the private funds you advise in Section 7.B.1 of Schedule D).

D. Do you or your *related persons* act as qualified custodians for your *clients* in connection with advisory services you provide to *clients*?

	Yes	No
(1) you act as a qualified custodian	☐	☐
(2) your *related persons* act as qualified custodians	☐	☐

If you checked "yes" to Item 9.D.(2), list in Section 9.D. of Schedule D all your related persons that are foreign financial institutions that act as qualified custodians for your clients in connection with advisory services you provide to clients. (You do not need to provide this information about private fund custodians in Section 9.D. of Schedule D if you already provided it in Section 7.B.1 of Schedule D. Related person broker-dealers, futures commission merchants and banks that act as qualified custodians should be identified in Section 7.A. of Schedule D.).

E. If you are filing your *annual updating amendment* and you were subject to a surprise examination by an *independent public accountant* during your last fiscal year, provide the date (MM/YYYY) the examination commenced: _____

F. How many persons, including, but not limited to, you and your *related persons*, act as qualified custodians for your *clients* in connection with advisory services you provide to *clients*? _____

Item 10 Control Persons

In this Item, we ask you to identify every *person* that, directly or indirectly, *controls* you.

If you are submitting an initial application or report, you must complete Schedule A and Schedule B. Schedule A asks for information about your direct owners and executive officers. Schedule B asks for information about your indirect owners. If this is an amendment and you are updating information you reported on either Schedule A or Schedule B (or both) that you filed with your initial application or report, you must complete Schedule C.

A. Does any *person* not named in Item 1.A. or Schedules A, B, or C, directly or indirectly, *control* your management or policies? ☐ Yes ☐ No

If yes, complete Section 10.A. of Schedule D.

B. If any *person* named in Schedules A, B, or C or in Section 10. A. of Schedule D is a public reporting company under Sections 12 or 15(d) of the Securities Exchange Act of 1934, please complete Section 10.B. of Schedule D.

Item 11 Disclosure Information

In this Item, we ask for information about your disciplinary history and the disciplinary history of all your *advisory affiliates*. We use this information to determine whether to grant your application for registration, to decide whether to revoke your registration or to place limitations on your activities as an investment adviser, and to identify potential problem areas to focus on during our on-site examinations. One event may result in "yes" answers to more than one of the questions below.

Your *advisory affiliates* are: (1) all of your current *employees* (other than *employees* performing only clerical, administrative, support or similar functions); (2) all of your officers, partners, or directors (or any *person* performing similar functions); and (3) all *persons* directly or indirectly *controlling* you or *controlled* by you. If you are a

"separately identifiable department or division" (SID) of a bank, see the Glossary of Terms to determine who your *advisory affiliates* are.

If you are registered or registering with the SEC or if you are an exempt reporting adviser, you may limit your disclosure of any event listed in Item 11 to ten years following the date of the event. If you are registered or registering with a state, you must respond to the questions as posed; you may, therefore, limit your disclosure to ten years following the date of an event only in responding to Items 11.A(1), 11.A(2), 11.B(1), 11.B(2), 11.D(4), and 11.H(1)(a). For purposes of calculating this ten-year period, the date of an event is the date the final order, judgment, or decree was entered, or the date any rights of appeal from preliminary orders, judgments, or decrees lapsed.

You must complete the appropriate Disclosure Reporting Page ("DRP") for "yes" answers to the questions in this Item 11.

	Yes	No
Do any of the events below involve you or any of your *supervised persons?*	☐	☐

For "yes" answers to the following questions, complete a Criminal Action DRP:

	Yes	No
A. In the past ten years, have you or any *advisory affiliate*:		
(1) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic, foreign, or military court to any *felony*?	☐	☐
(2) been *charged* with any *felony*?	☐	☐

If you are registered or registering with the SEC, or if you are reporting as an exempt reporting adviser, you may limit your response to Item 11.A(2) to charges that are currently pending.

B. In the past ten years, have you or any *advisory affiliate*:		
(1) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic, foreign, or military court to a *misdemeanor* involving: investments or an *investment-related* business, or any fraud, false statements, or omissions, wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion, or a conspiracy to commit any of these offenses?	☐	☐
(2) been *charged* with a *misdemeanor* listed in Item 11.B(1)?	☐	☐

If you are registered or registering with the SEC, or if you are reporting as an exempt reporting adviser, you may limit your response to Item 11.B(2) to charges that are currently pending.

For "yes" answers to the following questions, complete a Regulatory Action DRP:

	Yes	No
C. Has the SEC or the Commodity Futures Trading Commission (CFTC) ever:		
(1) *found* you or any *advisory affiliate* to have made a false statement or omission?	☐	☐
(2) *found* you or any *advisory affiliate* to have been *involved* in a violation of SEC or CFTC regulations or statutes?	☐	☐

(3) *found* you or any *advisory affiliate* to have been a cause of an *investment-related* business having its authorization to do business denied, suspended, revoked, or restricted? ☐ ☐

(4) entered an *order* against you or any *advisory affiliate* in connection with *investment-related* activity? ☐ ☐

(5) imposed a civil money penalty on you or any *advisory affiliate*, or *ordered* you or any *advisory affiliate* to cease and desist from any activity? ☐ ☐

D. Has any other federal regulatory agency, any state regulatory agency, or any *foreign financial regulatory authority*:

(1) ever *found* you or any *advisory affiliate* to have made a false statement or omission, or been dishonest, unfair, or unethical? ☐ ☐

(2) ever *found* you or any *advisory affiliate* to have been *involved* in a violation of *investment-related* regulations or statutes? ☐ ☐

Yes No

(3) ever *found* you or any *advisory affiliate* to have been a cause of an *investment-related* business having its authorization to do business denied, suspended, revoked, or restricted? ☐ ☐

(4) in the past ten years, entered an *order* against you or any *advisory affiliate* in connection with an *investment-related* activity? ☐ ☐

(5) ever denied, suspended, or revoked your or any *advisory affiliate's* registration or license, or otherwise prevented you or any *advisory affiliate*, by *order*, from associating with an *investment-related* business or restricted your or any *advisory affiliate's* activity? ☐ ☐

E. Has any *self-regulatory organization* or commodities exchange ever:

(1) *found* you or any *advisory affiliate* to have made a false statement or omission? ☐ ☐

(2) *found* you or any *advisory affiliate* to have been *involved* in a violation of its rules (other than a violation designated as a "*minor rule violation*" under a plan approved by the SEC)? ☐ ☐

(3) *found* you or any *advisory affiliate* to have been the cause of an *investment-related* business having its authorization to do business denied, suspended, revoked, or restricted? ☐ ☐

(4) disciplined you or any *advisory affiliate* by expelling or suspending you or the *advisory affiliate* from membership, barring or suspending you or the *advisory affiliate* from association with other members, or otherwise restricting your or the *advisory affiliate's* activities? ☐ ☐

F. Has an authorization to act as an attorney, accountant, or federal contractor granted to you or any *advisory affiliate* ever been revoked or suspended? ☐ ☐

G. Are you or any *advisory affiliate* now the subject of any regulatory *proceeding* that could result in a "yes" answer to any part of Item 11.C., 11.D., or 11.E.? ☐ ☐

For "yes" answers to the following questions, complete a Civil Judicial Action DRP:

	Yes	No
H. (1) Has any domestic or foreign court:		
(a) in the past ten years, *enjoined* you or any *advisory affiliate* in connection with any *investment-related* activity?	☐	☐
(b) ever *found* that you or any *advisory affiliate* were *involved* in a violation of *investment-related* statutes or regulations?	☐	☐
(c) ever dismissed, pursuant to a settlement agreement, an *investment-related* civil action brought against you or any *advisory affiliate* by a state or *foreign financial regulatory authority*?	☐	☐
(2) Are you or any *advisory affiliate* now the subject of any civil *proceeding* that could result in a "yes" answer to any part of Item 11.H(1)?	☐	☐

Item 12 Small Businesses

The SEC is required by the Regulatory Flexibility Act to consider the effect of its regulations on small entities. In order to do this, we need to determine whether you meet the definition of "small business" or "small organization" under rule 0-7.

Answer this Item 12 only if you are registered or registering with the SEC and you indicated in response to Item 5.F.(2)(c) that you have regulatory assets under management of less than $25 million. You are not required to answer this Item 12 if you are filing for initial registration as a state adviser, amending a current state registration, or switching from SEC to state registration.

For purposes of this Item 12 only:

- Total Assets refers to the total assets of a firm, rather than the assets managed on behalf of *clients*. In determining your or another *person's* total assets, you may use the total assets shown on a current balance sheet (but use total assets reported on a consolidated balance sheet with subsidiaries included, if that amount is larger).

- *Control* means the power to direct or cause the direction of the management or policies of a *person*, whether through ownership of securities, by contract, or otherwise. Any *person* that directly or indirectly has the right to vote 25 percent or more of the voting securities, or is entitled to 25 percent or more of the profits, of another *person* is presumed to *control* the other *person*.

	Yes	No
A. Did you have total assets of $5 million or more on the last day of your most recent fiscal year?	☐	☐

If "yes," you do not need to answer Items 12.B. and 12.C.

FORM ADV Part 1A Page 20 of 20	Your Name _____ *CRD* Number _____ Date _____ SEC 801- or 802- Number _____

B. Do you:

(1) *control* another investment adviser that had regulatory assets under management (calculated in response to Item 5.F.(2)(c) of Form ADV) $25 million or more on the last day of its most recent fiscal year? ☐ ☐

(2) *control* another *person* (other than a natural person) that had total assets of $5 million or more on the last day of its most recent fiscal year? ☐ ☐

C. Are you:

(1) *controlled* by or under common *control* with another investment adviser that had regulatory assets under management (calculated in response to Item 5.F.(2)(c) of Form ADV) of $25 million or more on the last day of its most recent fiscal year? ☐ ☐

(2) *controlled* by or under common *control* with another *person* (other than a natural person) that had total assets of $5 million or more on the last day of its most recent fiscal year? ☐ ☐

FORM ADV
Schedule A

Your Name: _____ SEC File No.: _____

Date: _____ *CRD* No.: _____

Direct Owners and Executive Officers

1. Complete Schedule A only if you are submitting an initial application or report. Schedule A asks for information about your direct owners and executive officers. Use Schedule C to amend this information.

2. Direct Owners and Executive Officers. List below the names of:

   (a) each Chief Executive Officer, Chief Financial Officer, Chief Operations Officer, Chief Legal Officer, Chief Compliance Officer (Chief Compliance Officer is required if you are registered or applying for registration and cannot be more than one individual), director and any other individuals with similar status or functions;

   (b) if you are organized as a corporation, each shareholder that is a direct owner of 5% or more of a class of your voting securities, unless you are a public reporting company (a company subject to Section 12 or 15(d) of the Exchange Act);

   Direct owners include any *person* that owns, beneficially owns, has the right to vote, or has the power to sell or direct the sale of, 5% or more of a class of your voting securities. For purposes of this Schedule, a *person* beneficially owns any securities: (i) owned by his/her child, stepchild, grandchild, parent, stepparent, grandparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law, sharing the same residence; or (ii) that he/she has the right to acquire, within 60 days, through the exercise of any option, warrant, or right to purchase the security.

   (c) if you are organized as a partnership, all general partners and those limited and special partners that have the right to receive upon dissolution, or have contributed, 5% or more of your capital;

   (d) in the case of a trust that directly owns 5% or more of a class of your voting securities, or that has the right to receive upon dissolution, or has contributed, 5% or more of your capital, the trust and each trustee; and

   (e) if you are organized as a limited liability company ("LLC"), (i) those members that have the right to receive upon dissolution, or have contributed, 5% or more of your capital, and (ii) if managed by elected managers, all elected managers.

3. Do you have any indirect owners to be reported on Schedule B? ☐ Yes ☐ No

4. In the DE/FE/I column below, enter "DE" if the owner is a domestic entity, "FE" if the owner is an entity incorporated or domiciled in a foreign country, or "I" if the owner or executive officer is an individual.

5. Complete the Title or Status column by entering board/management titles; status as partner, trustee, sole proprietor, elected manager, shareholder, or member; and for shareholders or members, the class of securities owned (if more than one is issued).

6. Ownership codes are:
   NA - less than 5%
   A - 5% but less than 10%
   B - 10% but less than 25%
   C - 25% but less than 50%
   D - 50% but less than 75%
   E - 75% or more

7. (a) In the *Control Person* column, enter "Yes" if the *person* has *control* as defined in the Glossary of Terms to Form ADV, and enter "No" if the *person* does not have *control*. Note that under this definition, most executive officers and all 25% owners, general partners, elected managers, and trustees are *control persons*.
   (b) In the PR column, enter "PR" if the owner is a public reporting company under Sections 12 or 15(d) of the Exchange Act.
   (c) Complete each column.

FULL LEGAL NAME (Individuals: Last Name, First Name, Middle Name)	DE/FE/I	Title or Status	Date Title or Status Acquired		Ownership Code	*Control Person*		*CRD* No. If None: S.S. No. and Date of Birth, IRS Tax No., or Employer ID No.
			MM	YYYY			PR	

FORM ADV
Schedule B

Your Name: _____ SEC File No.: _____

Date: _____ *CRD* No.: _____

Indirect Owners

1. Complete Schedule B only if you are submitting an initial application or report. Schedule B asks for information about your indirect owners; you must first complete Schedule A, which asks for information about your direct owners. Use Schedule C to amend this information.

2. Indirect Owners. With respect to each owner listed on Schedule A (except individual owners), list below:

   (a) in the case of an owner that is a corporation, each of its shareholders that beneficially owns, has the right to vote, or has the power to sell or direct the sale of, 25% or more of a class of a voting security of that corporation;

   For purposes of this Schedule, a *person* beneficially owns any securities: (i) owned by his/her child, stepchild, grandchild, parent, stepparent, grandparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law, sharing the same residence; or (ii) that he/she has the right to acquire, within 60 days, through the exercise of any option, warrant, or right to purchase the security.

   (b) in the case of an owner that is a partnership, all general partners and those limited and special partners that have the right to receive upon dissolution, or have contributed, 25% or more of the partnership's capital;

   (c) in the case of an owner that is a trust, the trust and each trustee; and

   (d) in the case of an owner that is a limited liability company ("LLC"), (i) those members that have the right to receive upon dissolution, or have contributed, 25% or more of the LLC's capital, and (ii) if managed by elected managers, all elected managers.

3. Continue up the chain of ownership listing all 25% owners at each level. Once a public reporting company (a company subject to Sections 12 or 15(d) of the Exchange Act) is reached, no further ownership information need be given.

4. In the DE/FE/I column below, enter "DE" if the owner is a domestic entity, "FE" if the owner is an entity incorporated or domiciled in a foreign country, or "I" if the owner is an individual.

5. Complete the Status column by entering the owner's status as partner, trustee, elected manager, shareholder, or member; and for shareholders or members, the class of securities owned (if more than one is issued).

6. Ownership codes are: C - 25% but less than 50% D - 50% but less than 75% E - 75% or more F - Other (general partner, trustee, or elected manager)

7. (a) In the *Control Person* column, enter "Yes" if the *person* has *control* as defined in the Glossary of Terms to Form ADV, and enter "No" if the *person* does not have *control*. Note that under this definition, most executive officers and all 25% owners, general partners, elected managers, and trustees are *control persons*.
   (b) In the PR column, enter "PR" if the owner is a public reporting company under Sections 12 or 15(d) of the Exchange Act.
   (c) Complete each column.

FULL LEGAL NAME (Individuals: Last Name, First Name, Middle Name)	DE/FE/I	Entity in Which Interest is Owned	Status	Date Status Acquired		Ownership Code		*Control Person*	*CRD* No. If None: S.S. No. and Date of Birth, IRS Tax No. or Employer ID No.
				MM	YYYY		PR		

FORM ADV Schedule C	Your Name: _____ SEC File No.: _____ Date: _____ *CRD* No.: _____

Amendments to Schedules A and B

1. Use Schedule C only to amend information requested on either Schedule A or Schedule B. Refer to Schedule A and Schedule B for specific instructions for completing this Schedule C. Complete each column.

2. In the Type of Amendment column, indicate "A" (addition), "D" (deletion), or "C" (change in information about the same *person*).

3. Ownership codes are:
   NA - less than 5%
   A - 5% but less than 10%
   B - 10% but less than 25%
   C - 25% but less than 50%
   D - 50% but less than 75%
   E - 75% or more
   G - Other (general partner, trustee, or elected member)

4. List below all changes to Schedule A (Direct Owners and Executive Officers):

FULL LEGAL NAME (Individuals: Last Name, First Name, Middle Name)	DE/FE/I	Type of Amend-ment	Title or Status	Date Title or Status Acquired		Owner-ship Code	*Control Person*	*CRD* No. If None: S.S. No. and Date of Birth, IRS Tax No. or Employer ID No.
				MM	YYYY		PR	

5. List below all changes to Schedule B (Indirect Owners):

FULL LEGAL NAME (Individuals: Last Name, First Name, Middle Name)	DE/FE/I	Type of Amend-ment	Entity in Which Interest is Owned	Status	Date Status Acquired		Owner-ship Code	*Control Person*		*CRD* No. If None: S.S. No. and Date of Birth, IRS Tax No., or Employer ID No.
					MM	YYYY			PR	

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Certain items in Part 1A of Form ADV require additional information on Schedule D. Use this Schedule D to report details for items listed below. Report only new information or changes/updates to previously submitted information. Do not repeat previously submitted information.

This is an ☐ INITIAL or ☐ AMENDED Schedule D

SECTION 1.B. Other Business Names

List your other business names and the jurisdictions in which you use them. You must complete a separate Schedule D Section 1.B. for each business name.

Check only one box: ☐ Add ☐ Delete ☐ Amend

Name _____ Jurisdictions _____

SECTION 1.F. Other Offices

Complete the following information for each office, other than your *principal office and place of business*, at which you conduct investment advisory business. You must complete a separate Schedule D Section 1.F. for each location. If you are applying for SEC registration, if you are registered only with the SEC, or if you are an *exempt reporting adviser*, list only the largest five offices (in terms of numbers of *employees*).

Check only one box: ☐ Add ☐ Delete

_____
(number and street)

_____
(city) (state/country) (zip+4/postal code)

If this address is a private residence, check this box: ☐

_____ _____
(area code) (telephone number) (area code) (facsimile number)

SECTION 1.I. Website Addresses

List your website addresses. You must complete a separate Schedule D Section 1.I. for each website address.

Check only one box: ☐ Add ☐ Delete

Website Address: _____

SECTION 1.L. Location of Books and Records

Complete the following information for each location at which you keep your books and records, other than your *principal office and place of business*. You must complete a separate Schedule D Section 1.L. for each location.

Check only one box: ☐ Add ☐ Delete ☐ Amend

Name of entity where books and records are kept: _____

_____
(number and street)

_____
(city) (state/country) (zip+4/postal code)

If this address is a private residence, check this box: ☐

_____ _____
(area code) (telephone number) (area code) (facsimile number)

This is (check one): ☐ one of your branch offices or affiliates.
☐ a third-party unaffiliated recordkeeper.
☐ other.

Briefly describe the books and records kept at this location. _____

_____

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Certain items in Part 1A of Form ADV require additional information on Schedule D. Use this Schedule D to report details for items listed below. Report only new information or changes/updates to previously submitted information. Do not repeat previously submitted information.

This is an ☐ INITIAL or ☐ AMENDED Schedule D

SECTION 1.M. Registration with *Foreign Financial Regulatory Authorities*

List the name and country, in English, of each *foreign financial regulatory authority* with which you are registered. You must complete a separate Schedule D Section 1.M. for each *foreign financial regulatory authority* with whom you are registered.

Check only one box: ☐ Add ☐ Delete

Name of *Foreign Financial Regulatory Authority* _____
Name of Country _____

SECTION 2.A.(8) Related Adviser

If you are relying on the exemption in rule 203A-2(b) from the prohibition on registration because you *control*, are *controlled* by, or are under common *control* with an investment adviser that is registered with the SEC and your *principal office and place of business* is the same as that of the registered adviser, provide the following information:

Name of Registered Investment Adviser _____
CRD Number of Registered Investment Adviser _____
SEC Number of Registered Investment Adviser 801-_____

SECTION 2.A.(9) Newly Formed Adviser

If you are relying on rule 203A-2(c), the newly formed adviser exemption from the prohibition on registration, you are required to make certain representations about your eligibility for SEC registration. By checking the appropriate boxes, you will be deemed to have made the required representations. You must make both of these representations:

☐ I am not registered or required to be registered with the SEC or a *state securities authority* and I have a reasonable expectation that I will be eligible to register with the SEC within 120 days after the date my registration with the SEC becomes effective.

☐ I undertake to withdraw from SEC registration if, on the 120th day after my registration with the SEC becomes effective, I would be prohibited by Section 203A(a) of the Advisers Act from registering with the SEC.

SECTION 2.A.(10) Multi-State Adviser

If you are relying on rule 203A-2(d), the multi-state adviser exemption from the prohibition on registration, you are required to make certain representations about your eligibility for SEC registration. By checking the appropriate boxes, you will be deemed to have made the required representations.

If you are applying for registration as an investment adviser with the SEC, you must make both of these representations:

☐ I have reviewed the applicable state and federal laws and have concluded that I am required by the laws of 15 or more states to register as an investment adviser with the *state securities authorities* in those states.

☐ I undertake to withdraw from SEC registration if I file an amendment to this registration indicating that I would be required by the laws of fewer than 15 states to register as an investment adviser with the *state securities authorities* of those states.

If you are submitting your *annual updating amendment*, you must make this representation:

☐ Within 90 days prior to the date of filing this amendment, I have reviewed the applicable state and federal laws and have concluded that I am required by the laws of at least 15 states to register as an investment adviser with the *state securities authorities* in those states.

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Certain items in Part 1A of Form ADV require additional information on Schedule D. Use this Schedule D to report details for items listed below. Report only new information or changes/updates to previously submitted information. Do not repeat previously submitted information.

This is an ☐ INITIAL or ☐ AMENDED Schedule D

SECTION 2.A.(12) SEC Exemptive *Order*

If you are relying upon an SEC *order* exempting you from the prohibition on registration, provide the following information:

Application Number: 803-_____ Date of *order*: _____
(mm/dd/yyyy)

SECTION 2.C. *Private Fund* Assets

If you check Item 2.C.(2), what is the amount of the *private fund* assets that you manage? _____.

NOTE: "*Private fund* assets" has the same meaning here as it has under rule 203(m)-1. If you are an investment adviser with its *principal office and place of business* outside of the United States only include *private fund* assets that you manage from a place of business in the United States.

SECTION 4 Successions

Complete the following information if you are succeeding to the business of a currently registered investment adviser. If you acquired more than one firm in the succession you are reporting on this Form ADV, you must complete a separate Schedule D Section 4 for each acquired firm. See Part 1A Instruction 4.

Name of Acquired Firm _____

Acquired Firm's SEC File No. (if any) 801- _____ Acquired Firm's *CRD* Number (if any) _____

SECTION 5.G.(3) Advisers to Registered Investment Companies

If you check Item 5.G (3), what is the SEC file number (811 number) of each of the registered investment companies to which you act as an adviser pursuant to an advisory contract? You must complete a separate Schedule D Section 5.G.(3) for each registered investment company to which you act as an adviser.

Check only one box: ☐ Add ☐ Delete

SEC File Number 811- _____

SECTION 5.I.(2) *Wrap Fee Programs*

If you are a portfolio manager for one or more *wrap fee programs*, list the name of each program and its *sponsor*. You must complete a separate Schedule D Section 5.I.(2) for each *wrap fee program* for which you are a portfolio manager.

Check only one box: ☐ Add ☐ Delete ☐ Amend

Name of *Wrap Fee Program* _____

Name of *Sponsor* _____

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Certain items in Part 1A of Form ADV require additional information on Schedule D. Use this Schedule D to report details for items listed below. Report only new information or changes/updates to previously submitted information. Do not repeat previously submitted information.

This is an ☐ INITIAL or ☐ AMENDED Schedule D

SECTION 6.A. Other Business Names

If you are actively engaged in other business using a different name, provide that name and the other line(s) of business.

Other Business Name: _____

Other line(s) of business in which you engage using this name: (check all that apply)

- ☐ (1) Broker-dealer
- ☐ (2) Registered representative of a broker-dealer
- ☐ (3) Commodity pool operator or commodity trading advisor (whether registered or exempt from registration)
- ☐ (4) Futures commission merchant
- ☐ (5) Real estate broker, dealer, or agent
- ☐ (6) Insurance broker or agent
- ☐ (7) Bank (including a separately identifiable department or division of a bank)
- ☐ (8) Trust company
- ☐ (9) Registered municipal advisor
- ☐ (10) Registered swap dealer
- ☐ (11) Other financial product salesperson (specify): _____
- ☐ (12) Accountant or accounting firm
- ☐ (13) Lawyer or law firm

SECTION 6.B. Description of Primary Business

Describe your primary business (not your investment advisory business), and if you engage in that business under a different name, provide that name: _____

SECTION 7.A. Financial Industry Affiliations

Complete a separate Schedule D Section 7.A. for each *related person* listed in Item 7.A.

Check only one box: ☐ Add ☐ Delete ☐ Amend

Legal Name of *Related Person*: _____

Primary Business Name of *Related Person*: _____

Related Person's SEC File Number (if any) (*e.g.*, 801-, 8-, 866-, 802-) _____

Related Person's CRD Number (if any): _____

Related Person is: (check all that apply)

- ☐ (1) broker-dealer, municipal securities dealer, or government securities broker or dealer
- ☐ (2) other investment adviser (including financial planners)
- ☐ (3) registered municipal advisor
- ☐ (4) registered swap dealer
- ☐ (5) commodity pool operator or commodity trading advisor (whether registered or exempt from registration)
- ☐ (6) futures commission merchant
- ☐ (7) banking or thrift institution
- ☐ (8) trust company
- ☐ (9) accountant or accounting firm

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Certain items in Part 1A of Form ADV require additional information on Schedule D. Use this Schedule D to report details for items listed below. Report only new information or changes/updates to previously submitted information. Do not repeat previously submitted information.

This is an ☐ INITIAL or ☐ AMENDED Schedule D

- ☐ (10) lawyer or law firm
- ☐ (11) insurance company or agency
- ☐ (12) pension consultant
- ☐ (13) real estate broker or dealer
- ☐ (14) sponsor or syndicator of limited partnerships
- ☐ (15) sponsor, general partner, managing member (or equivalent) of pooled investment vehicles

1. Do you *control* or are you *controlled* by the *related person*? ☐ Yes ☐ No
2. Are you and the *related person* under common *control*? ☐ Yes ☐ No
3. (a) If the *related person* is a broker-dealer, bank, or futures commission merchant, is it a qualified custodian for your *clients* in connection with advisory services you provide to *clients*? ☐ Yes ☐ No

   (b) If you are registering or registered with the SEC and you have answered "yes," have you overcome the presumption that you are not operationally independent (pursuant to rule 206(4)(2)-(d)(5)) from the *related person* broker-dealer, bank, or futures commission merchant and thus are not required to obtain a surprise examination for your *clients'* funds or securities that are maintained at the *related person*? ☐ Yes ☐ No
4. (a) If the *related person* is an investment adviser, is it exempt from registration? ☐ Yes ☐ No

   (b) If the answer is yes, under what exemption? _____
5. (a) Is the *related person* registered with a *foreign financial regulatory authority?* ☐ Yes ☐ No

   (b) If the answer is yes, list the name and country, in English, of each *foreign financial regulatory authority* with which the *related person* is registered. _____
6. Do you and the *related person* share any personnel that is your, or the *related person*'s, "access person" under the definition of rule 204A-1(e)(1) under the Advisers Act, or any information the access to which would render your, or the *related person*'s, *supervised persons* such an "access person"? ☐ Yes ☐ No

---

SECTION 7.B.1 *Private Fund* Reporting

Check only one box: ☐ Add ☐ Delete ☐ Amend

A. PRIVATE FUND

Information About the *Private Fund*

1. (a) Name of the *private fund*: _____

   (b) *Private fund* identification number: _____
2. Under the laws of what state or country is the *private fund* organized: _____
3. Name of General Partner, Manager, Trustee, or Directors (or persons serving in a similar capacity): _____
4. The *private fund* (check all that apply):

   ☐ (1) qualifies for the exclusion from the definition of investment company under section 3(c)(1) of the Investment Company Act of 1940

   ☐ (2) qualifies for the exclusion from the definition of investment company under section 3(c)(7) of the Investment Company Act of 1940

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Certain items in Part 1A of Form ADV require additional information on Schedule D. Use this Schedule D to report details for items listed below. Report only new information or changes/updates to previously submitted information. Do not repeat previously submitted information.

This is an ☐ INITIAL or ☐ AMENDED Schedule D

5. List the name and country, in English, of each *foreign financial regulatory authority* with which the *private fund* is registered.

   Check only one box: ☐ Add ☐ Delete

   English Name of *Foreign Financial Regulatory Authority* _____ Name of Country _____
   _____ _____
   _____ _____

6. (a) Is this a "master fund" in a master-feeder arrangement? ☐ Yes ☐ No

   (b) If yes, what is the name and *private fund* identification number (if any) of the feeder funds investing in this *private fund*? _____
   _____

   (c) Is this a "feeder fund" in a master-feeder arrangement? ☐ Yes ☐ No

   (d) If yes, what is the name and *private fund* identification number (if any) of the master fund in which this *private fund* invests?
   _____ _____

7. If you are filing a single Schedule D,Section 7.B.1 for a master-feeder arrangement according to the instructions to this Section 7.B.1, for each of the feeder funds answer the following questions:

   (a) Name of the *private fund*: _____

   (b) *Private fund* identification number: _____

   (c) Under the laws of what state or country is the *private fund* organized: _____

   (d) Name of General Partner, Manager, Trustee, or Directors (or persons serving in a similar capacity): _____

   (e) The *private fund* (check all that apply):

   ☐ qualifies for the exclusion from the definition of investment company under section 3(c)(1) of the Investment Company Act of 1940

   ☐ qualifies for the exclusion from the definition of investment company under section 3(c)(7) of the Investment Company Act of 1940

   (f) List the name and country, in English, of each *foreign financial regulatory authority* with which the *private fund* is registered.

   Check only one box: ☐ Add ☐ Delete

   English Name of *Foreign Financial Regulatory Authority* _____ Name of Country _____
   _____ _____
   _____ _____

   For purposes of questions 6 and 7, in a master-feeder arrangement, one or more funds ("feeder funds") invest all or substantially all of their assets in a single fund ("master fund"). A fund would also be a "feeder fund" investing in a "master fund" for purposes of this question if it issued multiple classes (or series) of shares or interests, and each class (or series) invests substantially all of its assets a single master fund.

8. (a) Is this *private fund* a "fund of funds"? ☐ Yes ☐ No

   (b) If yes, does the *private fund* invest in funds managed by you or by a *related person?* ☐ Yes ☐ No

   NOTE: For purposes of this question only, answer "yes" if the fund invests 10 percent or more of its total assets in other pooled investment vehicles, whether or not they are also *private funds*, or registered investment companies.

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Certain items in Part 1A of Form ADV require additional information on Schedule D. Use this Schedule D to report details for items listed below. Report only new information or changes/updates to previously submitted information. Do not repeat previously submitted information.

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9. During the last fiscal year, did the *private fund* invest in securities issued by investment companies registered under the Investment Company Act of 1940? ☐ Yes ☐ No

10. What type of fund best describes the *private fund*?

☐ hedge fund ☐ liquidity fund ☐ private equity fund ☐ real estate fund ☐ securitized asset fund ☐ venture capital fund

☐ Other *private fund*: _____

NOTE: For funds of funds, refer to the funds in which the *private fund* invests.

11. (a) Current gross asset value of the *private fund*: $_____

(b) Current net asset value of the *private fund*: $_____

12. Provide a summary of the current value of the *private fund*'s investments broken down by asset and liability class and categorized in the fair value hierarchy established under U.S. generally accepted accounting principles ("GAAP") (*i.e.*, Level 1, 2 or 3 measurements)

Asset Class	Level 1	Level 2	Level 3
_____	$___	$___	$___
Liability Class			
_____	$___	$___	$___

Ownership

13. Minimum investment commitment required of an investor in the *private fund*: $_____

14. Number of the *private fund*'s beneficial owners ____

15. What is the approximate percentage of the *private fund* beneficially owned by you and your *related persons*:

_____ %

16. What is the approximate percentage of the *private fund* beneficially owned (in the aggregate) by funds of funds:

_____ %

17. What is the approximate percentage of the *private fund* beneficially owned by the following groups of investors:

Individuals (including their trusts)	_____ %
Broker-Dealers	_____ %
Insurance Companies	_____ %
Registered Investment Companies	_____ %
Private Funds	_____ %
Non-profits	_____ %
Pension plans (excluding state or governmental plans)	_____ %
Banking or thrift institutions (proprietary)	_____ %
State or municipal *government entities* including governmental pension plans	_____ %
Other	_____ %

18. What is the approximate percentage of the *private fund* beneficially owned by *non-United States persons*:

_____ %

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Certain items in Part 1A of Form ADV require additional information on Schedule D. Use this Schedule D to report details for items listed below. Report only new information or changes/updates to previously submitted information. Do not repeat previously submitted information.

This is an ☐ INITIAL or ☐ AMENDED Schedule D

Your Advisory Services

19. (a) Are you a subadviser to this *private fund*? ☐ Yes ☐ No

(b) If the answer to question 19(a) is "yes," provide the name and SEC file number, if any, of the adviser of the *private fund*. If the answer to question 19(a) is "no," leave this question blank. _____

20. (a) Do any other investment advisers advise the *private fund*? ☐ Yes ☐ No

(b) If the answer to question 20(a) is "yes," provide the name and SEC file number, if any, of the other advisers to the *private fund*. If the answer to question 20(a) is "no," leave this question blank. _____ _____

21. Are your *clients* solicited to invest in the *private fund*? ☐ Yes ☐ No

22. Approximately what percentage of your *clients* has invested in the *private fund*? _____%

Private Offering

23. Does the *private fund* rely on an exemption from registration of its securities under Regulation D of the Securities Act of 1933?
☐ Yes ☐ No

24. If yes, *private fund*'s Form D file number (if any): 021-____

B. SERVICE PROVIDERS

☐ Check this box if you are filing this Form ADV through the IARD system and want the IARD system to create a new Schedule D, Section 7.B.1. with the same service provider information you have given here in Questions 25 - 29 for a new *private fund* for which you are required to complete Section 7.B.1. If you check the box, the system will pre-fill those fields for you, but you will be able to manually edit the information after it is pre-filled and before you submit your filing.

Auditors

25. (a) (1) Are the *private fund*'s financial statements subject to an annual audit? ☐ Yes ☐ No

(2) Are the financial statements prepared in accordance with U.S. GAAP? ☐ Yes ☐ No

If the answer to 25(a)(1) is "yes," respond to questions (b) – (g) below. You must complete a separate Schedule D Section 7.B.1. for each auditor.

(b) Name of the auditing firm: _____

(c) The location of the auditing firm's office responsible for the *private fund's* audit (city and country): _____

(d) Is the auditing firm an *independent public accountant*?
☐ Yes ☐ No

(e) Is the auditing firm registered with the Public Company Accounting Oversight Board? ☐ Yes ☐ No

(f) If yes to (e) above, is the auditing firm subject to regular inspection by the Public Company Accounting Oversight Board in accordance with its rules? ☐ Yes ☐ No

(g) Are the *private fund*'s audited financial statements distributed to the *private fund*'s investors? ☐ Yes ☐ No

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Certain items in Part 1A of Form ADV require additional information on Schedule D. Use this Schedule D to report details for items listed below. Report only new information or changes/updates to previously submitted information. Do not repeat previously submitted information.

This is an ☐ INITIAL or ☐ AMENDED Schedule D

Prime Broker

26. (a) Does the *private fund* use one or more prime brokers? ☐ Yes ☐ No

If the answer to 26(a) is "yes," respond to questions (b) through (e) below for each prime broker the *private fund* uses. You must complete a separate Schedule D Section 7.B.1. for each prime broker.

(b) Name of the prime broker: _____

(c) If the prime broker is registered with the SEC, its registration number: 8-_____

(d) Location of prime broker's office used principally by the *private fund* (city and country): _____

(e) Does this prime broker act as custodian for some or all of the *private fund*'s assets? ☐ Yes ☐ No

Custodian

27. (a) Does the *private fund* use any custodians (including the prime brokers listed above) to hold some or all of its assets? ☐ Yes ☐ No

If the answer to 27(a) is "yes," respond to questions (b) through (f) below for each custodian the *private fund* uses. You must complete a separate Schedule D Section 7.B.1. for each custodian.

(b) Legal name of custodian: _____

(c) Primary business name of custodian: _____

(d) The location of the custodian's office responsible for *custody* of the *private fund*'s assets (city and country): _____

(e) Is the custodian your *related person*? ☐ Yes ☐ No

(f) If the custodian is a broker-dealer, provide its SEC registration number (if any) 8-_____

Administrator

28. (a) Does the *private fund* use an administrator other than your firm?

If the answer to 28(a) is "yes," respond to questions (b) – (f) below. You must complete a separate Schedule D Section 7.B.1. for each administrator.

(b) Name of administrator: _____

(c) Location of administrator (city and country): _____

(d) Is the administrator a *related person* of your firm? ☐ Yes ☐ No

(e) Does the administrator prepare and send investor account statements to the *private fund*'s investors?

☐ Yes (provided to all investors) ☐ Some (provided to some but not all investors) ☐ No (provided to no investors)

If the answer to 28(e) is "no" or "some," who sends the investor account statements to the (rest of the) *private fund*'s investors?
_____.

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Certain items in Part 1A of Form ADV require additional information on Schedule D. Use this Schedule D to report details for items listed below. Report only new information or changes/updates to previously submitted information. Do not repeat previously submitted information.

This is an ☐ INITIAL or ☐ AMENDED Schedule D

(f) (1) What percentage of the *private fund*'s assets are valued by a *person*, such as an administrator, which is not your *related person*?

_____%

Include only those assets where the *person* is responsible for the valuation used for purposes of investor subscriptions, redemptions or distributions, and fee calculations (including allocations).

(2) Name of the *person* _____

(3) Location of the *person* (city and country): _____

Marketers

29. (a) Does the *private fund* use the services of someone other than you or your *employees* for marketing purposes? ☐ Yes ☐ No

You must answer "yes" whether the person acts as a placement agent, consultant, finder, introducer, municipal advisor or other solicitor, or similar person. If the answer to 29(a) is "yes", respond to questions (b) through (f) below for each such marketer the *private fund* uses. You must complete a separate Schedule D Section 7.B.1. for each marketer.

(b) Is the marketer a *related person* of your firm? ☐ Yes ☐ No

(c) Name of the marketer: _____

(d) If the marketer is registered with the SEC, its file number (*e.g.*, 801-, 8-, or 866-): _____ and *CRD* Number (if any) _____

(e) Location of the marketer's office used principally by the *private fund*: (city and country): _____

(f) Does the marketer market the *private fund* through one or more websites? ☐ Yes ☐ No

If yes, list the website address(es): _____

SECTION 7.B.2. *Private Fund* Reporting

(1) Name of the *private fund* _____

(2) *Private fund* identification number _____

(3) Name and SEC File number of adviser that provides information about this *private fund* in Section 7.B.1. of Schedule D of its Form ADV filing _____, 801- _____ or 802-_____

(4) Are your *clients* solicited to invest in this *private fund*? ☐ Yes ☐ No

In answering this question, disregard feeder funds' investment in a master fund. For purposes of this question, in a master-feeder arrangement, one or more funds ("feeder funds") invest all or substantially all of their assets in a single fund ("master fund"). A fund would also be a "feeder fund" investing in a "master fund" for purposes of this question if it issued multiple classes (or series) of shares or interests, and each class (or series) invests substantially all of its assets a single master fund.

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Certain items in Part 1A of Form ADV require additional information on Schedule D. Use this Schedule D to report details for items listed below. Report only new information or changes/updates to previously submitted information. Do not repeat previously submitted information.

This is an ☐ INITIAL or ☐ AMENDED Schedule D

SECTION 9.C. *Independent Public Accountant*

You must complete the following information for each *independent public accountant* engaged to perform a surprise examination, perform an audit of a pooled investment vehicle that you manage, or prepare an internal control report. You must complete a separate Schedule D Section 9.C. for each *independent public accountant.*

Check only one box: ☐ Add ☐ Delete ☐ Amend

(1) Name of the *independent public accountant*: _____

(2) The location of the *independent public accountant*'s office responsible for the services provided:

_____
(number and street)

_____
(city) (state/country) (zip+4/postal code)

(3) Is the *independent public accountant* registered with the Public Company Accounting Oversight Board? ☐ Yes ☐ No

(4) If yes to (3) above, is the *independent public accountant* subject to regular inspection by the Public Company Accounting Oversight Board in accordance with its rules? ☐ Yes ☐ No

(5) The *independent public accountant* is engaged to:

A. ☐ audit a pooled investment vehicle
B. ☐ perform a surprise examination of *clients'* assets
C. ☐ prepare an internal control report

(6) Does the report prepared by the *independent public accountant* that audited the pooled investment vehicle or that examined internal controls contain an unqualified opinion? ☐ Yes ☐ No

SECTION 9.D. Foreign Financial Institution *Related Person* Qualified Custodian

You must complete the following information for each of your foreign financial institution *related persons* that acts as a qualified custodian for your *clients* in connection with advisory services you provide to *clients*. You must complete a separate Schedule D for each listed *related person.*

Check only one box: ☐ Add ☐ Delete ☐ Amend

(1) Legal Name of Foreign Financial Institution *Related Person*: _____

(2) Primary Business Name of Foreign Financial Institution *Related Person*: _____

(3) The location of the *related person's* office responsible for *custody* of your *clients'* assets:

_____
(number and street)

_____
(city) (state/country) (zip+4/postal code)

(4) If you are registering or registered with the SEC, have you overcome the presumption that you are not operationally independent (pursuant to Advisers Act rule 206(4)(2)-(d)(5)) from the *related person* qualified custodian, and thus are not required to obtain a surprise examination for your *clients'* funds or securities that are maintained at the *related person*?

☐ Yes ☐ No

FORM ADV Your Name _____ *CRD* Number _____
Schedule D Date _____ SEC 801- or 802- Number _____
Page 12 of 13

Certain items in Part 1A of Form ADV require additional information on Schedule D. Use this Schedule D to report details for items listed below. Report only new information or changes/updates to previously submitted information. Do not repeat previously submitted information.

This is an ☐ INITIAL or ☐ AMENDED Schedule D

SECTION 10.A. *Control Persons*

A. You must complete a separate Schedule D Section 10.A. for each *control person* not named in Item 1.A. or Schedules A, B, or C that directly or indirectly *controls* your management or policies.

Check only one box: ☐ Add ☐ Delete ☐ Amend

(1) Firm or Organization Name

_____

(2) *CRD* Number (if any) _____ Effective Date _____ (mm/dd/yyyy) Termination Date _____ (mm/dd/yyyy)

(3) Business Address:

_____
(number and street)

_____
(city) (state/country) (zip+4/postal code)

If this address is a private residence, check this box: ☐

(4) Individual Name (if applicable) (Last, First, Middle)

_____

(5) *CRD* Number (if any) _____ Effective Date _____ (mm/dd/yyyy) Termination Date _____ (mm/dd/yyyy)

(6) Business Address:

_____
(number and street)

_____
(city) (state/country) (zip+4/postal code)

If this address is a private residence, check this box: ☐

(7) Briefly describe the nature of the *control*:

_____

SECTION 10.B. *Control Person* Public Reporting Companies

B. If any person named in Schedules A, B, or C, or in Section 10 A. of Schedule D is a public reporting company under Sections 12 or 15(d) of the Securities Exchange Act of 1934 , please provide the following information (you must complete a separate Schedule D Section 10.B. for each public reporting company):

(1) Full legal name of the public reporting company: _____

(2) The public reporting company's CIK number (Central Index Key number that the SEC assigns to each reporting company):

_____

FORM ADV Your Name _____ *CRD* Number _____
Schedule D Date _____ SEC 801- or 802- Number _____
Page 13 of 13

Certain items in Part 1A of Form ADV require additional information on Schedule D. Use this Schedule D to report details for items listed below. Report only new information or changes/updates to previously submitted information. Do not repeat previously submitted information.

This is an ☐ INITIAL or ☐ AMENDED Schedule D

Miscellaneous

You may use the space below to explain a response to an Item or to provide any other information.

_____
_____
_____
_____
_____
_____
_____
_____

CRIMINAL DISCLOSURE REPORTING PAGE (ADV)

GENERAL INSTRUCTIONS

This Disclosure Reporting Page (DRP ADV) is an ☐ INITIAL ***OR*** ☐ AMENDED response used to report details for affirmative responses to Items 11.A. or 11.B. of Form ADV.

Check item(s) being responded to: ☐ 11.A(1) ☐ 11.A(2) ☐11.B(1) ☐11.B(2)

Use a separate DRP for each event or *proceeding*. The same event or *proceeding* may be reported for more than one *person* or entity using one DRP. File with a completed Execution Page.

Multiple counts of the same charge arising out of the same event(s) should be reported on the same DRP. Unrelated criminal actions, including separate cases arising out of the same event, must be reported on separate DRPs. Use this DRP to report all charges arising out of the same event. One event may result in more than one affirmative answer to the items listed above.

PART I

A. The *person(s)* or entity(ies) for whom this DRP is being filed is (are):
- ☐ You (the advisory firm)
- ☐ You and one or more of your *advisory affiliates*
- ☐ One or more of your *advisory affiliates*

If this DRP is being filed for an *advisory affiliate*, give the full name of the *advisory affiliate* below (for individuals, Last name, First name, Middle name).

If the *advisory affiliate* has a *CRD* number, provide that number. If not, indicate "non-registered" by checking the appropriate box.

Your Name	Your *CRD* Number

ADV DRP - *ADVISORY AFFILIATE*

CRD Number	This *advisory affiliate* is Registered:	☐a firm ☐an individual ☐Yes ☐No

Name (For individuals, Last, First, Middle)

- ☐ This DRP should be removed from the ADV record because the *advisory affiliate(s)* is no longer associated with the adviser.
- ☐ This DRP should be removed from the ADV record because: (1) the event or *proceeding* occurred more than ten years ago or (2) the adviser is registered or applying for registration with the SEC and the event was resolved in the adviser's or *advisory affiliate's* favor.
- ☐ This DRP should be removed from the ADV record because it was filed in error, such as due to a clerical or data-entry mistake. Explain the circumstances:

_____
_____
_____

B. If the *advisory affiliate* is registered through the IARD system or *CRD* system, has the *advisory affiliate* submitted a DRP (with Form ADV, BD or U-4) to the IARD or *CRD* for the event? If the answer is "Yes," no other information on this DRP must be provided.
☐ Yes ☐ No

NOTE: The completion of this form does not relieve the *advisory affiliate* of its obligation to update its IARD or *CRD* records.

(continued)

CRIMINAL DISCLOSURE REPORTING PAGE (ADV)
(continuation)

PART II

1. If charge(s) were brought against an organization over which you or an *advisory affiliate* exercise(d) *control*: Enter organization name, whether or not the organization was an *investment-related* business and your or the *advisory affiliate's* position, title, or relationship.

2. Formal Charge(s) were brought in: (include name of Federal, Military, State or Foreign Court, Location of Court - City or County and State or Country, Docket/Case number).

3. Event Disclosure Detail (Use this for both organizational and individual charges.)

   A. Date First *Charged* (MM/DD/YYYY): ☐ Exact ☐ Explanation

   If not exact, provide explanation: _____

   B. Event Disclosure Detail (include Charge(s)/Charge Description(s), and for each charge provide: (1) number of counts, (2) *felony* or *misdemeanor*, (3) plea for each charge, and (4) product type if charge is *investment-related*).

   C. Did any of the Charge(s) within the Event involve a *felony*? ☐ Yes ☐ No

   D. Current status of the Event? ☐ Pending ☐ On Appeal ☐ Final

   E. Event Status Date (complete unless status is Pending) (MM/DD/YYYY):

   ☐ Exact ☐ Explanation

   If not exact, provide explanation: _____

4. Disposition Disclosure Detail: Include for each charge (a) Disposition Type (e.g., convicted, acquitted, dismissed, pretrial, etc.), (b) Date, (c) Sentence/Penalty, (d) Duration (if sentence-suspension, probation, etc.), (e) Start Date of Penalty, (f) Penalty/Fine Amount, and (g) Date Paid.

(continued)

CRIMINAL DISCLOSURE REPORTING PAGE (ADV)
(continuation)

5. Provide a brief summary of circumstances leading to the charge(s) as well as the disposition. Include the relevant dates when the conduct which was the subject of the charge(s) occurred. (Your response must fit within the space provided.)

REGULATORY ACTION DISCLOSURE REPORTING PAGE (ADV)

GENERAL INSTRUCTIONS

This Disclosure Reporting Page (DRP ADV) is an ☐ INITIAL ***OR*** ☐ AMENDED response used to report details for affirmative responses to Items 11.C., 11.D., 11.E., 11.F. or 11.G. of Form ADV.

Check item(s) being responded to:

☐ 11.C(1)	☐ 11.C(2)	☐ 11.C(3)	☐ 11.C(4)	☐ 11.C(5)
☐ 11.D(1)	☐ 11.D(2)	☐ 11.D(3)	☐ 11.D(4)	☐ 11.D(5)
☐ 11.E(1)	☐ 11.E(2)	☐ 11.E(3)	☐ 11.E(4)	
☐ 11.F.	☐ 11.G.			

Use a separate DRP for each event or *proceeding*. The same event or *proceeding* may be reported for more than one *person* or entity using one DRP. File with a completed Execution Page.

One event may result in more than one affirmative answer to Items 11.C., 11.D., 11.E., 11.F. or 11.G. Use only one DRP to report details related to the same event. If an event gives rise to actions by more than one regulator, provide details for each action on a separate DRP.

PART I

A. The *person(s)* or entity(ies) for whom this DRP is being filed is (are):
- ☐ You (the advisory firm)
- ☐ You and one or more of your *advisory affiliates*
- ☐ One or more of your *advisory affiliates*

If this DRP is being filed for an *advisory affiliate*, give the full name of the *advisory affiliate* below (for individuals, Last name, First name, Middle name).

If the *advisory affiliate* has a *CRD* number, provide that number. If not, indicate "non-registered" by checking the appropriate box.

Your Name	Your *CRD* Number

ADV DRP - *ADVISORY AFFILIATE*

CRD Number	This *advisory affiliate* is ☐ a firm ☐ an individual Registered: ☐ Yes ☐ No

Name (For individuals, Last, First, Middle)

☐ This DRP should be removed from the ADV record because the *advisory affiliate(s)* is no longer associated with the adviser.

☐ This DRP should be removed from the ADV record because: (1) the event or *proceeding* occurred more than ten years ago or (2) the adviser is registered or applying for registration with the SEC and the event was resolved in the adviser's or *advisory affiliate's* favor.

If you are registered or registering with a *state securities authority*, you may remove a DRP for an event you reported only in response to Item 11.D(4), and only if that event occurred more than ten years ago. If you are registered or registering with the SEC, you may remove a DRP for any event listed in Item 11 that occurred more than ten years ago.

☐ This DRP should be removed from the ADV record because it was filed in error, such as due to a clerical or data-entry mistake. Explain the circumstances:

_____

_____

B. If the *advisory affiliate* is registered through the IARD system or *CRD* system, has the *advisory affiliate* submitted a DRP (with Form ADV, BD or U-4) to the IARD or *CRD* for the event? If the answer is "Yes," no other information on this DRP must be provided.
☐ Yes ☐ No

NOTE: The completion of this form does not relieve the *advisory affiliate* of its obligation to update its IARD or *CRD* records.

(continued)

REGULATORY ACTION DISCLOSURE REPORTING PAGE (ADV)
(continuation)

PART II

1. Regulatory Action initiated by:
☐ SEC ☐ Other Federal ☐ State ☐ *SRO* ☐ Foreign

(Full name of regulator, *foreign financial regulatory authority*, federal, state or *SRO*)

_____

2. Principal Sanction (check appropriate item):

☐ Civil and Administrative Penalty(ies)/Fine(s)	☐ Disgorgement	☐ Restitution
☐ Bar	☐ Expulsion	☐ Revocation
☐ Cease and Desist	☐ Injunction	☐ Suspension
☐ Censure	☐ Prohibition	☐ Undertaking
☐ Denial	☐ Reprimand	☐ Other _____

Other Sanctions:

_____
_____
_____

3. Date Initiated (MM/DD/YYYY): ☐ Exact ☐ Explanation

If not exact, provide explanation: _____

4. Docket/Case Number:

5. *Advisory Affiliate* Employing Firm when activity occurred which led to the regulatory action (if applicable):

6. Principal Product Type (check appropriate item):

☐ Annuity(ies) - Fixed	☐ Derivative(s)	☐ Investment Contract(s)
☐ Annuity(ies) - Variable	☐ Direct Investment(s) - DPP & LP Interest(s)	☐ Money Market Fund(s)
☐ CD(s)	☐ Equity - OTC	☐ Mutual Fund(s)
☐ Commodity Option(s)	☐ Equity Listed (Common & Preferred Stock)	☐ No Product
☐ Debt - Asset Backed	☐ Futures - Commodity	☐ Options
☐ Debt - Corporate	☐ Futures - Financial	☐ Penny Stock(s)
☐ Debt - Government	☐ Index Option(s)	☐ Unit Investment Trust(s)
☐ Debt - Municipal	☐ Insurance	☐ Other _____

Other Product Types:

_____
_____

(continued)

REGULATORY ACTION DISCLOSURE REPORTING PAGE (ADV)
(continuation)

7. Describe the allegations related to this regulatory action (your response must fit within the space provided):

8. Current status? ☐ Pending ☐ On Appeal ☐ Final

9. If on appeal, regulatory action appealed to (SEC, *SRO*, Federal or State Court) and Date Appeal Filed:

If Final or On Appeal, complete all items below. For Pending Actions, complete Item 13 only.

10. How was matter resolved (check appropriate item):

☐ Acceptance, Waiver & Consent (AWC)
☐ Consent
☐ Decision
☐ Decision & *Order* of Offer of Settlement
☐ Dismissed
☐ *Order*
☐ Settled
☐ Stipulation and Consent
☐ Vacated
☐ Withdrawn
☐ Other _____

11. Resolution Date (MM/DD/YYYY): ☐ Exact ☐ Explanation

If not exact, provide explanation: _____

12. Resolution Detail:

A. Were any of the following Sanctions *Ordered* (check all appropriate items)?

☐ Monetary/Fine ☐ Revocation/Expulsion/Denial ☐ Disgorgement/Restitution

Amount: $ ☐ Censure ☐ Cease and Desist/Injunction ☐ Bar ☐ Suspension

B. Other Sanctions *Ordered*:

Sanction detail: if suspended, *enjoined* or barred, provide duration including start date and capacities affected (General Securities Principal, Financial Operations Principal, etc.). If requalification by exam/retraining was a condition of the sanction, provide length of time given to requalify/retrain, type of exam required and whether condition has been satisfied. If disposition resulted in a fine, penalty, restitution, disgorgement or monetary compensation, provide total amount, portion levied against you or an *advisory affiliate*, date paid and if any portion of penalty was waived:

(continued)

REGULATORY ACTION DISCLOSURE REPORTING PAGE (ADV)
(continuation)

13. Provide a brief summary of details related to the action status and (or) disposition and include relevant terms, conditions and dates (your response must fit within the space provided).

CIVIL JUDICIAL ACTION DISCLOSURE REPORTING PAGE (ADV)

GENERAL INSTRUCTIONS

This Disclosure Reporting Page (DRP ADV) is an ☐ INITIAL ***OR*** ☐ AMENDED response used to report details for affirmative responses to Item 11.H. of Part 1A and Item 2.F. of Part 1B of Form ADV.

Check Part 1A item(s) being responded to: ☐ 11.H(1)(a) ☐ 11.H(1)(b) ☐ 11.H(1)(c) ☐ 11.H(2)
Check Part 1B item(s) being responded to: ☐ 2.F(1) ☐ 2.F(2) ☐ 2.F(3) ☐ 2.F(4) ☐ 2.F(5)

Use a separate DRP for each event or *proceeding*. The same event or *proceeding* may be reported for more than one *person* or entity using one DRP. File with a completed Execution Page.

One event may result in more than one affirmative answer to Item 11.H. of Part 1A or Item 2.F. of Part 1B. Use only one DRP to report details related to the same event. Unrelated civil judicial actions must be reported on separate DRPs.

PART I

A. The *person(s)* or entity(ies) for whom this DRP is being filed is (are):
- ☐ You (the advisory firm)
- ☐ You and one or more of your *advisory affiliates*
- ☐ One or more of your *advisory affiliates*

If this DRP is being filed for an *advisory affiliate*, give the full name of the *advisory affiliate* below (for individuals, Last name, First name, Middle name).

If the *advisory affiliate* has a *CRD* number, provide that number. If not, indicate "non-registered" by checking the appropriate box.

Your Name	Your *CRD* Number

ADV DRP - *ADVISORY AFFILIATE*

CRD Number	This *advisory affiliate* is ☐ a firm ☐ an individual Registered: ☐ Yes ☐ No

Name (For individuals, Last, First, Middle)

☐ This DRP should be removed from the ADV record because the *advisory affiliate(s)* is no longer associated with the adviser.

☐ This DRP should be removed from the ADV record because: (1) the event or *proceeding* occurred more than ten years ago or (2) the adviser is registered or applying for registration with the SEC and the event was resolved in the adviser's or advisory affiliate's favor.

If you are registered or registering with a *state securities authority*, you may remove a DRP for an event you reported only in response to Item 11.H(1)(a), and only if that event occurred more than ten years ago. If you are registered or registering with the SEC, you may remove a DRP for any event listed in Item 11 that occurred more than ten years ago.

☐ This DRP should be removed from the ADV record because it was filed in error, such as due to a clerical or data-entry mistake. Explain the circumstances:

_____

_____

_____

B. If the *advisory affiliate* is registered through the IARD system or *CRD* system, has the *advisory affiliate* submitted a DRP (with Form ADV, BD or U-4) to the IARD or *CRD* for the event? If the answer is "Yes," no other information on this DRP must be provided.
☐ Yes ☐ No

NOTE: The completion of this form does not relieve the *advisory affiliate* of its obligation to update its IARD or *CRD* records.

(continued)

CIVIL JUDICIAL ACTION DISCLOSURE REPORTING PAGE (ADV)
(continuation)

PART II

1. Court Action initiated by: (Name of regulator, *foreign financial regulatory authority, SRO*, commodities exchange, agency, firm, private plaintiff, etc.)

2. Principal Relief Sought (check appropriate item):

☐ Cease and Desist ☐ Disgorgement ☐ Money Damages (Private/Civil Complaint) ☐ Restraining Order
☐ Civil Penalty(ies)/Fine(s) ☐ Injunction ☐ Restitution ☐ Other _____

Other Relief Sought:

3. Filing Date of Court Action (MM/DD/YYYY): ☐ Exact ☐ Explanation

If not exact, provide explanation:

4. Principal Product Type (check appropriate item):

☐ Annuity(ies) - Fixed ☐ Derivative(s) ☐ Investment Contract(s)
☐ Annuity(ies) - Variable ☐ Direct Investment(s) - DPP & LP Interest(s) ☐ Money Market Fund(s)
☐ CD(s) ☐ Equity - OTC ☐ Mutual Fund(s)
☐ Commodity Option(s) ☐ Equity Listed (Common & Preferred Stock) ☐ No Product
☐ Debt - Asset Backed ☐ Futures - Commodity ☐ Options
☐ Debt - Corporate ☐ Futures - Financial ☐ Penny Stock(s)
☐ Debt - Government ☐ Index Option(s) ☐ Unit Investment Trust(s)
☐ Debt - Municipal ☐ Insurance ☐ Other _____

Other Product Types:

5. Formal Action was brought in (include name of Federal, State or Foreign Court, Location of Court - City or County and State or Country, Docket/Case Number):

6. *Advisory Affiliate* Employing Firm when activity occurred which led to the civil judicial action (if applicable):

(continued)

CIVIL JUDICIAL ACTION DISCLOSURE REPORTING PAGE (ADV)
(continuation)

7. Describe the allegations related to this civil action (your response must fit within the space provided):

8. Current status? ☐ Pending ☐ On Appeal ☐ Final

9. If on appeal, action appealed to (provide name of court) and Date Appeal Filed (MM/DD/YYYY):

10. If pending, date notice/process was served (MM/DD/YYYY): ☐ Exact ☐ Explanation

If not exact, provide explanation:

If Final or On Appeal, complete all items below. For Pending Actions, complete Item 14 only.

11. How was matter resolved (check appropriate item):

☐ Consent ☐ Judgment Rendered ☐ Settled
☐ Dismissed ☐ Opinion ☐ Withdrawn ☐ Other

12. Resolution Date (MM/DD/YYYY): ☐ Exact ☐ Explanation

If not exact, provide explanation:

13. Resolution Detail:

A. Were any of the following Sanctions Ordered or Relief Granted (check appropriate items)?

☐ Monetary/Fine ☐ Revocation/Expulsion/Denial ☐ Disgorgement/Restitution

Amount: $ ☐ Censure ☐ Cease and Desist/Injunction ☐ Bar ☐ Suspension

B. Other Sanctions:

(continued)

CIVIL JUDICIAL ACTION DISCLOSURE REPORTING PAGE (ADV)
(continuation)

C. Sanction detail: if suspended, *enjoined* or barred, provide duration including start date and capacities affected (General Securities Principal, Financial Operations Principal, etc.). If requalification by exam/retraining was a condition of the sanction, provide length of time given to requalify/retrain, type of exam required and whether condition has been satisfied. If disposition resulted in a fine, penalty, restitution, disgorgement or monetary compensation, provide total amount, portion levied against you or an *advisory affiliate*, date paid and if any portion of penalty was waived:

14. Provide a brief summary of circumstances related to the action(s), allegation(s), disposition(s) and/or finding(s) disclosed above (your response must fit within the space provided).

APPENDIX E

FORM ADV (Paper Version)

- **UNIFORM APPLICATION FOR INVESTMENT ADVISER REGISTRATION**
  AND
- **REPORT BY EXEMPT REPORTING ADVISERS**

DOMESTIC INVESTMENT ADVISER EXECUTION PAGE

You must complete the following Execution Page to Form ADV. This execution page must be signed and attached to your initial submission of Form ADV to the SEC and all amendments.

Appointment of Agent for Service of Process

By signing this Form ADV Execution Page, you, the undersigned adviser, irrevocably appoint the Secretary of State or other legally designated officer, of the state in which you maintain your *principal office and place of business* and any other state in which you are submitting a *notice filing*, as your agents to receive service, and agree that such *persons* may accept service on your behalf, of any notice, subpoena, summons, *order* instituting *proceedings*, demand for arbitration, or other process or papers, and you further agree that such service may be made by registered or certified mail, in any federal or state action, administrative *proceeding* or arbitration brought against you in any place subject to the jurisdiction of the United States, if the action, *proceeding* or arbitration (a) arises out of any activity in connection with your investment advisory business that is subject to the jurisdiction of the United States, and (b) is *founded*, directly or indirectly, upon the provisions of: (i) the Securities Act of 1933, the Securities Exchange Act of 1934, the Trust Indenture Act of 1939, the Investment Company Act of 1940, or the Investment Advisers Act of 1940, or any rule or regulation under any of these acts, or (ii) the laws of the state in which you maintain your *principal office and place of business* or of any state in which you are submitting a *notice filing*.

Signature

I, the undersigned, sign this Form ADV on behalf of, and with the authority of, the investment adviser. The investment adviser and I both certify, under penalty of perjury under the laws of the United States of America, that the information and statements made in this ADV, including exhibits and any other information submitted, are true and correct, and that I am signing this Form ADV Execution Page as a free and voluntary act.

I certify that the adviser's books and records will be preserved and available for inspection as required by law. Finally, I authorize any *person* having *custody* or possession of these books and records to make them available to federal and state regulatory representatives.

Signature: _____ Date: _____

Printed Name: _____ Title: _____

Adviser *CRD* Number: _____

SEC 1707 (03-10)
File 4 of 4

APPENDIX E

FORM ADV (Paper Version)

- **UNIFORM APPLICATION FOR INVESTMENT ADVISER REGISTRATION AND**
- **REPORT BY EXEMPT REPORTING ADVISERS**

STATE-REGISTERED INVESTMENT ADVISER EXECUTION PAGE

You must complete the following Execution Page to Form ADV. This execution page must be signed and attached to your initial application for state registration and all amendments to registration.

1. Appointment of Agent for Service of Process

By signing this Form ADV Execution Page, you, the undersigned adviser, irrevocably appoint the legally designated officers and their successors, of the state in which you maintain your *principal office and place of business* and any other state in which you are applying for registration or amending your registration, as your agents to receive service, and agree that such *persons* may accept service on your behalf, of any notice, subpoena, summons, *order* instituting *proceedings*, demand for arbitration, or other process or papers, and you further agree that such service may be made by registered or certified mail, in any federal or state action, administrative *proceeding* or arbitration brought against you in any place subject to the jurisdiction of the United States, if the action, *proceeding* or arbitration (a) arises out of any activity in connection with your investment advisory business that is subject to the jurisdiction of the United States, and (b) is *founded*, directly or indirectly, upon the provisions of: (i) the Securities Act of 1933, the Securities Exchange Act of 1934, the Trust Indenture Act of 1939, the Investment Company Act of 1940, or the Investment Advisers Act of 1940, or any rule or regulation under any of these acts, or (ii) the laws of the state in which you maintain your *principal office and place of business* or of any state in which you are applying for registration, or amending your registration.

2. State-Registered Investment Adviser Affidavit

If you are subject to state regulation, by signing this Form ADV, you represent that, you are in compliance with the registration requirements of the state in which you maintain your *principal place of business* and are in compliance with the bonding, capital, and recordkeeping requirements of that state.

Signature

I, the undersigned, sign this Form ADV on behalf of, and with the authority of, the investment adviser. The investment adviser and I both certify, under penalty of perjury under the laws of the United States of America, that the information and statements made in this ADV, including exhibits and any other information submitted, are true and correct, and that I am signing this Form ADV Execution Page as a free and voluntary act.

I certify that the adviser's books and records will be preserved and available for inspection as required by law. Finally, I authorize any *person* having custody or possession of these books and records to make them available to federal and state regulatory representatives.

Signature: _____ Date: _____

Printed Name: _____ Title: _____

Adviser *CRD* Number: _____

APPENDIX E

FORM ADV (Paper Version)

- **UNIFORM APPLICATION FOR INVESTMENT ADVISER REGISTRATION**
  AND
- **REPORT BY EXEMPT REPORTING ADVISERS**

NON-RESIDENT **INVESTMENT ADVISER EXECUTION**	**PAGE 1**

You must complete the following Execution Page to Form ADV. This execution page must be signed and attached to your initial submission of Form ADV to the SEC and all amendments.

1. Appointment of Agent for Service of Process

By signing this Form ADV Execution Page, you, the undersigned adviser, irrevocably appoint each of the Secretary of the SEC, and the Secretary of State or other legally designated officer, of any other state in which you are submitting a *notice filing*, as your agents to receive service, and agree that such *persons* may accept service on your behalf, of any notice, subpoena, summons, *order* instituting *proceedings*, demand for arbitration, or other process or papers, and you further agree that such service may be made by registered or certified mail, in any federal or state action, administrative *proceeding* or arbitration brought against you in any place subject to the jurisdiction of the United States, if the action, *proceeding* or arbitration (a) arises out of any activity in connection with your investment advisory business that is subject to the jurisdiction of the United States, and (b) is *founded*, directly or indirectly, upon the provisions of: (i) the Securities Act of 1933, the Securities Exchange Act of 1934, the Trust Indenture Act of 1939, the Investment Company Act of 1940, or the Investment Advisers Act of 1940, or any rule or regulation under any of these acts, or (ii) the laws of any state in which you are submitting a *notice filing*.

2. Appointment and Consent: Effect on Partnerships

If you are organized as a partnership, this irrevocable power of attorney and consent to service of process will continue in effect if any partner withdraws from or is admitted to the partnership, provided that the admission or withdrawal does not create a new partnership. If the partnership dissolves, this irrevocable power of attorney and consent shall be in effect for any action brought against you or any of your former partners.

3. *Non-Resident* Investment Adviser Undertaking Regarding Books and Records

By signing this Form ADV, you also agree to provide, at your own expense, to the U.S. Securities and Exchange Commission at its principal office in Washington D.C., at any Regional or District Office of the Commission, or at any one of its offices in the United States, as specified by the Commission, correct, current, and complete copies of any or all records that you are required to maintain under Rule 204-2 under the Investment Advisers Act of 1940. This undertaking shall be binding upon you, your heirs, successors and assigns, and any *person* subject to your written irrevocable consents or powers of attorney or any of your general partners and *managing agents*.

Signature

I, the undersigned, sign this Form ADV on behalf of, and with the authority of, the *non-resident* investment adviser. The investment adviser and I both certify, under penalty of perjury under the laws of the United States of America, that the information and statements made in this ADV, including exhibits and any other information submitted, are true and correct, and that I am signing this Form ADV Execution Page as a free and voluntary act.

I certify that the adviser's books and records will be preserved and available for inspection as required by law. Finally, I authorize any *person* having custody or possession of these books and records to make them available to federal and state regulatory representatives.

Signature: _____ Date: _____

Printed Name: _____ Title: _____

Adviser *CRD* Number: _____

OMB APPROVAL
OMB Number: 3235-0538
Expires: March 31, 2011
Estimated average burden hours per response . . .1.00

APPENDIX F

Form ADV-H
APPLICATION FOR A TEMPORARY OR CONTINUING HARDSHIP EXEMPTION

Item 1 Type of Exemption

You are (check one):

- ☐ Requesting a Temporary Hardship Exemption; or
- ☐ Applying for a Continuing Hardship Exemption

A. If you are requesting a temporary hardship exemption, this Form ADV-H is for your (check one)

- ☐ Initial SEC Application
- ☐ *Annual updating amendment* to SEC Registration
- ☐ Other-than-annual amendment to SEC Registration
- ☐ Initial report to the SEC as an *exempt reporting adviser*
- ☐ *Annual updating amendment* to your report as an *exempt reporting adviser*
- ☐ Submit an other-than-annual amendment to your report as an *exempt reporting adviser*
- ☐ Submit a final report an *exempt reporting adviser*

B. If you are applying for a continuing hardship exemption, this Form ADV-H is for all filings between the date you file this form and _____.
MM / DD / YYYY

Only an adviser that is a "small business" (as defined by SEC rule 0-7) is eligible for a continuing hardship exemption. To determine whether you are eligible for a continuing hardship exemption, review Item 12 of the Form ADV that you filed most recently with the SEC to answer the following questions:

Were you required to answer Item 12 of Part 1A of Form ADV? Yes ☐ No ☐

Did you check "yes" to any question on Item 12 of Part 1A of Form ADV? Yes ☐ No ☐

If you were not required to answer Item 12 or checked "yes" to any question on Item 12, you are not eligible for a continuing hardship exemption and must submit electronic filings to the IARD system.

Item 2 Identifying Information

SEC File number: 801 - _____ or 802 - _____

CRD Number (if you have one) _____

A. Your full legal name (if you are a sole proprietor, state your last, first, and middle names):

_____

B. *Principal Office and Place of Business*
Address (do not use a P.O. Box):

_____
(number and street)

_____
(city) (state) (country) (zip+4/postal code)

If this address is a private residence, check this box: ☐

C. Name and telephone number of the individual filing this Form ADV-H:

_____
(name) (title) (area code) (telephone number)

Item 3 Information Relating to the Hardship

A. If you are filing to request a temporary hardship exemption, attach a separate page that:

1. Describes the nature and extent of the temporary technical difficulties when you attempt to submit the filing in electronic format.

2. Describes the extent to which you previously have submitted documents in electronic format with the same hardware and software that you are unable to use to submit this filing.

3. Describes the burden and expense of employing alternative means (*e.g.* public library, service provider) to submit the filing in electronic format in a timely manner.

4. Provides any other reasons why a temporary hardship exemption is warranted.

B. If you are applying for a continuing hardship exemption, your application will be granted or denied based on the following items. You should attach a separate page to this Form ADV-H that:

1. Explains the reason(s) that the necessary hardware and software are not available without unreasonable burden and expense.

2. Describes the burden and expense of employing alternative means (*e.g.* public library, service provider) to submit your filings in electronic format in a timely manner.

3. Justifies the time period requested in Item 1 of this Form ADV-H.

4. Provides any other reasons why a continuing hardship exemption is warranted.

Item 4 How to Submit Your Form ADV-H

Sign this Form ADV-H. You must preserve in your records a copy of the Form ADV-H that you file. Mail one manually signed Form ADV-H and one copy to U.S. Securities and Exchange Commission, Branch of Regulations and Examinations, Mail Stop 0-25, 100 F Street, NE, Washington, DC 20549.

Item 5 Execution

I, the undersigned, have signed this Form ADV-H on behalf of, and with the authority of, the adviser requesting a temporary hardship exemption or applying for a continuing hardship exemption. The undersigned and the adviser represent that the information and statements made in this ADV-H, including any other information submitted, are true. The undersigned and the adviser further agree to waive any claim against the administrator of the IARD for errors made in good faith that may occur when converting to electronic format this Form ADV-H or any paper filing made in reliance of a continuing hardship exemption.

Signature: _____ Date: _____

Printed Name: _____ Title: _____

PRIVACY ACT STATEMENT. Section 203(c)(1) of the Advisers Act [15 U.S.C. § 80b-3(c)(1)] authorizes the Commission to collect the information required by Form ADV-H. The Commission collects this information for regulatory purposes, such as processing requests for temporary hardship exemptions and determining whether to grant a continuing hardship exemption. Filing Form ADV-H is mandatory for investment advisers requesting a temporary or continuing hardship exemption. The Commission maintains the information submitted on Form ADV-H and makes it publicly available. The Commission may return forms that do not include required information. Intentional misstatements or omissions constitute federal criminal violations under 18 U.S.C. § 1001 and 15 U.S.C. § 80b-17. The information contained in Form ADV-H is part of a system of records subject to the Privacy Act of 1974, as amended. The Commission has published in the Federal Register the Privacy Act System of Records Notice for these records.

SEC'S COLLECTION OF INFORMATION. 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. Section 203(c)(1) of the Advisers Act authorizes the Commission to collect the information on this Form from applicants. *See* 15 U.S.C. § 80b-3(c)(1). Filing of this Form is mandatory for an investment adviser to request an exemption from the electronic filing requirements. The principal purpose of this collection of information is to enable the Commission to process requests for temporary hardship exemptions and to determine whether to grant a continuing hardship exemption. By accepting a form, however, the Commission does not make a finding that it has been completed or submitted correctly. The Commission will maintain files of the information on Form ADV-H and will make the information publicly available. Any member of the public may direct to the Commission any comments concerning the accuracy of the burden estimate on page one of Form ADV-H, and any suggestions for reducing this burden. This collection of information has been reviewed by the Office of Management and Budget in accordance with the clearance requirements of 44 U.S.C. §3507.

APPENDIX G

OMB APPROVAL	
OMB Number:	3235-0240
Expires:	February 28, 2011
Estimated average burden hours per response	1.00

Form ADV-NR

APPOINTMENT OF AGENT FOR SERVICE OF PROCESS BY NON-RESIDENT GENERAL PARTNER AND NON-RESIDENT MANAGING AGENT OF AN INVESTMENT ADVISER

You must submit this Form ADV-NR if you are a *non-resident* general partner or a *non-resident managing agent* of any investment adviser (domestic or *non-resident*). Form ADV-NR must be signed and submitted in connection with the adviser's initial Form ADV submission. If the mailing address you list below changes, you must file an amended Form ADV-NR to provide the current address. If you become a *non-resident* general partner or a *non-resident managing agent* after the date the adviser files its initial Form ADV, you must file Form ADV-NR with the Commission within 30 days of the date that you became a *non-resident* general partner or a *non-resident managing agent*. If you serve as a general partner or *managing agent* for multiple advisers, you must submit a separate Form ADV-NR for each adviser.

1. Appointment of Agent for Service of Process

By signing this Form ADV-NR, you, the undersigned *non-resident* general partner or *non-resident managing agent,* irrevocably appoint each of the Secretary of the SEC, and the Secretary of State, or equivalent officer, of the state in which the adviser referred to in this form maintains its *principal office and place of business*, if applicable, and any other state in which the adviser is applying for registration, amending its registration, or submitting a *notice filing*, as your agents to receive service, and agree that such *persons* may accept service on your behalf, of any notice, subpoena, summons, *order* instituting *proceedings*, demand for arbitration, or other process or papers, and you further agree that such service may be made by registered or certified mail, in any federal or state action, administrative *proceeding* or arbitration brought against you in any place subject to the jurisdiction of the United States, if the action, *proceeding* or arbitration: (a) arises out of any activity in connection with the investment adviser's business that is subject to the jurisdiction of the United States, and (b) is *founded*, directly or indirectly, upon the provisions of: (i) the Securities Act of 1933, the Securities Exchange Act of 1934, the Trust Indenture Act of 1939, the Investment Company Act of 1940, or the Investment Advisers Act of 1940, or any rule or regulation under any of these acts, or (ii) the laws of the state in which the adviser referred to in this Form maintains its *principal office and place of business*, if applicable, or of any state in which the adviser is applying for registration, amending its registration, or submitting a *notice filing*.

2. Appointment and Consent: Effect on Partnerships

If you are organized as a partnership, this irrevocable power of attorney and consent to service of process will continue in effect if any partner withdraws from or is admitted to the partnership, provided that the admission or withdrawal does not create a new partnership. If the partnership dissolves, this irrevocable power of attorney and consent shall be in effect for any action brought against you or any of your former partners.

Signature

I, the undersigned *non-resident* general partner or *non-resident managing agent,* certify, under penalty of perjury under the laws of the United States of America, that the information contained in this Form ADV-NR is true and correct and that I am signing this Form ADV-NR as a free and voluntary act.

Signature of Partner or Agent:

_____ Date: _____

Printed Name: _____ Title: _____

Mailing Address of Partner or Agent (no P.O. Boxes):

_____

_____

_____

_____

_____

Signature of Investment Adviser:

_____ Date: _____

Printed Name: _____ Title: _____

Adviser SEC File Number: 801-_____ or 802-_____

Adviser *CRD* Number: _____

Adviser Name: _____

PRIVACY ACT STATEMENT. Section 211(a) of the Advisers Act [15 U.S.C. § 80b-11(a)] authorizes the Commission to collect the information required by Form ADV-NR. The Commission collects this information to ensure that a non-resident general partner or managing agent of an investment adviser appoints an agent for service of process in the United States. Filing Form ADV-NR is mandatory for non-resident general partners and non-resident managing agents of investment advisers. The Commission maintains the information submitted on Form ADV-NR and makes it publicly available. The Commission may return forms that do not include required information. Intentional misstatements or omissions constitute federal criminal violations under 18 U.S.C. § 1001 and 15 U.S.C. § 80b-17. The information contained in Form ADV-NR is part of a system of records subject to the Privacy Act of 1974, as amended. The Commission has published in the Federal Register the Privacy Act System of Records Notice for these records.

SEC'S COLLECTION OF INFORMATION. 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. Section 211(a) of the Advisers Act authorizes the Commission to collect the information on this Form from applicants. *See* 15 U.S.C. § 80b-11(a). Filing of this Form is mandatory for non-resident general partners or managing agents of investment advisers. The principal purpose of this collection of information is to ensure that a non-resident general partner or managing agent of an investment adviser appoints an agent for service of process in the United States. The Commission will maintain files of the information on Form ADV-NR and will make the information publicly available. Any member of the public may direct to the Commission any comments concerning the accuracy of the burden estimate on page one of Form ADV-NR, and any suggestions for reducing this burden. This collection of information has been reviewed by the Office of Management and Budget in accordance with the clearance requirements of 44 U.S.C. § 3507.

FORM ADV-NR **PAGE 2**

page one of Form ADV-NR, and any suggestions for reducing this burden. This collection of information has been reviewed by the Office of Management

[FR Doc. 2010–29956 Filed 12–9–10; 8:45 am]
BILLING CODE C

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 275

[Release No. IA–3111; File No. S7–37–10]

RIN 3235–AK81

Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission (the "Commission") is proposing rules that would implement new exemptions from the registration requirements of the Investment Advisers Act of 1940 for advisers to certain privately offered investment funds that were enacted as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). As required by Title IV of the Dodd-Frank Act—the Private Fund Investment Advisers Registration Act of 2010, the new rules would define "venture capital fund" and provide for an exemption for advisers with less than $150 million in private fund assets under management in the United States. The new rules would also clarify the meaning of certain terms included in a new exemption for foreign private advisers.

DATES: Comments should be received on or before January 24, 2011.

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 e-mail to *rule-comments@sec.gov*. Please include File Number S7–37–10 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–37–10. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/proposed.shtml*). Comments are also available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Tram N. Nguyen, Daniele Marchesani, or David A. Vaughan, at (202) 551–6787 or *(IArules@sec.gov)*, Division of Investment Management, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–8549.

SUPPLEMENTARY INFORMATION: The Commission is requesting public comment on proposed rules 203(l)–1, 203(m)–1 and 202(a)(30)–1 (17 CFR 275.203(l)–1, 275.203(m)–1 and 275.202(a)(30)–1) under the Investment Advisers Act of 1940 (15 U.S.C. 80b) ("Advisers Act").[1]

Table of Contents

I. Background

On July 21, 2010, President Obama signed into law the Dodd-Frank Act,[2] which amends various provisions of the Advisers Act and requires or authorizes the Commission to adopt several new rules and revise existing rules.[3] Unless otherwise provided for in the Dodd-Frank Act, the amendments become effective on July 21, 2011.[4]

The amendments include the repeal of section 203(b)(3) of the Advisers Act, which exempts any investment adviser from registration if the investment adviser (i) Has had fewer than 15 clients in the preceding 12 months, (ii) does not hold itself out to the public as an investment adviser and (iii) does not act as an investment adviser to a registered investment company or a company that has elected to be a business development company (the "private adviser exemption").[5] Advisers specifically exempt under section 203(b) are not subject to reporting or recordkeeping provisions under the Advisers Act, and are not subject to examination by our staff.[6]

The primary purpose of Congress in repealing section 203(b)(3) was to require advisers to "private funds" to register under the Advisers Act.[7] Private

[1] Unless otherwise noted, all references to rules under the Advisers Act will be to title 17, part 275 of the Code of Federal Regulations (17 CFR 275).

[2] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

[3] In this Release, when we refer to the "Advisers Act," we refer to the Advisers Act as in effect on July 21, 2011.

[4] Section 419 of the Dodd-Frank Act.

[5] 15 U.S.C. 80b-3(b)(3) as in effect before July 21, 2011.

[6] *See* section 204(a) of the Advisers Act. *See also infra* note 30.

[7] *See* S. Rep. No. 111–176, at 71–3 (2010) ("S. Rep. No. 111–176"); H. Rep. No. 111–517, at 866

funds include hedge funds, private equity funds and other types of pooled investment vehicles that are excluded from the definition of "investment company" under the Investment Company Act of 1940 [8] ("Investment Company Act") by reason of sections 3(c)(1) or 3(c)(7) of such Act.[9] Section 3(c)(1) is available to a fund that does not publicly offer the securities it issues [10] and has 100 or fewer beneficial owners of its outstanding securities.[11] A fund relying on section 3(c)(7) cannot publicly offer the securities it issues [12] and generally must limit the owners of its outstanding securities to "qualified purchasers." [13]

Each of these types of private funds advised by an adviser typically qualifies as a single client for purposes of the private adviser exemption.[14] As a result, investment advisers could form up to 14 private funds, regardless of the total number of investors investing in the funds, without the need to register with us.[15] This has permitted the growth of unregistered investment advisers with large amounts of assets under management and significant numbers of investors but without the Commission oversight that registration under the Advisers Act provides.[16] Concern about this lack of Commission oversight led us to adopt a rule in 2004 extending registration to hedge fund advisers,[17] which was vacated by a federal court in 2006.[18] In Title IV of the Dodd-Frank Act ("Title IV"), Congress has now generally extended Advisers Act registration to advisers to hedge funds and many other private funds by eliminating the current private adviser exemption.[19]

In addition to removing the broad exemption provided by section 203(b)(3), Congress created three exemptions from registration under the Advisers Act.[20] These new exemptions apply to: (i) Advisers solely to venture capital funds, without regard to the number of such funds advised by the adviser or the size of such funds; [21] (ii) advisers solely to private funds with less than $150 million in assets under management in the United States, without regard to the number or type of private funds advised; [22] and (iii) non-U.S. advisers with less than $25 million in aggregate assets under management from U.S. clients and private fund investors and fewer than 15 such clients and investors.[23]

II. Discussion

Today we are proposing three rules that would implement these exemptions.[24] In a separate companion release (the "Implementing Release"),[25] we are proposing rules to implement other amendments made to the Advisers Act by the Dodd-Frank Act, some of which also concern certain advisers that qualify for the exemptions discussed in this Release.[26]

New section 203(l) of the Advisers Act provides that an investment adviser that solely advises venture capital funds is exempt from registration under the Advisers Act and directs the Commission to define "venture capital fund" within one year of enactment.[27] We are proposing new rule 203(l)-1 to provide such a definition, which we discuss below in Section II.A of this Release.

New section 203(m) of the Advisers Act directs the Commission to provide an exemption from registration to any investment adviser that solely advises private funds if the adviser has assets

(2010) ("H. Rep. No. 111–517"). H. Rep. No. 111–517 contains the conference report accompanying the version of H.R. 4173 that was debated in conference, *infra* note 39.

[8] 15 U.S.C. 80a.

[9] Section 202(a)(29) of the Advisers Act defines the term "private fund" as "an issuer that would be an investment company, as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a-3), but for section 3(c)(1) or 3(c)(7) of that Act."

[10] Interests in a private fund may be offered pursuant to an exemption from registration under the Securities Act of 1933 (15 U.S.C. 77a) ("Securities Act"). Notwithstanding these exemptions, the persons who market interests in a private fund may be subject to the registration requirements of section 15(a) under the Securities Exchange Act of 1934 ("Exchange Act") (15 U.S.C. 78o(a)). The Exchange Act generally defines a "broker" as any person engaged in the business of effecting transactions in securities for the account of others. Section 3(a)(4)(A) of the Exchange Act (15 U.S.C. 78c(a)(4)(A)). *See also Definition of Terms in and Specific Exemptions for Banks, Savings Associations, and Savings Banks Under Sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934,* Exchange Act Release No. 44291 (May 11, 2001) [66 FR 27759 (May 18, 2001)], at n.124 ("Solicitation is one of the most relevant factors in determining whether a person is effecting transactions."); *Political Contributions by Certain Investment Advisers,* Investment Advisers Act Release No. 3043 (July 1, 2010) [75 FR 41018 (July 14, 2010)], n.326 ("Pay to Play Release").

[11] *See* section 3(c)(1) of the Investment Company Act (providing an exclusion from the definition of "investment company" for any "issuer whose outstanding securities (other than short-term paper) are beneficially owned by not more than one hundred persons and which is not making and does not presently propose to make a public offering of its securities.").

[12] *See supra* note 10.

[13] *See* section 3(c)(7) of the Investment Company Act (providing an exclusion from the definition of "investment company" for any "issuer, the outstanding securities of which are owned exclusively by persons who, at the time of acquisition of such securities, are qualified purchasers, and which is not making and does not at that time propose to make a public offering of such securities."). The term "qualified purchaser" is defined in section 2(a)(51) of the Investment Company Act.

[14] *See* rule 203(b)(3)-1(a)(2).

[15] *See* Staff Report to the united states securities and exchange Commission, Implications of the Growth of Hedge Funds, at 21 (2003), *http://www.sec.gov/news/studies/hedgefunds0903.pdf* (discussing section 203(b)(3) of the Advisers Act as in effect before July 21, 2011).

[16] *See generally id.* (noting that the private adviser exemption contributed to growth in the number and size of, and investor participation in, hedge funds).

[17] *See Registration Under the Advisers Act of Certain Hedge Fund Advisers,* Investment Advisers Act Release No. 2333 (Dec. 2, 2004) [69 FR 72054 (Dec. 10, 2004)] ("Hedge Fund Adviser Registration Release").

[18] *Goldstein v. Securities and Exchange Commission,* 451 F.3d 873 (D.C. Cir. 2006) ("*Goldstein*").

[19] Section 403 of the Dodd-Frank Act amends existing section 203(b)(3) of the Advisers Act by repealing the current private adviser exemption and inserting the foreign private adviser exemption. *See infra* Section II.C. Unlike our 2004 rule, which sought to apply only to advisers of "hedge funds," the Dodd-Frank Act requires that, unless another exemption applies, all advisers previously eligible for the private adviser exemption register with us regardless of the type of private funds or other clients the adviser has.

[20] Title IV also created exemptions and exclusions in addition to the three discussed at length in this Release. *See, e.g.,* sections 403 and 409 of the Dodd-Frank Act (exempting advisers to licensed small business investment companies from registration under the Advisers Act and excluding family offices from the definition of "investment adviser" under the Advisers Act). We proposed a rule defining "family office" in a prior release (*Family Offices,* Investment Advisers Act Release No. 3098 (Oct. 12, 2010) [75 FR 63753 (Oct. 18, 2010)]).

[21] *See* section 407 of the Dodd-Frank Act (exempting advisers solely to "venture capital funds," as defined by the Commission).

[22] *See* section 408 of the Dodd-Frank Act (directing the Commission to exempt private fund advisers with less than $150 million in aggregate assets under management in the United States).

[23] *See* section 402 of the Dodd-Frank Act (defining "foreign private adviser" as "any investment adviser who—(A) Has no place of business in the United States; (B) has, in total, fewer than 15 clients and investors in the United States in private funds advised by the investment adviser; (C) has aggregate assets under management attributable to clients in the United States and investors in the United States in private funds advised by the investment adviser of less than $25,000,000, or such higher amount as the Commission may, by rule, deem appropriate in accordance with the purposes of this title; and (D) neither—(i) Holds itself out generally to the public in the United States as an investment adviser; nor (ii) acts as—(I) an investment adviser to any investment company registered under the Investment Company Act of 1940 [15 U.S.C. 80a]; or a company that has elected to be a business development company pursuant to section 54 of the Investment Company Act of 1940 (15 U.S.C. 80a-53), and has not withdrawn its election.").

[24] The Commission provided the public with an opportunity to present its views on various rulemaking and other initiatives that the Dodd-Frank Act required the Commission to undertake. Public views relating to our rulemaking in connection with the exemptions for certain advisers addressed in this Release are available at *http://www.sec.gov/comments/df-title-iv/exemptions/exemptions.shtml.*

[25] *Rules Implementing Amendments to the Investment Advisers Act of 1940,* Investment Advisers Act Release No. 3110 (Nov. 19, 2010).

[26] *See infra* note 30 and accompanying and following text.

[27] *See supra* note 21.

under management in the United States of less than $150 million.[28] We are proposing such an exemption in a new rule 203(m)–1, which we discuss below in Section II.B of this Release. Proposed rule 203(m)–1 includes provisions for determining the amount of an adviser's private fund assets for purposes of the exemption and when those assets are deemed managed in the United States.

The new exemptions under sections 203(l) and 203(m) provide that the Commission shall require advisers relying on them to provide the Commission with reports and keep records as the Commission determines necessary or appropriate in the public interest or for the protection of investors.[29] These new exemptions do not limit our statutory authority to examine the books and records of advisers relying upon these exemptions.[30] For purposes of this Release we will refer to these advisers as "exempt reporting advisers." In the Implementing Release, we are proposing reporting requirements for exempt reporting advisers.[31]

The third exemption, set forth in amended section 203(b)(3) of the Advisers Act, provides an exemption from registration for certain foreign private advisers. New section 202(a)(30) of the Advisers Act defines "foreign private adviser" as an investment adviser that has no place of business in the United States, has fewer than 15 clients in the United States and investors in the United States in private funds advised by the adviser,[32] and less than $25 million in aggregate assets under management from such clients and investors.[33] As discussed in Section II.C of this Release, in order to clarify the application of this new exemption, we are proposing a new rule 202(a)(30)-1, which would define a number of terms included in the statutory definition of foreign private adviser.[34]

These exemptions are not mandatory. Thus, an adviser that qualifies for any of the exemptions could choose to register (or remain registered) with the Commission, subject to section 203A of the Advisers Act, which generally prohibits from registering with the Commission most advisers that do not have at least $100 million in assets under management.[35] An adviser choosing to avail itself of the exemptions under sections 203(l), 203(m) or 203(b)(3), however, may be subject to registration by one or more state securities authorities.[36]

A. Definition of Venture Capital Fund

We are proposing a definition of "venture capital fund" for purposes of the new exemption for investment advisers that advise solely venture capital funds.[37] Proposed rule 203(l)-1 would define the term venture capital fund consistently with what we believe Congress understood venture capital funds to be, and in light of other provisions of the federal securities laws that seek to achieve similar objectives.[38]

We understand that Congress sought to distinguish advisers to "venture capital funds" from the larger category of advisers to "private equity funds" for which Congress considered, but ultimately did not provide, an exemption.[39] As a general matter, venture capital funds are long-term investors in early-stage or small companies that are privately held, as distinguished from other types of private equity funds, which may invest in businesses at various stages of development including mature, publicly held companies.[40] Testimony received by Congress characterized venture capital funds as typically contributing substantial capital to early-stage companies [41] and generally not

[28] *See supra* note 22.

[29] *See supra* notes 21 and 22.

[30] Under section 204(a) of the Advisers Act, the Commission has the authority to require an investment adviser to maintain records and provide reports, as well as the authority to examine such adviser's records, unless the adviser is "specifically exempted" from the requirement to register pursuant to section 203(b) of the Advisers Act. Investment advisers that are exempt from registration in reliance on section 203(l) or 203(m) of the Advisers Act are not "specifically exempted" from the requirement to register pursuant to section 203(b), and thus the Commission has authority under section 204(a) of the Advisers Act to require those advisers to maintain records and provide reports and has authority to examine such advisers' records.

[31] *See* Implementing Release, *supra* note 25, at section II.B.

[32] Subparagraph (B) of section 202(a)(30) refers to number of "clients and investors in the United States in private funds," while subparagraph (C) refers to the assets of "clients *in the United States* and investors in the United States in private funds" (emphasis added). We interpret these provisions consistently so that only clients *in the United States* and investors in the United States should be included for purposes of determining eligibility for the exemption under subparagraph (B).

[33] The exemption is not available to an adviser that "acts as (I) an investment adviser to any investment company registered under the [Investment Company Act]; or (II) a company that has elected to be a business development company pursuant to section 54 of [that Act] and has not withdrawn its election." Section 202(a)(30)(D)(ii). We interpret subparagraph (II) to prevent an adviser *that advises* a business development company from relying on the exemption.

[34] Proposed rule 202(a)(30)-1 would define the following terms: (i) "client;" (ii) "investor;" (iii) "in the United States;" (iv) "place of business;" and (v) "assets under management." *See* discussion *infra* in section II.C of this Release. We are proposing rule 202(a)(30)-1 pursuant to section 211(a) of the Advisers Act, which Congress amended to explicitly provide us with the authority to define technical, trade, and other terms used in the Advisers Act. *See* section 406 of the Dodd-Frank Act.

[35] Section 203A(a)(1) of the Advisers Act generally prohibits an investment adviser regulated by the state in which it maintains its principal office and place of business from registering with the Commission unless it has at least $25 million of assets under management, and preempts certain state laws regulating advisers that are registered with the Commission. Section 410 of the Dodd-Frank Act amended section 203A(a) to also prohibit generally from registering with the Commission an investment adviser that has assets under management between $25 million and $100 million if the adviser is required to be registered with, and if registered, would be subject to examination by, the state security authority where it maintains its principal office and place of business. *See* section 203A(a)(2) of the Advisers Act. In each of subparagraphs (1) and (2) of section 203A(a), additional conditions also may apply. *See* Implementing Release, *supra* note 25, at section II.A.

[36] *See* section 203A(b)(1) of the Advisers Act (exempting from state regulatory requirements only advisers registered with the Commission). *See also infra* note 265 (discussing the application of section 222 of the Advisers Act).

[37] *See* proposed rule 203(l)–1.

[38] *See infra* notes 94, 123, 125 (discussing the history of and regulatory framework applicable to business development companies under federal securities laws).

[39] While the Senate voted to exempt private equity fund advisers in addition to venture capital fund advisers, the final Dodd-Frank Act only exempts venture capital fund advisers. *Compare* Restoring American Financial Stability Act of 2010, S. 3217, 111th Cong. § 408 (2010) (as passed by the Senate) *with* Dodd-Frank Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. (2009) (as passed by the House) ("H.R. 4173") *and* Dodd-Frank Act.

[40] *See* Testimony of Trevor Loy, Flywheel Ventures, before the Senate Banking Subcommittee on Securities, Insurance and Investment Hearing, July 15, 2009 ("Loy Testimony"), at 3; Testimony of James Chanos, Chairman, Coalition of Private Investment Companies, July 15, 2009, at 4 ("Chanos Testimony") ("Private investment companies play significant, diverse roles in the financial markets and in the economy as a whole. For example, venture capital funds are an important source of funding for start-up companies or turnaround ventures. Other private equity funds provide growth capital to established small-sized companies, while still others pursue 'buyout' strategies by investing in underperforming companies and providing them with capital and/or expertise to improve results."); Testimony of Mark Tresnowksi, General Counsel, Madison Dearborn Partners, LLC, on behalf of the Private Equity Council, before the Senate Banking Subcommittee on Securities, Insurance and Investment, July 15, 2009, at 2 ("Tresnowski Testimony") (stating that private equity firms invest in broad categories of companies, including "struggling and underperforming businesses" and " promising or strong companies"). *See also* Preqin, Private Equity and Alternative Asset Glossary, *http://www.preqin.com/itemGlossary.aspx?pnl=UtoZ* (defining venture capital as "a type of private equity investment that provides capital to new or growing businesses. Venture funds invest in start-up firms and small businesses with perceived, long-term growth potential.").

[41] Loy Testimony, *supra* note 40, at 3; Testimony of Terry McGuire, General Partner, Polaris Venture Partners, and Chairman, National Venture Capital Association, before the U.S. House of Representatives Committee on Financial Services, October 6, 2009, at 3 ("McGuire Testimony") ("Our

leveraged,[42] and thus not contributing to systemic risk, a factor that appears significant to Congress' determination to exempt these advisers.[43] In drafting the proposed rule, we have sought to incorporate this Congressional understanding of the nature of investments of a venture capital fund, and these principles guided our consideration of the proposed venture capital fund definition.

This is not the first time that Congress has included special provisions to the federal securities laws for these types of private funds and the advisers that advise them. In 1980, in an effort to promote capital raising by small businesses,[44] Congress provided exemptions from various requirements in the Investment Company Act and Advisers Act for "business development companies" (or "BDCs").[45] Congress adopted the term BDC to avoid "semantical disagreements" over what constituted a venture capital or small business company,[46] but acknowledged that the purpose of the BDC provisions was to support "venture capital" activity in capital formation for small businesses.[47] The BDC provisions and venture capital exemption reflect many similar policy considerations, and thus in drafting the definition of "venture capital fund," we have looked, in part, to language Congress previously used to describe these types of funds.

As described in more detail below, we propose to define a venture capital fund as a private fund that: (i) Invests in equity securities of private companies in order to provide operating and business expansion capital (*i.e.,* "qualifying portfolio companies," which are discussed below) and at least 80 percent of each company's securities owned by the fund were acquired directly from the qualifying portfolio company; (ii) directly, or through its investment advisers, offers or provides significant managerial assistance to, or controls, the qualifying portfolio company; (iii) does not borrow or otherwise incur leverage (other than limited short-term borrowing); (iv) does not offer its investors redemption or other similar liquidity rights except in extraordinary circumstances; (v) represents itself as a venture capital fund to investors; and (vi) is not registered under the Investment Company Act and has not elected to be treated as a BDC.[48] We also propose to grandfather an existing fund as a venture capital fund if it satisfies certain criteria under the grandfathering provision.[49] An adviser would be eligible to rely on the exemption under section 203(l) of the Advisers Act (the "venture capital exemption") only if it solely advised venture capital funds that met all of the elements of the proposed definition or if it were grandfathered.

1. Qualifying Portfolio Companies

We propose to define a venture capital fund for the purposes of the exemption as a fund that invests in equity securities issued by "qualifying portfolio companies," which we define generally as any company that: (i) Is not publicly traded; (ii) does not incur leverage in connection with the investment by the private fund; (iii) uses the capital provided by the fund for operating or business expansion purposes rather than to buy out other investors; and (iv) is not itself a fund (*i.e.,* is an operating company).[50] In addition to equity securities, the venture capital fund may also hold cash (and cash equivalents) and U.S. Treasuries with a remaining maturity of 60 days or less.[51] We understand each of the criteria to be characteristic of issuers of portfolio securities held by venture capital funds.[52] Moreover, collectively, these criteria would operate to exclude most other private equity funds and hedge funds from the definition. We describe each element of a qualifying portfolio company below.

a. Private Companies

We propose to define a venture capital fund as a fund that invests in equity securities of qualifying portfolio companies and cash and cash equivalents and U.S. Treasuries with a remaining maturity of 60 days or less.[53] At the time of each investment by the venture capital fund, the portfolio company could not be publicly traded nor could it control, be controlled by, or be under common control with, a publicly traded company.[54] Under the proposed definition, a venture capital fund could continue to hold securities of a portfolio company that subsequently becomes public.

Venture capital funds provide operating capital to companies in the early stages of their development with the goal of eventually either selling the company or taking it public.[55] Unlike

job is to find the most promising, innovative ideas, entrepreneurs, and companies that have the potential to grow exponentially with the application of our expertise and venture capital investment. Often these companies are formed from ideas and entrepreneurs that come out of university and government laboratories—or even someone's garage."). *See also* National Venture Capital Association Yearbook 2010, at 7–8 (noting that venture capital is a "long-term investment" and the "payoff [to the venture capital firm] comes after the company is acquired or goes public") ("NVCA Yearbook 2010"); Private Equity Growth Capital Council, Private Equity: Frequently Asked Questions, *http://www.privateequitycouncil.org/just-the-facts/private-equity-frequently-asked-questions/* (noting that venture capital funds focus on "start-up and young companies with little or no track record," whereas buyout and growth funds focus on more mature businesses).

[42] Loy Testimony, *supra* note 40, at 3. *See also* McGuire Testimony, *supra* note 41, at 3–4 ("most limited partnership agreements [of venture capital funds] * * * prohibit [the venture capital fund] from any type of long term borrowing. * * * Leverage is not part of the equation because start-ups do not typically have the ability to sustain debt interest payments and often do not have collateral that lenders desire. In fact most of our companies are not profitable and require our equity to fund their losses through their initial growth period.").

[43] *See* S. Rep. No. 111–176, *supra* note 7, at 74–5 (noting that venture capital funds "do not present the same risks as the large private funds whose advisers are required to register with the SEC under this title [IV]. Their activities are not interconnected with the global financial system, and they generally rely on equity funding, so that losses that may occur do not ripple throughout world markets but are borne by fund investors alone. Terry McGuire, Chairman of the National Venture Capital Association, wrote in congressional testimony that 'venture capital did not contribute to the implosion that occurred in the financial system in the last year, nor does it pose a future systemic risk to our world financial markets or retail investors.'"). *See also* Loy Testimony, *supra* note 40, at 7 (noting the factors by which the venture capital industry is exposed to "entrepreneurial and technological risk not systemic financial risk").

[44] *See* H. Rep. No. 96–1341, at 21–22 (1980) ("1980 House Report").

[45] *See infra* note 123 for a discussion of these definitions.

[46] *See* 1980 House Report, *supra* note 44, at 22.

[47] *See id.,* at 21.

[48] Proposed rule 203(l)–1(a).

[49] Proposed rule 203(l)–1(b).

[50] Proposed rule 203(l)–1(c)(4).

[51] Proposed rule 203(l)–1(a)(2).

[52] *See infra* sections II.A.1.a–II.A.1.e of this Release.

[53] Proposed rule 203(l)–1(a)(2).

[54] Proposed rule 203(l)–1(c)(4)(i); proposed rule 203(l)–1(c)(3) (defining a "publicly traded" company as one that is subject to the reporting requirements under section 13 or 15(d) of the Exchange Act, or has a security listed or traded on any exchange or organized market operating in a foreign jurisdiction). This definition is similar to rule 2a51–1 under the Investment Company Act (defining "public company," for purposes of the qualified purchaser standard, as "a company that files reports pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934") and rule 12g3–2 under the Exchange Act (conditioning a foreign private issuer's exemption from registering securities under section 12(g) of the Exchange Act if, among other conditions, the "issuer is not required to file or furnish reports" pursuant to section 13(a) or section 15(d) of the Exchange Act). Under the proposed rule, securities of a publicly traded company, as defined, would include securities of non-U.S. companies that are listed on a non-U.S. market or non-U.S. exchange. Some securities that are "pink sheets" (*i.e.,* generally over-the-counter securities that are quoted on an electronic quotation system operated by Pink OTC Markets) are not subject to the reporting requirements under sections 13 and 15(d) of the Exchange Act and would not be publicly traded for purposes of the proposed rule.

[55] *See* Chanos Testimony, *supra* note 40, at 4 ("[V]enture capital funds are an important source of funding for start-up companies or turnaround ventures."); NVCA Yearbook 2010, *supra* note 41, at 7–8 (noting that venture capital is a "long-term

Continued

other types of private funds, venture capital funds do not trade in the public markets, but may sell portfolio company securities into the public markets once the portfolio company has matured.[56] As of year-end 2009, U.S. venture capital funds managed approximately $179.4 billion in assets.[57] In comparison, as of year-end 2009, the U.S. publicly traded equity market had a market value of approximately $13.7 trillion,[58] whereas global hedge funds had approximately $1.4 trillion in assets under management.[59] As a consequence, the aggregate amount invested in venture capital funds is considerably smaller, and Congressional testimony asserted that these funds may be less connected with the public markets and may involve less potential for systemic risk.[60] This appears to be a key consideration by Congress that led to the enactment of the venture capital exemption.[61]

We request comment on our proposed approach. We considered more narrow definitions, such as defining a qualifying portfolio company as a "start-up company" or "small company."[62] There appears to be little consensus, however, as to what a start-up company is. A company may be considered a "start-up" business depending on when it was formed as a legal entity,[63] whether it employs workers or paid employment taxes,[64] or whether it has generated revenues.[65] Defining a portfolio company based on any one of these factors may inadvertently exclude too many start-up portfolio companies. For example, solely relying on the age of the company (*e.g.,* first year since incorporation) fails to recognize that many companies may be incorporated for some period of time prior to initiating business operations or remain unincorporated for significant periods of time.[66] Likewise, payment of employment taxes assumes the hiring of employees, despite the fact that many new business ventures are sole proprietorships without employees.[67] Such a test could also have the unintended effect of discouraging hiring. Similarly, a bright-line revenue test set too low could exclude young or new businesses that generate significant revenues more quickly than other companies.[68] This could have the unintended consequence of venture capital funds that seek to fall within the definition investing in less promising, non-revenue generating, young companies.

We also considered defining a qualifying portfolio company as a small company. As in the case of defining "start-up," there is no single definition for what constitutes a "small company."[69] We are concerned that

investment" and the "payoff [to the venture capital firm] comes after the company is acquired or goes public."); George W. Fenn, Nellie Liang and Stephen Prowse, The Economics of the Private Equity Market, December 1995, 22, n.61 and accompanying text ("Fenn *et al.*") ("Private sales" are not normally the most important type of exit strategy as compared to IPOs, yet of the 635 successful portfolio company exits by venture capitalists between 1991–1993 "merger and acquisition transactions accounted for 191 deals and IPOs for 444 deals." Furthermore, between 1983 and 1994, of the 2,200 venture capital fund exits, 1,104 (approximately 50%) were attributed to mergers and acquisitions of venture-backed firms.). *See also* Jack S. Levin, Structuring Venture Capital, Private Equity and Entrepreneurial Transactions, 2000 ("Levin") at 1–2 to 1–7 (describing the various types of venture capital and private equity investment business but stating that "the phrase 'venture capital' is sometimes used narrowly to refer only to financing the start-up of a new business"); Anna T. Pinedo & James R. Tanenbaum, Exempt and Hybrid Securities Offerings (2009), Vol. 1 at 12–2 ("Pinedo") (discussing the role initial public offerings play in providing venture capital investors with liquidity).

[56] *See* Loy Testimony, *supra* note 40, at 5 ("We do not trade in the public markets."). *See also* McGuire Testimony, *supra* note 41, at 11 ("[V]enture capital funds do not typically trade in the public markets and generally limit advisory activities to the purchase and sale of securities of private operating companies in private transactions"); Levin, *supra* note 55, at 1–4 ("A *third* distinguishing feature of venture capital/private equity investing is that the securities purchased are generally privately held as opposed to publicly traded * * * a venture capital/private equity investment is normally made in a privately-held company, and in the relatively infrequent cases where the investment is into a publicly-held company, the [venture capital fund] generally holds non-public securities.") (emphasis in original).

[57] NVCA Yearbook 2010, *supra* note 41, at 9.

[58] Bloomberg Terminal Database, WCAUUS (Bloomberg United States Exchange Market Capitalization).

[59] See Saijel Kishan, *Hedge Funds Hold Investors "Hostage" After Decade's Best Year,* Bloomberg Businessweek, Jan. 20, 2010, available at *http://www.businessweek.com/news/2010–01–20/hedge-funds-hold-investors-hostage-after-decade-s-best-year.html.*

[60] *See supra* note 43; McGuire Testimony, *supra* note 41, at 6 (noting that the "venture capital industry's activities are not interwoven with U.S. financial markets."). *See also* Group of Thirty, Financial Reform: A Framework for Financial Stability, January 15, 2009, at 9 (discussing the need for registration of managers of "private pools of capital that employ substantial borrowed funds" yet recognizing the need to exempt venture capital from registration).

[61] *See supra* note 43.

[62] *See* S. Rep. No. 111–176, *supra* note 7, at 74 (describing venture capital funds as a subset of private investment companies, specializing in long-term equity investments in "small or start-up businesses").

[63] There is no generally accepted definition of a "start-up" entity although it is generally used to refer to new business ventures. *See, e.g.,* U.S. Census Bureau, Business Dynamics Statistics, *available at http://www.ces.census.gov/index.php/bds/bds_overview* (which tracks information on businesses, based on the size and age of the business, and assigns a "birth" year to a business beginning in the year in which it reports positive employment of workers on the payroll); The Kauffman Foundation, *Where Will the Jobs Come From?,* November 2009, at 5 (identifying "start-ups" as those firms younger than one year); Anastasia Di Carlo & Roger Kelly, *Private Equity Market Outlook* 27 (European Investment Fund, Working Paper 2010/005) (defining start-ups as companies that are "in the process of being set up or may have been in business for a short time, but have not sold their product commercially").

[64] *See, e.g.,* The Kauffman Foundation, *An Overview of the Kauffman Firm Survey, Results from the 2004–2008 Data,* May 2010, at 26 ("*Overview of the Kauffman Firm Survey*") (discussing the difficulties of compiling data on new businesses; start-up businesses were generally identified based on several factors: the payment of state unemployment taxes, the payment of Federal Insurance Contributions Act taxes, the existence of a legal entity, use of an employer identification number, and use of a schedule C to report business income on a personal tax return).

[65] *See, e.g.,* NVCA Yearbook 2010, *supra* note 41, at 61, 69, 111 (not defining "start-up" but classifying investments in "start-up/seed" companies and defining the "seed stage" of a company as "the state of a company when it has just been incorporated and its founders are developing their product or service," whereas an "early stage" company is one that is beyond the "seed stage" but has not yet generated revenues). *Cf.* PricewaterhouseCoopers MoneyTree Report Definitions, *https://www.pwcmoneytree.com/MTPublic/ns/nav.jsp?page=definitions* (last visited Sept. 23, 2010) (defining a "seed/start-up" company as one that has a concept or product in development but not yet operational and usually has been in existence for less than 18 months).

[66] According to the Kauffman Survey, in 2004, 36.0% of all start-up companies were sole proprietorships; by 2008, 34.4% of all surviving companies were sole proprietorships. *Overview of the Kauffman Firm Survey, supra* note 64, at 8.

[67] *See, e.g.,* Ying Lowrey, *Startup Business Characteristics and Dynamics: A Data Analysis of the Kauffman Firm Survey,* Aug. 2009, at 6 (Working Paper) (based on a survey sample of businesses started in 2004, reporting that 59% of all start-up companies in 2004 had zero employees; a "start-up" business was any business that met any one of the five following criteria for being a start-up: the payment of state unemployment taxes, the payment of Federal Insurance Contributions Act taxes, the existence of a legal entity, use of an employer identification number, and use of a schedule C to report business income on a personal tax return).

[68] According to the Kauffman Survey, which conducted a longitudinal study of "start-up" businesses that began in 2004, 46.5% of all such "start-up" companies in 2004 had zero revenues; by 2008, 30.2% of the surviving companies in the sample reported zero revenues. In comparison, in 2004, 15.3% of start-up companies reported revenues of more than $100,000 and in 2008, 36.1% of the surviving companies in the survey reported revenues of more than $100,000. *Overview of the Kauffman Firm Survey, supra* note 64, at 9.

[69] Among countries that are members of the Organisation for Economic Co-operation and Development, "small and medium-sized enterprises" ("SMEs") are defined as non-subsidiary, independent firms employing fewer than the number of employees as is set by each country. The definition of SME may be used to determine funding or other programs sponsored by member countries. Although the European Union generally defines SMEs as businesses with fewer than 250 employees, the United States sets the threshold at fewer than 500 employees. Moreover, "small" firms are generally defined as those with fewer than 50 employees, while micro-enterprises have at most 10, or in some cases five, workers. In 2005, the European Union adopted additional tests for small

imposing a standardized metric such as net income, the number of employees, or another single factor test could ignore the complexities of doing business in different industries or regions. As in the case of adopting a revenue-based test, there is the potential that even a low threshold for a size metric could inadvertently restrict venture capital funds from funding otherwise promising young small companies.

Other tests also present concerns. A test adopted by the California Corporations Commission and the U.S. Department of Labor requires that a venture capital company hold at least 50 percent of its assets in "operating companies," which are defined as companies primarily engaged in the production or sale of a product or services other than the investment of capital.[70] Under the California exemption, a venture capital fund could invest in older and more mature companies that qualify as "operating companies" as well as in securities issued by publicly traded companies provided that the venture capital fund obtained management rights in such publicly traded companies.[71] Hence, although the California venture capital exemption is for advisers to so-called "venture capital companies," the rule provides a much broader exemption that would include many types of private equity and other types of private funds and thus does not appear consistent with our understanding of the intended scope of section 203(l).[72] We request comment on any of these approaches or alternative ones that we have not discussed.[73]

We also request comment on our approach to "follow-on" investments.[74] Under our proposed rule, a qualifying portfolio company is defined to include a company that is not publicly traded (or controlled by a publicly traded company) at the time of each fund investment,[75] but would not exclude a portfolio company that ultimately becomes a successful venture capital investment (typically when the company is taken "public"). Under this approach, an adviser could continue to rely on the exemption even if the venture capital fund's portfolio ultimately consisted entirely of publicly traded securities, a result that could be viewed as inconsistent with section 203(l) of the Advisers Act. We believe that our proposed approach would give advisers to venture capital funds sufficient flexibility to exercise their business judgment on the appropriate time to dispose of portfolio company investments—which may occur at a time when the company is privately held or publicly held.[76] Moreover, under the federal securities laws, a person that is deemed to be an affiliate of a publicly traded company may be limited in its ability to dispose of publicly traded securities.[77] Would our proposed approach to follow-on investments accommodate the way venture capital funds typically invest? Are there circumstances in which a venture capital fund would provide follow-on investments in a company that has become public? Should the rule specifically provide that a venture capital fund includes a fund that invests a limited percentage of its capital in publicly traded securities under certain circumstances (*e.g.,* a follow-on investment in a company in which the fund's previous investments were made when the company was private)? If so, what is the appropriate percentage threshold (*e.g.,* 5, 10 or 20 percent)?

We request comment on whether our definition should exclude any venture capital fund that holds any publicly traded securities or a specified percentage of publicly traded portfolio company securities. What percentage

businesses, defining small business (*i.e.,* 10–49 employees) as those with no more than €10 million in annual revenue and no more than €10 million in assets as evidenced on their annual balance sheet. *See, e.g.,* Organisation for Economic Co-operation and Development, Glossary of Statistical Terms, *http://stats.oecd.org/glossary/detail.asp?ID=3123.*

Under one regulatory framework in the United States, a business may be considered "small" depending on the specified number of employees or the net worth or net income of such business. Separate tests are specified for a business based on various factors, such as the size of the industry, its geographical concentration, and the number of market participants. *See, e.g.,* Small Business Administration, SBA Size Standards Methodology (Apr. 2009) at 8, *http://www.sba.gov/idc/groups/public/documents/sba_homepage/size_standards_methodology.pdf* (noting that the Small Business Administration ("SBA") decided to apply the net worth and net income measures to its Small Business Investment Company ("SBIC") financing program because investment companies typically evaluate businesses using these measures when determining whether or not to invest). For example, under the SBIC program administered by the SBA, SBA loans may be made to SBICs that invest in companies that are "small" (usually defined as having a net worth of $18 million or less and an average after-tax net income for the prior two years of no more than $6 million, although there are specific tests depending on the industry of the company that may be based on net income, net worth or number of employees). The size requirement is codified at 13 CFR 121.301(c)(2). *See* SBA, Investment Program Summary, *http://www.sba.gov/financialassistance/borrowers/vc/sbainvp/index.html.*

[70] Under section 260.204.9 of the California Code of Regulations (the "California VC exemption"), an adviser is exempt from the requirement to register if it provides investment advice only to "venture capital companies," which are generally defined as entities that, on at least one annual occasion (commencing with the first annual period following the initial capitalization), have at least 50% of their assets (other than short-term investments pending long-term commitment or distribution to investors), valued at cost, in "venture capital investments." A venture capital investment is defined as an acquisition of securities in an operating company as to which the adviser has or obtains management rights. *See* Cal. Code Regs. tit. 10, § 260.204.9(a), (b)(3), (b)(4) (2010). An "operating company" is defined to mean any entity "primarily engaged, directly or through a majority owned subsidiary or subsidiaries, in the production or sale (including any research or development) of a product or service other than the management or investment of capital but shall not include an individual or sole proprietorship." *Id.* tit. 10, § 260.204.9(b)(7). "Management rights" is defined as the "right, obtained contractually or through ownership of securities . . . to substantially participate in, to substantially influence the conduct of, or to provide (or offer to provide) significant guidance and counsel concerning, the management, operations or business objectives of the operating company in which the venture capital investment is made." *Id.* tit. 10, § 260.204.9(b)(6). Management rights may be held by the adviser, the fund or an affiliated person of the adviser, and may be obtained either through one person or through two or more persons acting together. *Id.*

The U.S. Department of Labor regulations ("VCOC exemption") are similar to the California VC exemption. The regulations define "operating company" to mean an entity that is "primarily engaged, directly or through a majority owned subsidiary or subsidiaries, in the production or sale of a product or service other than the investment of capital. The term 'operating company' includes an entity that is not described in the preceding sentence, but that is a 'venture capital operating company' described in paragraph (d) or a 'real estate operating company' described in paragraph (e)." 29 CFR 2510.3–101(c)(1). The regulations define a venture capital operating company ("VCOC") as any entity that, as of the date of the first investment (or other relevant time), has at least 50% of its assets (other than short-term investments pending long-term commitment or distribution to investors), valued at cost, invested in venture capital investments. 29 CFR 2510.3–101(d). A venture capital investment is defined as "an investment in an operating company (other than a venture capital operating company) as to which the investor has or obtains management rights" that are "contractual rights * * * to substantially participate in, or substantially influence the conduct of, the management of the operating company." 29 CFR 2510.3–101(d)(3).

[71] *See* Cal. Code Reg. tit. 10, § 260.204.9.

[72] The California VC exemption does not limit permitted investments to companies that are start-up or privately held companies, which were cited as characteristic of venture capital investing in testimony to Congress. *See* McGuire Testimony, *supra* note 41; Loy Testimony, *supra* note 40.

[73] *See* Letter of Keith P. Bishop (July 28, 2009) (recommending elements of the California VC exemption). *Cf.* Letter of P. James (August 21, 2010) (expressing the view that the provision of management services does not distinguish venture capital from private equity). We received these letters in response to our request for public views on rulemaking and other initiatives under the Dodd-Frank Act. *See generally supra* note 24.

[74] *See, e.g.,* Loy Testimony, *supra* note 40, at 3 (discussing the role of follow-on investments); NVCA Yearbook 2010, *supra* note 41, at 34 (statistics comparing initial investments versus follow-on investments made by venture capital funds at Figure 3.15).

[75] *See* proposed rule 203(l)–1(c)(4)(i).

[76] *See supra* note 55.

[77] *See, e.g.,* rule 144 under the Securities Act (17 CFR 230.144) (prohibiting the resale of certain restricted and control securities by "affiliates" unless certain conditions are met).

would be appropriate? What percentage would give venture capital funds sufficient flexibility to dispose of their publicly traded securities? Would 30 or 40 percent of the value of a venture capital fund's assets be appropriate? [78] Should the rule specify that publicly traded securities may only be held for a limited period of time, such as one-year, or that a venture capital fund's entire portfolio may not consist only of publicly traded securities except for a limited period of time, such as one-year or other period?

b. Equity Securities, Cash and Cash Equivalents and Short-Term U.S. Treasuries.

We propose to define venture capital fund for purposes of the exemption as a fund that invests in equity securities of qualifying portfolio companies, cash and cash equivalents and U.S. Treasuries with a remaining maturity of 60 days or less.[79] Under our proposed definition, a fund would not qualify as a venture capital fund for purposes of the exemption if it invested in debt instruments (unless they met the definition of "equity security") of a portfolio company or otherwise lent money to a portfolio company, strategies that are not the typical form of venture capital investing.[80] Congress received testimony that, unlike other types of private funds, venture capital funds "invest cash in return for an equity share of the company's stock." [81] As a consequence, venture capital funds avoid using financial leverage, and leverage appears to have raised systemic risk concerns for Congress.[82] Should our definition of venture capital fund include funds that invest in debt, or certain types of debt, issued by qualifying portfolio companies, or make certain types of loans to qualifying portfolio companies? We understand that some venture capital funds may extend "bridge" financing to portfolio companies in anticipation of a future round of venture capital investment.[83] Such financings may take the form of investment in instruments that are ultimately convertible into a portfolio company's common or preferred stock at a subsequent investment stage and thus would meet the definition of "equity security." [84] Should our definition include any fund that extends bridge financing that does not meet the definition of "equity security" on a short-term limited basis to a qualifying portfolio company? Should our definition be limited to those funds that make bridge loans to a portfolio company that are convertible into equity funding only in the next round of venture capital investing? Under our proposed definition, debt investments or loans with respect to qualifying portfolio companies that did not meet the definition of "equity security" could not be made by a fund seeking to qualify as a venture capital fund. Should we modify the proposed rule so that such investments and loans could be made subject to a limit? If so, what would be an appropriate limit (*e.g.,* 5 or 10 percent) and how should the limit be determined (*e.g.,* as a percentage of the fund's capital commitments)?

We propose to use the definition of equity security in section 3(a)(11) of the Securities Exchange Act of 1934 ("Exchange Act") and rule 3a11–1 thereunder.[85] This definition is broad, and includes common stock as well as preferred stock, warrants and other securities convertible into common stock in addition to limited partnership interests.[86] This definition would include various securities in which venture capital funds typically invest and would provide venture capital funds with flexibility to determine which equity securities in the portfolio company capital structure are appropriate for the fund.[87] We request comment on the use of this definition. Should we consider a more limited definition of equity security? Do venture capital funds typically invest in other types of equity securities that are not covered by the proposed definition?

Under the proposed rule, we define a venture capital fund for purposes of the exemption as a fund that holds cash and cash equivalents or short-term U.S. Treasuries, in recognition of the manner in which venture capital funds operate.[88] A venture capital fund may hold cash funded by its investors until the cash is allocated to an investment opportunity; subsequently, upon liquidation of the investment, the venture capital fund will receive cash as a return on its investment, which is then distributed to the fund's investors.[89] Thus, pending receipt of all

[78] *Cf.* note 94 (discussing limits applicable to BDCs).

[79] Proposed rule 203(l)–1(a)(2).

[80] *See* Loy Testimony, *supra* note 40, at 2, 4; Pinedo, *supra* note 55, Vol. 1 at 12–2; Levin, *supra* note 55, at 1–5 (noting that venture capital funds focus on "common stock or common equivalent securities, with any purchase of subordinated debentures and/or preferred stock generally designed merely to fill a hole in the financing or to provide [the venture capitalist] with some priority over management in liquidation or return of capital"). *See also* Jesse M. Fried and Mira Ganor, *Agency Costs of Venture Capitalist Control in Startups,* 81 N.Y.U. Law Journal 967, 970 (2006) (venture capital funds investing in U.S. start-ups "almost always receive convertible preferred stock"); Fenn *et al.*, *supra* note 55, at 32.

[81] McGuire Testimony, *supra* note 41, at 4; Loy Testimony, *supra* note 40, at 2.

[82] *See infra* section II.A.3 of this Release.

[83] *See, e.g.,* Darian M. Ibrahim, *Debt as Venture Capital,* 4 U. Ill. L. Rev. 1169, 1173, 1206 (2010) ("VCs sometimes [provide] bridge loans to their portfolio companies * * * [A] bridge loan * * * is [essentially] about 'funding to subsequent rounds of equity' rather than relying on the underlying start-up's ability to repay the loan through cash flows."); Alan Olsen, *Venture Capital Financing: Structure and Pricing,* VirtualStreet (July 25, 2010), *available at http://www20.csueastbay.edu/news/2010/07/alan-olsen-venture-capital.html* ("Bridge financing is designed as temporary financing in cases where the company has obtained a commitment for financing at a future date, which funds will be used to retire the debt."); Thomas Flynn, *Venture Capital: Current Trends and Lessons Learned,* Ventures and Intellectual Property Letter (2003), *available at http://www.shipmangoodwin.com/publications/Detail.aspx?pub=194* ("The bridge financing, intended to take the cash strapped company either to the next full round of venture investment or alternatively to a liquidity event or wind-up, has become a familiar fixture in the life cycle of a venture-backed company.").

[84] Provided such financings were structured to satisfy the definition of equity security, we would view such transactions to satisfy the definition of qualifying portfolio company under proposed rule 203(l)–1(c)(4)(ii).

[85] *See* 15 U.S.C. 78c(a)(11) (defining "equity security" as "any stock or similar security; or any security future on any such security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any other security which the Commission shall deem to be of similar nature and consider necessary or appropriate, by such rules and regulations as it may prescribe in the public interest or for the protection of investors, to treat as an equity security."); rule 3a11–1 under the Exchange Act (17 CFR 240.3a11–1) (defining "equity security" to include "any stock or similar security, certificate of interest or participation in any profit sharing agreement, preorganization certificate or subscription, transferable share, voting trust certificate or certificate of deposit for an equity security, limited partnership interest, interest in a joint venture, or certificate of interest in a business trust; any security future on any such security; or any security convertible, with or without consideration into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any put, call, straddle, or other option or privilege of buying such a security from or selling such a security to another without being bound to do so.").

[86] *See* rule 3a11–1 under the Exchange Act (17 CFR 240.3a11–1) (defining "equity security" to include any "limited partnership interest").

[87] Our proposed use of the definition of equity security under the Exchange Act acknowledges that venture capital funds typically invest in common stock and other equity instruments that may be convertible into equity common stock. *See supra* note 80. Our proposed definition does not otherwise specify the types of equity instruments that a venture capital fund could hold in deference to the business judgment of venture capital investors.

[88] Proposed rule 203(l)–1(a)(2)(ii).

[89] "[T]he capital supplied to a venture capital fund consists entirely of equity commitments provided as cash from investors in installments on an as-needed basis. * * * The 'capital calls' for investments generally happen in cycles over the full life of the fund on an 'as needed' basis as investments are identified by the general partners and then as further rounds of investment are made into the portfolio companies." Loy Testimony, *supra* note 40, at 2; Paul A. Gompers & Josh Lerner,

capital commitments from investors or pending distribution of such proceeds to investors, a venture capital fund could hold cash and cash equivalents and short-term U.S. Treasuries.[90] We define "cash and cash equivalents" by reference to rule 2a51–1(b)(7)(i) under the Investment Company Act.[91] Rule 2a51–1, however, is used to determine whether an owner of an investment company excluded by reason of section 3(c)(7) of the Investment Company Act meets the definition of a qualified purchaser by examining whether such owner holds sufficient "investments" (generally securities and other assets held for investment purposes).[92] We do not propose to define a venture capital fund's cash holdings by reference to whether the cash is held "for investment purposes" or to the net cash surrender value of an insurance policy. Furthermore, since rule 2a51–1 does not explicitly include short-term U.S. Treasuries, which we believe would be an appropriate form of cash equivalent for a venture capital fund to hold pending investment in a portfolio company or distribution to investors, our rule would include short-term U.S. Treasuries with a remaining maturity of 60 days or less among the investments a venture capital fund could hold.[93] Should we specify a shorter or longer period of remaining maturity for U.S. Treasuries?

We request comment on whether the proposed rule's provision for cash holdings is too broad or too narrow. Should the rule only specify that cash be held in anticipation of investments, or in connection with the payment of expenses or liquidations from underlying portfolio companies? Are there other types of cash instruments in which venture capital funds typically invest and/or that should be reflected in the proposed rule?

We do not propose to define venture capital fund for purposes of the exemption as one that invests solely in U.S. companies. In contrast, the BDC provisions in the Investment Company Act generally limit the exemption to U.S. companies and require that permitted investments generally be made in U.S. companies.[94] However, as we discuss below, there is no indication in the legislative record that Congress intended the venture capital exemption would be available only to U.S. advisers or to advisers that invest fund assets solely in U.S. companies.[95] Should our proposed definition similarly define a venture capital fund as a fund formed under the laws of the United States and/or that invests exclusively or primarily in U.S. portfolio companies or a sub-set of such companies (*e.g.,* U.S. companies operating in non-financial sectors)? Are venture capital funds that invest in non-U.S. portfolio companies more or less likely to have financial relationships that may pose systemic risk issues, a rationale that was presented and appeared significant to Congress in exempting advisers to venture capital funds?

c. Portfolio Company Leverage

Proposed rule 203(l)–1 would define a qualifying portfolio company for purposes of the exemption as one that does not borrow, issue debt obligations or otherwise incur leverage in connection with the venture capital fund's investments.[96] As a consequence, certain types of funds that use leverage or finance their investments in portfolio companies or the buyout of existing investors with borrowed money (*e.g.,* leveraged buyout funds, which are a different subset of private equity funds) would not meet the proposed rule's definition of a venture capital fund.[97] As discussed in greater detail below, we believe that Congress did not intend the venture capital fund definition to apply to these other types of private equity funds.[98] This definition of qualifying portfolio company would only exclude companies that borrow in connection with a venture capital fund's investment, but would not exclude companies that borrow in the ordinary course of their business (*e.g.,* to finance inventory or capital equipment, manage cash flows, and meet payroll). We would generally view any financing or loan (unless it met the definition of equity security) to a portfolio company that was provided by, or was a condition of a contractual obligation with, a fund or its adviser as part of the fund's investments as being a type of financing that is "in connection with" the fund's investment, although we recognize that other types of financings may also be "in connection with" a fund's investment. Should we provide guidance on other types of financing transactions as being "in connection with" a fund's investment in a qualifying portfolio company? If so, what types of financing transactions should such guidance address? We propose this element of the qualifying portfolio company definition because of the focus on leverage in the Dodd-Frank Act as a potential contributor to systemic risk as discussed by the Senate Committee report,[99] and the testimony

The Venture Capital Cycle, at 459 (MIT Press 2004) ("Gompers & Lerner") ("Venture capitalists can liquidate their position in the company by selling shares on the open market and then paying those proceeds to investors in cash.").

[90] Proposed rule 203(l)–1(a)(2)(ii).

[91] Rule 2a51–1(b)(7) under the Investment Company Act provides that cash and cash equivalents include foreign currencies "held for investment purposes" and "(i) [b]ank deposits, certificates of deposit, bankers acceptances and similar bank instruments held for investment purposes; and (ii) [t]he net cash surrender value of an insurance policy." 17 CFR 270.2a51–1(b)(7).

[92] *See generally* sections 2(a)(51) and 3(c)(7) of the Investment Company Act; 17 CFR 270.2a51(b) and (c).

[93] We have treated debt securities with maturities of 60 days or less differently than debt securities with longer maturities under our rules. In particular, we have recognized that the potential for fluctuation in those shorter-term securities' market value has decreased sufficiently that, under certain conditions, we allow certain open-end investment companies to value them using amortized cost value rather than market value. *See Valuation of Debt Instruments by Money Market Funds and Certain Other Open-End Investment Companies,* Investment Company Act Release No. 9786 (May 31, 1977) [42 FR 28999 (June 7, 1977)]. We believe that the same consideration warrants treating U.S. Treasury securities with a remaining maturity of 60 days or less as more akin to cash equivalents than Treasuries with longer maturities for purposes of the definition of venture capital fund.

[94] *See* sections 2(a)(46) and 2(a)(48) of the Investment Company Act. Under section 55 of the Investment Company Act, a BDC is prohibited from acquiring any assets, except for permitted assets, unless, at the time the acquisition is made, permitted assets "represent at least 70 per centum of the value of [the BDC's] total assets." Permitted assets for this purpose generally mean securities of an "eligible portfolio company," which is defined in section 2(a)(46) of the Investment Company Act.

[95] *See infra* section II.A.8 of this Release.

[96] Proposed rule 203(l)–1(c)(4)(ii) (setting forth this requirement as a condition for the portfolio company to qualify as a "qualifying portfolio company").

[97] A leveraged buyout fund is a private equity fund that will "borrow significant amounts from banks to finance their deals—increasing the debt-to-equity ratio of the acquired companies." U.S. Govt. Accountability Office, Private Equity: Recent Growth in Leveraged Buyouts Exposed Risks that Warrant Continued Attention (2008) ("GAO Private Equity Report"), at 1. A leverage buyout fund in 2005 typically financed a deal with 34% equity and 66% debt. *Id.* at 13. *See also* Fenn *et al., supra* note 55, at 23 (companies that have been taken private in an LBO transaction generally "spend less on research and development, relative to assets, and have a greater proportion of fixed assets; their debt-to-assets ratios are high, above 60%, and are two to four times those of venture-backed firms." Moreover, compared to venture capital backed companies, LBO-private equity backed companies that are taken public typically use proceeds from an IPO to reduce debt whereas new venture capital backed firms tend to use proceeds to fund growth.); Tresnowski Testimony, *supra* note 40, at 2 (indicating that portfolio companies in which private equity funds invest typically have 60% debt and 40% equity).

[98] *See infra* discussion in section II.A.1.d of this Release.

[99] *See* S. Rep. No. 111–176, *supra* note 7, at 74 ("The Committee believes that venture capital funds, a subset of private investment funds specializing in long-term equity investment in small or start-up businesses, do not present the same risks as the large private funds whose advisers are required to register with the SEC under this title."); *id.* at 75 (concluding that private funds that use limited or no leverage at the fund level engage in

Continued

before Congress that stressed the lack of leverage in venture capital investing.[100] Should we use a test other than whether the loan is "in connection with" the fund's investments? For example, should the test be whether the portfolio company currently intends to borrow at the time of the fund's investment? Should the test depend only on how the portfolio company uses the proceeds of borrowing, such as by excluding companies that use proceeds to buyout investors or return capital to a fund?

Venture capital has been described as investing in companies that cannot borrow from the usual lending sources.[101] Should we define a qualifying portfolio company as a company that does not incur certain specified types of borrowing or other forms of leverage? Would such a definition narrow the current range of portfolio companies in which venture capital funds typically invest?

d. Capital Used for Operating and Business Purposes

Under proposed rule 203(l)–1, a venture capital fund is defined as a fund that holds equity securities of qualifying portfolio companies, and at least 80 percent of each company's equity securities owned by the venture capital fund were acquired directly from each such qualifying portfolio company.[102] This element reflects the distinction between venture capital funds that provide capital to portfolio companies for operating and business purposes (in exchange for an equity investment) and leveraged buyout funds, which acquire controlling equity interests in operating companies through the "buy out" of existing security holders. Hence, in addition to the definitional element that a venture capital fund is one that does not redeem or repurchase securities from other shareholders (*i.e.*, a "buyout"), a related criterion in the rule specifies that a qualifying portfolio company is one that does not distribute company assets to other security holders in connection with the venture capital fund's investment in the company (which could be an indirect buyout).[103]

One of the distinguishing features of venture capital funds is that, unlike many hedge funds and private equity funds, they invest capital directly in portfolio companies for the purpose of funding the expansion and development of the company's business rather than buying out existing security holders, otherwise purchasing securities from other shareholders, or leveraging the capital investment with debt financing.[104] Testimony received by Congress and our research suggest that venture capital funds provide capital to many types of businesses at different stages of development,[105] generally with the goal of financing the expansion of the company [106] and helping it progress to the next stage of its development through successive tranches of investment (*i.e.*, "follow-on" investments) if the company reaches agreed-upon milestones.[107]

In contrast, private equity funds that are identified as buyout funds typically provide capital to an operating company in exchange for majority or complete ownership of the company,[108] generally achieved through the buyout of existing shareholders or other security holders and financed with debt incurred by the portfolio company,[109] and compared to venture capital funds, hold the investment for shorter periods of time.[110] As a result of the use of the capital provided and the incurrence of this debt, following the buyout fund investment, the operating company may carry debt several times its equity and may devote significant levels of its cash flow and corporate earnings to repaying the debt financing, rather than investing in capital improvement or business operations.[111]

activities that do not pose risks to the wider markets through credit or counterparty relationships).

[100] *See* Loy Testimony, *supra* note 40, at 6 (noting that "many venture capital funds significantly limit borrowing"). *See also* McGuire Testimony, *supra* note 41, at 7 ("Not only are our partnerships run without debt but our portfolio companies are usually run without debt as well.").

[101] *See* Loy Testimony, *supra* note 40, at 3. *See also* James Schell, Private Equity Funds: Business Structure and Operations (2010), at § 1.03[1] ("Schell") ("Venture Capital Funds provide investment capital to business enterprises early in their development cycle at a time when access to conventional financing sources is non-existent or extremely limited.").

[102] Proposed rule 203(l)–1(a)(2)(i).

[103] Proposed rule 203(l)–1(c)(4)(iii).

[104] *See* Loy Testimony, *supra* note 40, at 2 ("Although venture capital funds may occasionally borrow on a short-term basis immediately preceding the time when the cash installments are due, they do not use debt to make investments in excess of the partner's capital commitments or 'lever up' the fund in a manner that would expose the fund to losses in excess of the committed capital or that would result in losses to counter parties requiring a rescue infusion from the government."). *See also infra* notes 109–111; Mark Heesen & Jennifer C. Dowling, National Venture Capital Association, *Venture Capital & Adviser Registration,* materials submitted in connection with the Commission's Government-Business Forum on Small Business Capital Formation ("Heesen") (summarizing the differences between venture capital funds and buyout and hedge funds), *available at http://www.sec.gov/info/smallbus/2010gbforumstatements.htm.*

[105] *See, e.g.,* McGuire Testimony, *supra* note 41, at 1; NVCA Yearbook 2010, *supra* note 41; PricewaterhouseCoopers/National Venture Capital Association MoneyTree Report, Q4 2009/Full-year 2009 Report (providing data on venture capital investments in portfolio companies); Schell, *supra* note 101, at § 1.03[1]; Gompers & Lerner, *supra* note 89, at 178, 180 table 8.2 (displaying percentage of annual venture capital investments by stage of development and classifying "early stage" as seed, start-up, or early stage and "late stage" as expansion, second, third, or bridge financing).

[106] *See* McGuire Testimony, *supra* note 41, at 1; Loy Testimony, *supra* note 40, at 3 ("Once the venture fund is formed, our job is to find the most promising, innovative ideas, entrepreneurs, and companies that have the potential to grow exponentially with the application of our expertise and venture capital investment."). *See also* William A. Sahlman, *The Structure and Governance of Venture-Capital Organizations,* Journal of Financial Economics 27 (1990), at 473, 503 ("Sahlman") (noting venture capitalists typically invest more than once during the life of a company, with the expectation that each capital investment will be sufficient to take the company to the next stage of development, at which point the company will require additional capital to make further progress).

[107] *See* Sahlman, at 503; Loy Testimony, *supra* note 40, at 3 ("[W]e continue to invest additional capital into those companies that are performing well; we cease follow-on investments into companies that do not reach their agreed upon milestones.").

[108] GAO Private Equity Report, *supra* note 97, at 8 ("A private equity-sponsored LBO generally is defined as an investment by a private equity fund in a public or private company (or division of a company) for majority or complete ownership.").

[109] *See* Annalisa Barrett *et al.*, Prepared by the Corporate Library Inc., under contract for the IRRC Institute, What is the Impact of Private Equity Buyout Fund Ownership on IPO Companies' Corporate Governance?, at 7 (June 2009) ("Barrett *et al.*") ("In general, VC firms provide funding to companies in early stages of their development, and the money they provide is used as working capital for the firm. Buyout firms, in contrast, work with mature companies, and the funds they provide are used to compensate the firm's existing owners."); Ieke van den Burg and Poul Nyrup Rasmussen, Hedge Funds and Private Equity: A Critical Analysis (2007), at 16–17 ("van den Burg"); Sahlman, *supra* note 106, at 517. *See also* Tax Legislation: CRS Report, Taxation of Hedge Fund and Private Equity Managers, Tax Law and Estate Planning Course Handbook Series, Practicing Law Institute (Nov. 2, 2007) at 2 (noting that in a leveraged buyout "private equity investors use the proceeds of debt issued by the target company to acquire all the outstanding shares of a public company, which then becomes private").

[110] Unlike venture capital funds, which generally invest in portfolio companies for 10 years or more, private equity funds that use leveraged buyouts invest in their portfolio companies for shorter periods of time. *See* Loy Testimony, *supra* note 40, at 3 (citing venture capital fund investments periods in portfolio companies of five to 10 years or longer); van den Burg, at 19 (noting that LBO investors generally retain their investment in a listed company for 2 to 4 years or even less after the company goes public). *See also* Paul A. Gompers, *The Rise and Fall of Venture Capital,* Business And Economic History, vol. 23, no. 2, Winter 1994, at 17 ("Gompers") (stating that "an LBO investment is significantly shorter than that of a comparable venture capital investment. Assets are sold off almost immediately to meet debt burden, and many companies go public again (in a reverse LBO) in a very short period of time").

[111] *See* Barrett *et al.*, *supra* note 109. *See also* Fenn *et al.*, *supra* note 55, at 23 (when comparing venture capital backed companies that are taken public to LBO-private equity backed companies that are taken public, the common use of proceeds from an IPO are used by LBO-private equity backed companies to reduce debt whereas new firms use proceeds to fund growth).

We believe that these differences (*i.e.*, the use of buyouts and associated leverage) distinguish venture capital funds from buyout private equity funds for which Congress did not provide an exemption.[112] Under our proposed rule, an exempt adviser relying on section 203(1) of the Advisers Act would not be eligible for the exemption if it advised these types of private equity funds that in effect acquire a majority of the equity securities of portfolio companies directly from other security holders.[113] Correspondingly, we also propose to define a qualifying portfolio company for purposes of the exemption as one that does not redeem or repurchase outstanding securities in connection with a venture capital fund's investment.[114] Because at least 80 percent of each portfolio company's equity securities in which the fund invests must be acquired directly from the portfolio company, a venture capital fund relying on the exemption could purchase the remainder of the securities directly from existing shareholders (*i.e.*, a "buyout"). Under our proposed definition, however, a company that achieves an indirect buyout of its security holders, such as through the complete recapitalization or restructuring of the portfolio company capital structure would not be a qualifying portfolio company.[115] The 80 percent test is not intended to preclude conversions of directly acquired securities into other equity securities. Similarly, we would not view a capital reorganization intended merely to simplify a qualifying portfolio company's capital structure and outstanding securities without any change in the existing beneficial owners' rights, priority, or economic terms as breaching the 80 percent condition.

We propose to define a venture capital fund by reference to ownership of equity securities of a qualifying portfolio company, wherein at least 80 percent of the securities owned were acquired directly from the company, in order to give venture capital funds relying on the exemption some flexibility to acquire securities from a portfolio company founder or "angel" investor who may seek liquidity from his or her initial investment.[116] We adopted this 80 percent threshold because we understand that many venture capital funds currently are managed in a manner that seeks to rely on provisions of the tax code providing favorable tax treatment for directly acquired equity securities of issuers that satisfy certain conditions.[117] Thus, using this threshold in our definition may not result in substantial changes to either investment strategies employed, or the compliance programs currently used, by venture capital advisers. Is our assumption that venture capital funds do not generally acquire portfolio company securities directly from existing shareholders correct? Is 80 percent the appropriate threshold? Should the threshold be set lower? Should direct acquisitions of equity securities be increased to 90 percent or 100 percent in order to more effectively prevent advisers to funds engaged in activities that are not characteristic of venture capital funds from relying on the exemption?

In contrast to leveraged buyout fund financing, venture capital received by a portfolio company is devoted to developing the company's business rather than repurchasing the securities of other shareholders or making payments to fund debt financing through the portfolio company. We request comment on this criterion. Does the definition's focus on a portfolio company's use of capital received from a venture capital fund impose any unnecessary burdens on the company's operation or business? Rather than define a venture capital fund by reference to the manner in which it acquires equity securities (or the manner in which qualifying portfolio companies may indirectly facilitate a buyout), should the proposed rule instead define the manner in which proceeds from a venture capital investment may be used? For example, should the rule specify that proceeds of borrowings or other financings not be used to finance the acquisition of equity securities by a venture capital fund or otherwise distribute company assets to equity owners? Would defining qualifying portfolio company in this manner facilitate compliance or would this approach make it easier for a company to achieve a "buyout" and thereby circumvent the intended scope of the exemption, given the fungibility of cash and the privately negotiated nature of typical venture capital transactions? We do not intend that a venture capital fund would not meet the proposed definition if it acquired equity securities from a portfolio company in connection with a capital reorganization intended to simplify the company's capital structure without changing the existing beneficial owners' rights, priority, or economic terms. Are there other capital reorganizations that would be consistent with the intent of our proposed rule but that would prevent a venture capital fund from satisfying the proposed definition?

e. Operating Companies

Proposed rule 203(l)–1 would define the term qualifying portfolio company for the purposes of the exemption to exclude any private fund or other pooled investment vehicle.[118] There is no indication that Congress intended the venture capital exemption to apply to funds of funds. Without this definition, a venture capital fund could circumvent the intended scope of the exemption by investing in other pooled investment vehicles that are not themselves subject to the definitional criteria under our proposed rule. For example, a venture capital fund could circumvent the intent of the proposed rule by incurring off-balance sheet leverage or indirectly investing in companies that may be publicly traded. Our proposed exclusion would be similar to the approach of other definitions of "venture capital" discussed above, which limit

[112] *See supra* notes 39, 42, 43, 99 and accompanying text.

[113] Proposed rule 203(l)–1(a)(2)(i).

[114] Proposed rule 203(l)–1(c)(4)(iii).

[115] For example, concurrently with the issuance of new securities to the venture capital fund, a portfolio company could redeem existing shareholders and use proceeds from the venture capital fund investment to pay such shareholders redemption proceeds. Similarly, existing shareholders may receive new securities that are subordinated to the securities issued to the venture capital fund in exchange for tendering their outstanding securities, partially funded with investments received from the venture capital fund. In each of these examples, the fund becomes a majority owner of the company by "buying out" the existing owners with investment capital initially provided by the fund.

[116] *See* NVCA Yearbook 2010, *supra* note 41, at 57 (defining "angel" as "a wealthy individual that invests in companies in relatively early stages of development"). *See also* Fenn *et al., supra* note 55, at 2 (defining angel capital as "investments in small, closely held companies by wealthy individuals, many of whom have experience operating similar companies [and] * * * may have substantial ownership stakes and may be active in advising the company, but they generally are not as active as professional managers in monitoring the company and rarely exercise control.").

[117] *See* Int. Rev. Code § 1202(e)(1)(A) (26 U.S.C. 1202) ("IRC 1202") (which permits partial exclusion from income tax gain on directly acquired equity securities of certain issuers that, among other things, devote at least 80% of their assets to the conduct of their business as specified in IRC 1202). Under our proposed rule, at least 80% of the portfolio company securities owned by a venture capital fund must be acquired directly from the portfolio company, which in turn cannot redeem or repurchase existing security holders in connection with such venture capital fund investment. Thus we presume that venture capital funding proceeds (or at least 80% of such proceeds) will be used for operating and business expansion purposes, which is similar to the requirements under IRC 1202.

[118] Proposed rule 203(l)–1(c)(4)(iv). For this purpose, pooled investment vehicles include investment companies, investment companies relying on rule 3a–7 under the Investment Company Act and commodity pools.

investments to operating companies and thus would exclude investments in other private funds or securitized asset vehicles.[119] We request comment on this definitional element. Under the proposed definition, a venture capital fund would not invest in another private fund, a commodity pool or other "investment companies." Should the proposed definition specifically identify other types of pooled investment vehicles (*e.g.*, real estate funds or structured investment vehicles) in which a fund seeking to satisfy the proposed definition could not invest?

1. Management Involvement

To qualify as a venture capital fund under our proposed definition, the fund or its investment adviser would: (i) Have an arrangement under which it offers to provide significant guidance and counsel concerning the management, operations or business objectives and policies of the portfolio company (and, if accepted, actually provides the guidance and counsel) or (ii) control the portfolio company.[120] Because a key distinguishing characteristic of venture capital investing is the assistance beyond the mere provision of capital, we propose that advisers seeking to rely on the rule have a significant level of involvement in developing a fund's portfolio companies.[121] Managerial assistance generally takes the form of active involvement in the business, operations or management of the portfolio company, or less active forms of control of the portfolio company, such as through board representation or similar voting rights.[122] We also acknowledge that the nature of managerial assistance may evolve over time as the needs of qualifying portfolio companies change, and hence the proposed rule does not specify that managerial assistance has a fixed character.

We have modeled the proposed approach to managerial assistance in part on existing provisions under the Advisers Act and the Investment Company Act dealing with BDCs, which were added over the years to ease the regulatory burdens on venture capital and other private equity investments.[123] In 1980, when Congress first introduced BDCs into the Advisers Act and Investment Company Act, it acknowledged that the purpose of the BDC provisions was to support "venture capital" activity in capital formation for small business, and described BDCs as principally investing in and providing managerial assistance to small, growing and financially troubled businesses.[124] Because Congress modeled the definition of BDC under the Advisers and Investment Company Acts on the capital formation activities of venture capital funds, both definitions under such Acts incorporate the requirement to make available significant managerial assistance to portfolio companies.[125]

Congress did not use the existing BDC definitions when determining the scope of the venture capital exemption,[126] and the primary policy considerations that led to the adoption of the BDC exemptions differed from those under the Dodd-Frank Act. However, we believe these provisions are instructive because they reflect many of the same characteristics of venture capital and private equity fund activity presented in testimony before Congress in connection with the Dodd-Frank Act.[127] Although Congress viewed BDC activities as typical of "venture capital" investing,[128] the BDC provisions are complex. Hence, we are proposing a modified version of the definition of "making available significant managerial assistance" in order to simplify the language and to reduce the potential for confusion that might arise in interpreting the meaning of the term.

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[119] *See* California VC exemption, *supra* notes 70–72; *see also* VCOC exemption under 29 CFR 2510.3–101(d), *supra* note 70.

[120] Proposed rule 203(l)–1(a)(3). Under section 202(a)(12) of the Advisers Act, "control" is defined to mean "the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with such company."

[121] *See* McGuire Testimony, *supra* note 41, at 1 ("[W]e build companies by actively partnering with each entrepreneur and management team to help propel their ideas into market leading businesses. We do this by providing a small amount of capital and a large amount of operating expertise and strategic counsel over a long period of time. While providing capital is the first order of business, it is the least time consuming of all our activities. We also recruit and attract employees at all levels [for the portfolio company]. We identify and structure strategic partnerships. We raise additional equity to help the [portfolio] company make it to the next milestone. And, we're available 24/7 to support great teams, solve problems, identify opportunities and detect 'land mines.' * * * We provide access to [our] expertise and network at all stages of a [portfolio] company's development and across all strategic areas of the business."). *See also* Levin, *supra* note 55, at 1–3 (noting that the "*first* feature distinguishing venture capital/private equity investing is the VC professional's active involvement in identifying the investment, negotiating and structuring the transaction, and monitoring the portfolio company after the investment has been made. Often, the VC professional will serve as a board member and/or financial advisor to the portfolio company. Hence, venture capital/private equity investing is significantly different from passive selection and retention of stock and debt investments by a money manager.") (emphasis in original); Sahlman, *supra* note 106, at 508 (noting that venture capitalists typically play a role in the operation of the company, help to establish tactics and strategy, work with suppliers and customers, and often assume more direct control by changing management and sometimes taking over day-to-day operations themselves). *See also* Fenn *et al.*, *supra* note 55, at 32–33 for a discussion of various control mechanisms available to venture capital and private equity funds, including preferred stock ownership, representation on the board and various contractual covenants.

[122] *See generally supra* note 121. *See also* Alan T. Frankel, *et al., Venture Capital: Financial and Tax Considerations,* The CPA Journal (Aug. 2003) at 1 (noting that the "VC will also monitor the portfolio company after the investment has been made. Oftentimes, the VC will serve as a board member or financial and strategic advisor to the portfolio company.").

[123] The term "business development company" was first introduced into the Investment Company Act and the Advisers Act in 1980 as part of the Small Business Investment Incentive Act of 1980 ("Small Business Act"), and was amended as part of the National Securities Markets Improvement Act of 1996, Public Law 104–290, 110 Stat. 3416 (1996) ("NSMIA"). Congress introduced an alternative regulatory framework applicable to BDCs, which was designed to remove "unnecessary disincentives" for BDCs to provide capital to small businesses, while also preserving protection for investors and preventing fraud and abuse. *See* 1980 House Report, *supra* note 44, at 21–22.

In the Small Business Act, Congress modeled the definition of a BDC under section 202(a)(22) of the Advisers Act on the capital formation activities of venture capital funds. Congress recognized that the principal activity of a BDC is to invest in and provide managerial assistance to small, growing and financially troubled companies. *See* 1980 House Report, *supra* note 44, at 21. *See also infra* note 129 (definition of "making available significant managerial assistance" by a BDC under section 2(a)(47) of the Investment Company Act).

[124] *See* 1980 House Report, *supra* note 44, at 21.

[125] *See* section 202(a)(22) of the Advisers Act; section 2(a)(48)(B) of the Investment Company Act. Generally, a BDC under the Advisers Act is any company that meets the definition of BDC under the Investment Company Act, except that certain requirements were modified for "private" BDCs under the Advisers Act. *See also Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles; Accredited Investors in Certain Private Investment Vehicles,* Investment Advisers Act Release No. 2576 (Dec. 27, 2006) [72 FR 400 (Jan. 4, 2007)] ("Accredited Natural Person Release"), at n.69 (discussing the difference between the term BDC under the Investment Company Act and the Advisers Act). In 1996, as part of NSMIA, Congress sought to encourage greater investment in small businesses by giving BDCs more flexibility, and therefore expanded the class of eligible portfolio companies in which BDCs could invest without being required to provide "managerial assistance." *See* S. Rep. No. 104–293, at 13 (1996).

[126] We have looked to the BDC definition to define a venture capital fund before. In 2006, we proposed to impose a qualification standard for all investors of private investment funds, excluding venture capital funds, which we proposed to define by reference to section 202(a)(22) of the Advisers Act. *See* Accredited Natural Person Release, *supra* note 125 (proposing to define the term "accredited natural person" as any natural person who satisfies the requirements in Regulation D as an accredited investor and who also owns investments of at least $2.5 million). We sought additional comment on this proposal in a subsequent release but a rule has not been adopted. *See Revisions of Limited Offering Exemptions in Regulation D,* Securities Act Release No. 8828 (Aug. 3, 2007) [72 FR 45116 (Aug. 10, 2007)].

[127] *See generally* Loy Testimony, *supra* note 40; McGuire Testimony, *supra* note 41.

[128] *See* 1980 House Report, *supra* note 44, at 21–2.

We request comment on the approach to managerial assistance in the definition of venture capital fund. As we have noted above, Congressional testimony asserted that a key characteristic of venture capital funds is the provision of managerial assistance. Is this true in the industry generally? We request comment on the description of managerial assistance in proposed rule 203(l)–1. Is this description easier to understand and apply than the definition in section 2(a)(47) of the Investment Company Act? [129] As under the definition of BDC in the Advisers and Investment Company Acts, the proposed definition specifies the fund or its adviser need only offer assistance. Should the rule specify that the fund or its adviser actually provide assistance? If so, what if a portfolio company that initially accepts the offer of assistance later refuses any actual or further assistance? We understand that when venture capital funds invest as a group, there may be an understanding among the funds and the portfolio company that while all fund advisers may be available to provide managerial assistance if necessary, one adviser is generally expected to provide most, if not all, of the assistance to the portfolio company. Is that understanding correct? Under proposed rule 203(l)–1, venture capital funds that invest as a group would only satisfy the definition if each venture capital fund (or its adviser) offered (and, if accepted, provided) managerial assistance or exercised control.[130] Should the rule specify how managerial assistance or control is to be determined in the case of venture capital funds that invest as a group if only one fund (or its adviser) provides the assistance? Should the rule specify the extent to which each fund (or its adviser) must offer or provide managerial assistance or adopt the approach of other regulatory definitions of "venture capital" funds, which impose strict numerical investment or ownership tests for determining whether a venture capital fund exercises supervision or influence over the operation or business of the operating company? [131] Does the fact that the assistance need only be offered render the condition so readily met that the criterion should be removed from the rule? Should our rule provide guidance on what constitutes "control" under our proposed definition? For example, instructions to Form ADV provide a presumption of control if a person has the power to vote 25 percent or more of a corporation's voting securities, or a person acts as manager of a limited liability company.[132] Should the proposed rule rely on similar or different presumptions?

Our proposed rule provides that when a fund controls the qualifying portfolio company, an offer to provide managerial assistance is not required. As in the case of "managerial assistance" as defined in the BDC provisions, the proposed rule presumes that when a fund acquires control, it is likely to be exercised. Should the rule specify that in all cases managerial assistance includes both the offer of assistance as well as the exercise of control? We request comment on whether venture capital funds (or their advisers) typically have the personnel to provide significant managerial assistance to all of their portfolio companies or only a subset. Would the requirement to offer and potentially provide managerial assistance to all of a fund's portfolio companies result in potential demands on a fund or its adviser that could not be satisfied if all or a significant subset of a fund's portfolio companies accepted the offer? Alternatively, does the proposed definition provide a venture capital fund (including those that invest as a group) with sufficient flexibility to determine the scope of any managerial assistance or control it may seek to offer (or provide) to a portfolio company?

2. Limitation on Leverage

Under proposed rule 203(l)–1, the definition of a venture capital fund for purposes of the exemption would be limited to a private fund that does not borrow, issue debt obligations, provide guarantees or otherwise incur leverage, in excess of 15 percent of the fund's capital contributions and uncalled committed capital, and any such borrowing, indebtedness, guarantee or leverage is for a non-renewable term of no longer than 120 calendar days.[133] Under the proposed definition, a fund could borrow and still be a venture capital fund provided it did not borrow or otherwise use leverage in excess of the specified threshold.

By specifying that loans be non-renewable, we would avoid the transformation of short-term debt into long-term debt without full repayment to the lender. Should the rule specify other borrowing or financing terms or conditions that would nevertheless avoid this type of transformation? Do venture capital funds use lines of credit repeatedly but pay the outstanding amounts in full before drawing down additional credit? Should loans of this nature be included in the definition? Under our proposed definition, it would be possible for a venture capital fund to issue commercial paper on a short-term basis to potential investors because the proposed definition does not specify which types of instruments a venture capital fund issues. Should the proposed rule specifically exclude commercial paper from debt issuances to avoid the potential that a venture capital fund could convert short-term debt into long-term debt by continuing to roll over its commercial paper issuances? [134] This criterion regarding

[129] Section 2(a)(47) of the Investment Company Act states:

"'Making available significant managerial assistance' by a business development company means—

(A) Any arrangement whereby a business development company, through its directors, officers, employees, or general partners, offers to provide, and, if accepted, does so provide, significant guidance and counsel concerning the management, operations, or business objectives and policies of a portfolio company;

(B) the exercise by a business development company of a controlling influence over the management or policies of a portfolio company by the business development company acting individually or as part of a group acting together which controls such portfolio company; or

(C) with respect to a small business investment company licensed by the Small Business Administration to operate under the Small Business Investment Act of 1958, the making of loans to a portfolio company.

For purposes of subparagraph (A), the requirement that a business development company make available significant managerial assistance shall be deemed to be satisfied with respect to any particular portfolio company where the business development company purchases securities of such portfolio company in conjunction with one or more other persons acting together, and at least one of the persons in the group makes available significant managerial assistance to such portfolio company, except that such requirement will not be deemed to be satisfied if the business development company, in all cases, makes available significant managerial assistance solely in the manner described in this sentence."

In contrast to section 2(a)(47) of the Investment Company Act, our proposed definitional approach to managerial assistance does not specifically define managerial assistance by referring to a fund's directors, officers, employees, or general partners or address how managerial assistance is determined for funds that invest as a group.

[130] According to one study, funds focusing on later-stage companies and middle-market buyout investing tend to invest alongside other funds, whereas venture capital funds focusing on early stage companies tend to invest individually in portfolio companies. *See* Fenn *et al., supra* note 55, at 31.

[131] *See supra* note 70 and accompanying text (discussing the California VC exemption and the VCOC exemption).

[132] *See Amendments to Form ADV,* Investment Advisers Act Release No. 3060 (July 28, 2010) [75 FR 49234 (Aug. 12, 2010)] ("Form ADV Release").

[133] Proposed rule 203(l)–1(a)(4). Similarly, our proposed rule would exclude from the definition of "qualifying portfolio company" a company that borrowed in connection with the venture capital fund's investments in the company. Proposed rule 203(l)–1(c)(4)(ii). *See supra* section II.A.1 of this Release.

[134] We note that because commercial paper issuers often refinance the repayment of maturing commercial paper with newly issued commercial

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leverage at the venture capital fund level is in addition to the conditions relating to a qualifying portfolio company's debt issuances in connection with the venture capital fund's investment.[135] Under this condition, a venture capital fund seeking to satisfy the definitional criteria could not avoid the borrowing element at the portfolio company level by incurring such leverage at the venture capital fund level.

Congress cited the implementation of trading strategies that use financial leverage by certain private funds as creating a potential for systemic risk.[136] In testimony before Congress, the venture capital industry identified the lack of financial leverage in venture capital funds as a basis for exempting advisers to venture capital funds[137] in contrast to other types of private funds such as hedge funds, which may engage in trading strategies that may contribute to systemic risk and affect the public securities markets.[138] For this reason, our proposed rule is designed to address concerns that financial leverage may contribute to systemic risk by excluding funds that incur more than a limited amount of leverage from the definition of venture capital fund.[139]

We also understand that venture capital funds generally do not rely on short-term financing,[140] which has been identified as another potential systemic risk factor.[141] Should we increase or reduce the 15 percent threshold for short-term borrowing? If so, what is the appropriate threshold (*e.g.,* 20, 10, or 5 percent)? Or should we define a venture capital fund as a private fund that does not borrow at all or otherwise incur any financial leverage? Would even the limited ability to engage in short-term borrowing or other forms of leverage encourage venture capital funds to incur other investment risks different from those typically associated with venture capital investing today? To the extent that venture capital funds use short-term leverage or borrowing, 90 days has been cited as typical.[142] Would a 120-day period, as specified in our proposed rule, create other investment risks for venture capital funds? Our proposed rule refers specifically to borrowing but also is designed to give venture capital funds the flexibility to issue debt (which is also a form of borrowing) for short-term purposes. Should the rule refer specifically to additional forms of borrowing not already identified? Do any or many venture capital funds borrow in excess of 120 days? Should the 15 percent limit not apply when a fund borrows in order to invest in a qualifying portfolio company and is repaid with capital called from the fund's investors? Would the 120-day limit alone achieve a similar result?

Our proposed rule specifies that the 15 percent calculation must be determined based on the fund's aggregate capital contributions and uncalled capital commitments. Unlike most registered investment companies or hedge funds, venture capital funds rely on investors funding their capital commitments from time to time in order to acquire portfolio companies.[143] A capital commitment is a contractual obligation to acquire an interest in, or provide the total commitment amount over time to, a fund, when called by the fund. Accordingly, advisers to venture capital funds manage the fund in anticipation of all investors fully funding their commitments when due and typically have the right to penalize investors for failure to do so.[144] Venture

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paper, they may face roll-over risk, *i.e.,* the risk that investors may not be willing to refinance maturing commercial paper. These risks became particularly apparent for issuers of asset-backed commercial paper beginning in August 2007. At that time, structured investment vehicles ("SIVs"), which are off-balance sheet funding vehicles sponsored by financial institutions, issued commercial paper to finance the acquisition of long-term assets, including residential mortgages. As a result of problems in the residential home mortgage market, short-term investors began to avoid asset-backed commercial paper tied to residential mortgages, regardless of whether the securities had substantial exposure to sub-prime mortgages. Unable to roll over their commercial paper, SIVs suffered severe liquidity problems and significant losses. *See Money Market Fund Reform,* Investment Company Act Release No. 28807 (June 30, 2009) [74 FR 32688 (July 8, 2009)] ("Money Market Fund Reform Release") at nn.37–39 and preceding and accompanying text; Marcin Dacperczyk and Philipp Schnabl, When Safe Proved Risky: Commercial Paper During the Financial Crisis of 2007–2009 (Nov. 2009).

[135] *See* proposed rule 203(l)–1(c)(4)(ii); *supra* section II.A.1.c of this Release. Because private equity funds often engage in leveraged buy-out transactions in which the portfolio company, rather than the fund, incurs debt, our proposed definition would exclude leveraged buy-out funds.

[136] *See, e.g.,* section 115 of the Dodd-Frank Act (enumerating prudential standards for addressing systemic risks, including risk-based capital requirements, leverage limits, liquidity requirements, resolution plan and credit exposure report requirements, concentration limits, a contingent capital requirement, enhanced public disclosures, short-term debt limits, and overall risk management requirements). *See also* G20 Working Group 1, Enhancing Sound Regulation and Strengthening Transparency, at iii–iv (March 25, 2009) ("G20 Working Group Report"), at iii (noting contribution to "market turmoil" when "the financial system developed new structures and created new instruments, some with embedded leverage." Further, "[w]hile the build-up of leverage and the underpricing of credit risk were recognized in advance of the turmoil, their extent was under-appreciated and there was no coordinated approach to assess the implications of these systemic risks * * *"); International Monetary Fund, Lessons of the Global Crisis for Macroeconomic Policy, February 19, 2009, at 6 (noting how "[l]everage * * * increases lender exposure by magnifying the impact of a price adjustment on borrowers' balance sheets and, thus on banks' losses and capital."). *See generally* Department of Treasury, Financial Regulatory Reform, A New Foundation: Rebuilding Financial Supervision and Regulation, June 2009, *available at http://www.financialstability.gov/docs/regs/FinalReport_web.pdf.*

[137] *See* McGuire Testimony, *supra* note 41, at 7 ("Venture capital firms do not use long term leverage, rely on short term funding, or create third party or counterparty risk * * * [F]rom previous testimony submitted by the buy-out industry, the typical capital structure of the companies acquired by a buyout fund is approximately 60% debt and 40% equity. In contrast, borrowing at the venture capital fund level, if done at all, typically is only used for short-term capital needs (pending drawdown of capital from its partners) and does not exceed 90 days. Not only are our partnerships run without debt but our portfolio companies are usually run without debt as well."); Loy Testimony, *supra* note 40, at 2 ("Although venture capital funds may occasionally borrow on a short-term basis immediately preceding the time when the cash installments are due, they do not use debt to make investments in excess of the partner's capital commitments or 'lever up' the fund in a manner that would expose the fund to losses in excess of the committed capital or that would result in losses to counter parties requiring a rescue infusion from the government.").

[138] *See* S. Rep. No. 111–176, *supra* note 7, at 74–75.

[139] In proposing an exemption for advisers to private equity funds, which would have required the Commission to define the term private equity fund, the Senate Banking Committee noted the difficulties in distinguishing some private equity funds from hedge funds and expected the Commission to exclude from the exemption private equity funds that raise significant potential systemic risk concerns. S. Rep. No. 111–176, *supra* note 7, at 75. *See also* G20 Working Group Report, *supra* note 136, at 7 (noting that unregulated entities such as hedge funds may contribute to systemic risks through their trading activities).

[140] *See* Loy Testimony, *supra* note 40, at 7 ("[V]enture capital firms do not generally rely on short-term funding. In fact, quite the opposite is true."); Schell, *supra* note 101, at § 1.03[6] ("Venture Capital Funds rarely have the ability to borrow money, other than short-term loans to cover Partnership Expenses or to 'bridge' Capital Contributions."); Heesen, *supra* note 104, at 17.

[141] *See, e.g.,* Financial Crisis Inquiry Commission, Preliminary Staff Report, Shadow Banking and the Financial Crisis (May 4, 2010).

[142] *See* McGuire Testimony, *supra* note 41, at 7.

[143] Schell, *supra* note 101, at § 1.03[8] ("The typical Venture Capital Fund calls for Capital Contributions from time to time as needed for investments."); *id.* at § 2.05[2] (stating that "[venture capital funds] begin operation with Capital Commitments but no meaningful assets. Over a specific period of time, the Capital Commitments are called by the General Partner and used to acquire Portfolio Investments.").

[144] *See* Loy Testimony, *supra* note 40, at 5 ("[Limited partners] make their investment in a venture fund with the full knowledge that they generally cannot withdraw their money or change their commitment to provide funds. Essentially they agree to "lock-up" their money for the life of the fund."). *See also* Stephanie Breslow & Phyllis Schwartz, Private Equity Funds, Formation and Operation 2010 ("Breslow & Schwartz"), at § 2:5.6 (discussing the various remedies that may be imposed in the event an investor fails to fund its contractual capital commitment, including, but not limited to, "the ability to draw additional capital from non-defaulting investors;" "the right to force a sale of the defaulting partner's interests at a price determined by the general partner;" and "the right

capital funds are subject to investment restrictions, and calculate fees payable to an adviser, as a percentage of the total capital commitments of investors, regardless of whether or not the capital commitment is ultimately funded by an investor.[145] Venture capital fund advisers typically report and market themselves to investors on the basis of aggregate capital commitment amounts raised for prior or existing funds.[146] These factors would lead to the conclusion that, in contrast to other types of private funds, such as hedge funds, which trade on a more frequent basis, a venture capital fund would view the fund's total capital commitments as the primary metric for managing the fund's assets and for determining compliance with investment guidelines. Hence, we believe that calculating the leverage threshold to include uncalled capital commitments is appropriate, given that capital commitments are already used by venture capital funds themselves to measure investment guideline compliance.

The proposed 15 percent threshold would be determined based on the venture capital fund's aggregate capital commitments. In practice, this means that a venture capital fund relying on the exemption could leverage an investment transaction up to 100 percent when acquiring equity securities of a particular portfolio company as long as the investment amount does not exceed 15 percent of the fund's total capital commitments, albeit on a short-term basis that did not exceed 120 days. Should the 15 percent calculation be determined with respect to the total investment amount for each portfolio company? Would this standard be easier to apply?

Our proposed rule defines a venture capital fund by reference to a maximum of 15 percent of borrowings based on our understanding that venture capital funds typically would not incur borrowings in excess of 10 to 15 percent of the fund's total capital contributions and uncalled capital commitments.[147] We believe that imposing a maximum at the upper range of borrowings typically used by venture capitals may accommodate existing practices of the vast majority of industry participants.

3. No Redemption Rights

Proposed rule 203(l)-1 would define a venture capital fund as a fund that issues securities that do not provide investors redemption rights except in "extraordinary circumstances" but that do entitle investors generally to receive *pro rata* distributions.[148] Unlike hedge funds, venture capital funds do not typically permit investors to redeem their interests during the life of the fund,[149] but rather distribute assets generally as investments mature.[150] Although venture capital funds typically return capital and profits to investors only through *pro rata* distributions, such funds may also provide extraordinary rights for an investor to withdraw from the fund under foreseeable but unexpected circumstances or rights to be excluded from particular investments due to regulatory or other legal requirements.[151] These events may be "foreseeable" because they are circumstances that are known to occur (*e.g.,* changes in law, corporate events such as mergers) but are unexpected in their timing or scope. Thus, withdrawal or exclusion rights might be triggered by a change in the tax law after an investor invests in the fund, or the enactment of laws that may prohibit an investor's participation in the fund's investment in particular countries or industries.[152] The trigger events for these rights are typically beyond the control of the adviser and fund investor (*e.g.,* tax and regulatory changes).

For these purposes, for example, a fund that permits quarterly or other periodic withdrawals would be considered to have granted investors redemption rights in the ordinary course even if those rights may be subject to an initial lock-up or suspension or restrictions on redemption. Is the phrase "extraordinary circumstances" sufficiently clear to distinguish the investor liquidity terms of venture capital funds, as they operate today, from hedge funds? Congressional

to take any other action permitted at law or in equity").

[145] *See, e.g.,* Breslow & Schwartz, *supra* note 144, at § 2:5.7 (noting that a cap of 10% to 25% of remaining capital commitments is a common limitation on follow-on investments). *See also* Schell, *supra* note 101, at § 1.01 (noting that capital contributions made by the investors are used to "make investments * * * in a manner consistent with the investment strategy or guidelines established for the Fund."); *id.* at § 1.03 ("Management fees in a Venture Capital Fund are usually an annual amount equal to a fixed percentage of total Capital Commitments."); *see also* Dow Jones, *Private Equity Partnership Terms and Conditions,* 2007 edition ("Dow Jones Report") at 15.

[146] *See, e.g.,* NVCA Yearbook 2010, *supra* note 41, at 16; John Jannarone, *Private Equity's Cash Problem,* Wall St. J., June 23, 2010, *http://online.wsj.com/article/SB10001424052748704853404575323073059041024.html#printMode.*

[147] *See* Loy Testimony, *supra* note 40, at 6 ("[M]any venture capital funds significantly limit borrowing such that all outstanding capital borrowed by the fund, together with guarantees of portfolio company indebtedness, does not exceed the lesser of (i) 10–15% of total limited partner commitments to the fund and (ii) undrawn limited partner commitments.").

[148] Proposed rule 203(l)–1(a)(5) (limiting venture capital funds to funds that "[o]nly issue[] securities the terms of which do not provide a holder with any right, except in extraordinary circumstances, to withdraw, redeem or require the repurchase of such securities but may entitle holders to receive distributions made to all holders pro rata").

[149] *See* Schell, *supra* note 101, at § 1.03[7] (venture capital fund "redemptions and withdrawals are rarely allowed, except in the case of legal compulsion"); Breslow & Schwartz, *supra* note 144, at § 2:14.2 ("the right to withdraw from the fund is typically provided only as a last resort").

[150] Loy Testimony, *supra* note 40, at 2–3 ("As portfolio company investments are sold in the later years of the [venture capital] fund—when the company has grown so that it can access the public markets through an initial public offering (an IPO) or when it is an attractive target to be bought—the liquidity from these 'exits' is distributed back to the limited partners. The timing of these distributions is subject to the discretion of the general partner, and limited partners may not otherwise withdraw capital during the life of the venture [capital] fund."). *Id.* at 5 (Investors "make their investment in a venture [capital] fund with the full knowledge that they generally cannot withdraw their money or change their commitment to provide funds. Essentially they agree to 'lock-up' their money for the life of the fund, generally 10 or more years as I stated earlier."). *See also* Dow Jones Report, *supra* note 145, at 60 (noting that an investor in a private equity or venture capital fund typically does not have the right to transfer its interest).

[151] *See* Hedge Fund Adviser Registration Release, *supra* note 17, at n.240 and accompanying text ("Many partnership agreements provide the investor the opportunity to redeem part or all of its investment, for example, in the event continuing to hold the investment became impractical or illegal, in the event of an owner's death or total disability, in the event key personnel at the fund adviser die, become incapacitated, or cease to be involved in the management of the fund for an extended period of time, in the event of a merger or reorganization of the fund, or in order to avoid a materially adverse tax or regulatory outcome. Similarly, some investment pools may offer redemption rights that can be exercised only in order to keep the pool's assets from being considered 'plan assets' under ERISA [Employee Retirement Income Security Act of 1974]."). *See, e.g.,* Breslow & Schwartz, *supra* note 144, at § 2:14.1 ("Private equity funds generally provide for mandatory withdrawal of a limited partner [*i.e.,* investor] only in the case where the continued participation by a limited partner in a fund would give rise to a regulatory or legal violation by the investor or the fund (or the general partner [*i.e.,* adviser] and its affiliates). Even then, it is often possible to address the regulatory issue by excusing the investor from particular investments while leaving them otherwise in the fund.").

[152] *See, e.g.,* Breslow & Schwartz, *supra* note 144, at § 2:14.2 ("The most common reason for allowing withdrawals from private equity funds arises in the case of an ERISA violation where there is a substantial likelihood that the assets of the fund would be treated as 'plan assets' of any ERISA partner for purposes of Title I of ERISA or section 4975 of the Code."). *See also* Schell, *supra* note 101, at § 9.04[3] ("Exclusion provisions allow the General Partner to exclude a Limited Partner from participation in any or all investments if a violation of law or another material adverse effect would otherwise occur."); *id.* at Appendix D–31 (attaching model limited partnership agreement providing "The General Partner at any time may cancel the obligations of all Partners to make Capital Contributions for Portfolio Instruments if * * * changes in applicable law * * * make such cancellation necessary or advisable. * * * ").

testimony cited an investor's inability to withdraw from a venture capital fund as a key characteristic of venture capital funds and a factor for reducing their potential for systemic risk.[153] Although a fund prohibiting redemptions would be a venture capital fund for purposes of the exemption, the rule does not specify a minimum period of time for an investor to remain in the fund. Should the rule define when withdrawals by investors would be "extraordinary?" Should the rule specify minimum investment periods for investors? Could venture capital funds provide investors with "extraordinary" rights to redeem that could effectively result in redemption rights in the ordinary course? [154] Should we address this potential for circumvention of the definition by establishing a maximum amount that may be redeemed during any period of time (*e.g.,* 10 percent of an investor's total capital commitments)? Would such a limit constrain investors in a way so as to prevent them from complying with other legal or regulatory requirements?

4. Represents Itself as a Venture Capital Fund

Proposed rule 203(l)–1 would limit the definition of venture capital fund for the purposes of the exemption to a private fund that represents itself as being a venture capital fund to its investors and potential investors.[155] A private fund could satisfy this definitional element by, for example, describing its investment strategy as venture capital investing or as a fund that is managed in compliance with the elements of our proposed rule. Without this element, a fund that did not engage in typical venture capital activities could be treated as a venture capital fund simply because it met the other elements specified in our proposed rule (because for example it only invests in short term Treasuries, controls portfolio companies, does not borrow, does not offer investors redemption rights, and is not a registered investment company).[156] We believe that only funds that do not significantly differ from the common understanding of what a venture capital fund is,[157] and that are actually offered to investors as venture capital funds, should qualify for the exemption. Thus, an adviser to a venture capital fund that is otherwise relying on the exemption could not identify the fund as a hedge fund or multi-strategy fund (*i.e.,* venture capital is one of several strategies used to manage the fund) or include the fund in a hedge fund database or hedge fund index.

We request comment on a venture capital fund's representations regarding itself as a criterion under the proposed definition. Is our criterion inconsistent with current practice? Does the proposed criterion regarding venture capital fund representations adequately address our concern that advisers should not be eligible for the exemption if they advise funds that otherwise meet the definitional criteria in the rule but engage in activities that do not constitute venture capital investing?

5. Is a Private Fund

We propose to define a venture capital fund for the purposes of the exemption as a private fund, which is defined in the Advisers Act,[158] and exclude from the proposed definition funds that are registered investment companies (*e.g.,* mutual funds) or have elected to be regulated as BDCs.[159] There is no indication that Congress intended this exemption to apply to advisers to these publicly available funds,[160] referring to venture capital funds as a "subset of private investment funds." [161] We request comment on this requirement and whether it appropriately reflects the expectation of Congress.

6. Other Factors

We request comment on whether the proposed rule should include other elements that were described in testimony as characteristic of venture capital funds or that distinguish venture capital funds from other types of private equity or private funds.[162] For example, testimony presented to Congress indicated that venture capital funds typically have capital contributions from their advisers, generally up to five percent of the fund's total capital commitments.[163] Congress also received testimony that venture capital funds are generally not open to retail investors,[164] have long investment periods, generally of at least ten years,[165] and contribute to the U.S. economy by creating jobs, fostering competition and facilitating innovation.[166]

Are any of these characteristics appropriate to include as elements in the definition? If so, which elements should be included and what would be appropriate thresholds for application? Do venture capital advisers typically invest in the funds they manage? Should we modify the proposed rule to include as a condition that advisers relying on the exemption under section 203(l) would invest in the venture capital fund at a specified minimum threshold? If so, what is an appropriate investment threshold—less than one percent, one percent, three percent, five percent, or somewhere in between? Should the proposed rule be modified to specify that venture capital funds have a minimum term, for example, of 10

[153] *See supra* notes 149–150 and accompanying text.

[154] For example, a private fund's governing documents may provide that investors do not have any right to redeem without the consent of the general partner. In practice, if the general partner typically permits investors to redeem or transfer their otherwise non-redeemable, non-transferable interests on a periodic basis, then the fund would not be considered to have issued securities that "do not provide a holder with any right, except in extraordinary circumstances, to withdraw."

[155] Proposed rule 203(l)–1(a)(1).

[156] We also note that a fund that represents to investors that it is one type of fund while pursuing a different type of fund strategy may raise concerns under rule 206(4)–8 of the Advisers Act.

[157] *See* Gompers, *supra* note 110, at 6–7.

[158] *See* section 202(a)(29) of the Advisers Act.

[159] Proposed rule 203(l)–1(a)(6).

[160] Legislative history does not indicate that Congress addressed this matter, nor does testimony before Congress suggest that this was contemplated. *See, e.g.,* McGuire Testimony, *supra* note 41, at 3 (noting that venture capital funds are not directly accessible by individual investors); Loy Testimony, *supra* note 40, at 2 ("Generally * * * capital for the venture fund is provided by qualified institutional investors such as pension funds, universities and endowments, private foundations, and to a lesser extent, high net worth individuals."). *See generally supra* note 158 (definition of "private fund").

[161] *See* S. Rep. No. 111–176, *supra* note 7, at 74 (describing venture capital funds as a subset of "private investment funds").

[162] *See, e.g.,* Heesen, *supra* note 104 (generally describing characteristics that distinguish venture capital funds from hedge funds and buyout funds).

[163] *See* Loy Testimony, *supra* note 40, at 2 ("[g]enerally, 95 to 99 percent of capital for the venture fund is provided by * * * investors * * * and we supply the rest of the capital for the fund from our own personal assets"); McGuire Testimony, *supra* note 41, at 3. Industry data confirm that such investments are typical in the venture capital industry. *See, e.g.,* Dow Jones Report, *supra* note 145, at 23–24 (showing that, in a survey of 110 North American general partners, at least 83% contributed at least 1% of venture capital fund capital). We note that certain investors perceive an investment in the fund as aligning the interest of investors and advisers. *See* Institutional Limited Partners Association Private Equity Principles, September 9, 2009, at 3 (recommending that the "general partner should have a substantial equity interest in the fund to maintain a strong alignment of interest with the limited partners, and a high percentage of the amount should be in cash as opposed to being contributed through the waiver of the management fee."); Mercer Investment Consulting, Inc., Key Terms and Conditions for Private Equity Investing, 1996 at 13 ("Many limited partners view the 1% standard as an inadequate sharing of risk * * *.").

[164] *See* McGuire Testimony, *supra* note 41, at 3 ("Venture capital funds are not sold directly to retail investors like mutual funds."); Loy Testimony, *supra* note 40, at 2 ("Generally, 95 to 99 percent of capital for the venture fund is provided by qualified institutional investors such as pension funds, universities and endowments, private foundations, and to a lesser extent, high net worth individuals.").

[165] *See* Loy Testimony, *supra* note 40, at 2; McGuire Testimony, *supra* note 41, at 3.

[166] *See* Loy Testimony, *supra* note 40, at 4; McGuire Testimony, *supra* note 41, at 5.

years? Should the proposed rule be modified to specify that a venture capital fund is one that does not have retail investors? If so, how should "retail investor" be defined? Should "retail investor" exclude persons who are not "qualified clients" for purposes of the Advisers Act?[167]

7. Application to Non-U.S. Advisers

Neither the statutory text of section 203(l) nor the legislative reports gives an indication of whether Congress intended the exemption to be available to advisers that operate principally outside of the United States but that invest in U.S. companies or solicit U.S. investors.[168] Testimony before Congress presented by members of the U.S. venture capital industry discussed the industry's role primarily in the U.S. economy including its lack of interconnection with the U.S. financial markets and "interdependence" with the world financial system.[169] Nevertheless, we expect that venture capital funds with advisers operating principally outside of the United States may seek to access the U.S. capital markets by investing in U.S. companies or soliciting U.S. investors; investors in the United States may also have an interest in venture capital opportunities outside of the United States. We request comment on whether the proposed rule should specify that an adviser with its principal office and place of business outside of the United States (a "non-U.S. adviser") is eligible to rely on the exemption even if it advises funds that do not meet our proposed definition of venture capital fund.

A non-U.S. adviser currently may rely on the private adviser exemption, if it meets the conditions of current section 203(b)(3) of the Advisers Act, including advising no more than 14 clients.[170] We have permitted such an adviser to count only clients that are residents of the United States,[171] and for this purpose permitted the adviser to treat a private fund incorporated outside of the United States as a non-resident of the United States, even if some or all of the investors in the private fund are residents of the United States.[172] A non-U.S. adviser may rely on the venture capital exemption if all of its clients, whether U.S. or non-U.S., are venture capital funds. In effecting the new venture capital exemption, should we specifically provide that a non-U.S. adviser may avail itself of the exemption even if it advises clients other than venture capital funds, provided such clients are non-United States persons, under the definition we propose for purposes of the other exemptions discussed below? [173] If we take this approach, should the non-U.S. adviser be able to rely on the venture capital exemption if it advises these other clients from within the United States?

If a non-U.S. adviser must advise solely venture capital funds (even those advisers that principally operate outside of the United States) our proposed definition may have the result of subjecting non-U.S. advisers to United States regulatory oversight because they advise funds offered only outside the United States. Under our proposed rule, only a private fund as defined under section 202(a)(29) may be a venture capital fund.[174] A non-U.S. fund that uses U.S. jurisdictional means in the offering of the securities it issues and relies on sections 3(c)(1) or 3(c)(7) would be a private fund.[175] A non-U.S. fund that does not make such a U.S. offering would not be a private fund and therefore could not qualify as a venture capital fund, even if operated as a venture capital fund in a manner that would otherwise meet the criteria under our proposed definition. If we adopt the approach we are proposing today, should we allow an adviser to treat such a non-U.S. fund as a private fund and, to the extent that the fund meets all of the other conditions of our proposed definition, as a venture capital fund for purposes of the exemption? If so, under what conditions? For example, should a non-U.S. fund be a private fund under the proposed rule if the non-U.S. fund would be deemed a private fund upon conducting a private offering in the United States in reliance on sections 3(c)(1) or 3(c)(7)?

8. Grandfathering Provision

We propose to include in the definition of "venture capital fund" any private fund that: (i) Represented to investors and potential investors at the time the fund offered its securities that it is a venture capital fund; (ii) has sold securities to one or more investors prior to December 31, 2010; and (iii) does not sell any securities to, including accepting any additional capital commitments from, any person after July 21, 2011 (the "grandfathering provision").[176] The grandfathering provision thus would include any fund that has accepted capital commitments by the specified dates even if none of the commitments has been called.[177] As a result, any investment adviser that solely advises private funds that meet the definitions in either proposed rule 203(l)–1(a) or (b) would be exempt from registration.

We believe that most funds previously sold as venture capital funds likely would satisfy all or most of the conditions in the proposed rule.

[167] Rule 205–3 generally defines a qualified client as any person who has at least $750,000 under management with an adviser immediately after entering into the contract or who has a net worth of more than $1,500,000 at the time the contract is entered into.

[168] *See* section 203(l) of the Advisers Act; H. Rep. No. 111–517, *supra* note 7, at 867; S. Rep. No. 111–176, *supra* note 7, at 74–75.

[169] *See* Loy Testimony, *supra* note 40, at 4–5; McGuire Testimony, *supra* note 41, at 5–6.

[170] *See supra* note 5 and accompanying text.

[171] *See* rule 203(b)(3)–1(b)(5).

[172] *See* rule 203(b)(3)–1(a)(2). *See also* ABA Subcommittee on Private Investment Companies, SEC Staff No-Action Letter (Aug. 10, 2006) ("ABA Letter"). In the ABA Letter, Commission staff expressed the view that the substantive provisions of the Advisers Act do not apply to offshore advisers with respect to such advisers' dealings with offshore funds and other offshore clients to the extent described in prior staff no-action letters and the Hedge Fund Adviser Registration Release, *supra* note 17. The staff took the position, however, that an offshore adviser registered with the Commission under the Advisers Act must comply with the Advisers Act and the Commission's rules thereunder with respect to any U.S. clients (and any prospective U.S. clients) it may have.

[173] *See* proposed rule 203(m)–1(e)(8); proposed rule 202(a)(30)–1(c)(2)(i).

[174] *See* proposed rule 203(l)–1(a).

[175] An issuer that is organized under the laws of the United States or of a state is a private fund if it is excluded from the definition of an investment company for most purposes under the Investment Company Act pursuant to sections 3(c)(1) or 3(c)(7). Section 7(d) of the Investment Company Act prohibits a non-U.S. fund from using U.S. jurisdictional means to make a public offering, absent an order permitting registration. A non-U.S. fund may conduct a private U.S. offering without violating section 7(d) only if the fund complies with either section 3(c)(1) or 3(c)(7) with respect to its U.S. investors (or some other available exemption or exclusion). Consistent with this view, a non-U.S. fund is a private fund if it makes use of U.S. jurisdictional means to, directly or indirectly, offer or sell any security of which it is the issuer and relies on either section 3(c)(1) or 3(c)(7). *See* Hedge Fund Adviser Registration Release, *supra* note 17, at n.226; *Offer and Sale of Securities to Canadian Tax-Deferred Retirement Savings Accounts,* Securities Act Release No. 7656 (Mar. 19, 1999) [64 FR 14648 (Mar. 26, 1999)], at nn.10, 20, 23; *Statement of the Commission Regarding Use of Internet Web Sites to Offer Securities, Solicit Securities Transactions or Advertise Investment Services Offshore,* Securities Act Release No. 7516 (Mar. 23, 1998) [63 FR 14806 (Mar. 27, 1998)], at n.41. *See also* Dechert LLP, SEC Staff No-Action Letter (Aug. 24, 2009) at n.8; Goodwin, Procter & Hoar LLP, SEC Staff No-Action Letter (Feb. 28, 1997) ("Goodwin Procter Letter"); Touche Remnant & Co., SEC Staff No-Action Letter (Aug. 27, 1984).

[176] Proposed rule 203(l)–1(b).

[177] *See also Electronic Filing and Revision of Form D,* Securities Act Release No. 8891(Feb. 6, 2008) [73 FR 10592 (Feb. 27, 2008)], at section VIII, Form D, General Instructions—When to File (noting that a Form D is required to be filed within 15 days of the first sale of securities which would include "the date on which the first investor is irrevocably contractually committed to invest"), n.159 ("a mandatory capital commitment call would not constitute a new offering, but would be made under the original offering").

Nevertheless, we recognize that investment advisers currently seeking to sponsor new funds before the adoption of the final version of proposed rule 203(l)–1 will continue to face uncertainty regarding the precise terms of the definition and hence uncertainty regarding their eligibility for the new exemption. Thus, our proposed rule presumes that a fund that has commenced its offering (*i.e.,* has initially sold securities by December 2010) and that also concludes its offering by the effective date of Title IV of the Dodd-Frank Act (*i.e.,* July 21, 2011) is unlikely to have been structured to circumvent the intended scope of the exemption. Moreover, requiring existing venture capital funds to modify their investment conditions or characteristics, liquidate portfolio company holdings or alter the rights of investors in the funds in order to satisfy the proposed definition of a venture capital fund would likely be impossible in many cases and yield unintended consequences for the funds and their investors.

Thus, we propose that an investment adviser may treat any existing private fund as a venture capital fund for purposes of section 203(l) of the Advisers Act if the fund meets the elements of the grandfathering provision. The current private adviser exemption does not require an adviser to identify or characterize itself as any type of adviser (or impose limits on advising any type of funds). Accordingly, we believe that advisers have not had an incentive to mis-characterize existing venture capital funds that have already been marketed to investors. As we note above, a fund that "represents" itself to investors as a venture capital fund is typically one that discloses it pursues a venture capital investing strategy and identifies itself as such. We do not expect funds identifying themselves as "private equity" or "hedge" would be able to rely on this exemption.

We request comment on this grandfathering provision. Should we include other conditions in addition to the fund representing itself as a venture capital fund? For example, should a fund seeking to be grandfathered also provide that its investors do not have any redemption rights except in extraordinary circumstances,[178] not incur leverage except on a short-term basis,[179] limit the securities that it acquires from portfolio companies to equity securities,[180] or provide significant managerial assistance to the portfolio companies in which the fund invests? [181] Should the grandfathering provision be modified to exclude other types of funds, such as funds of venture capital funds or publicly available venture capital funds? [182] We understand that venture capital funds may be in the planning and initial offering stage for a considerable period of time.[183] Should funds that have their first sale of securities within a period of time such as 180 days after the final rule is adopted be able to rely on the proposed grandfathering provision? Does our grandfathering provision unnecessarily encourage the formation of new funds before December 31, 2010, and therefore should the grandfathering provision only apply to funds in existence on the date of this proposal or some other time before December 31, 2010? Would the dates specified in the grandfathering provision significantly shorten the fundraising periods for venture capital funds? Should we specify a date later than December 31, 2010 or earlier than July 21, 2011? Do venture capital fund advisers need more time or flexibility to determine eligibility for the grandfathering provision? Alternatively, would exempt advisers consider registering with the Commission in order to retain flexibility to raise capital for new venture capital funds without regard to the grandfathering provision?

B. Exemption for Investment Advisers Solely to Private Funds With Less Than $150 Million in Assets Under Management

Section 203(m) of the Advisers Act directs the Commission to exempt from registration any investment adviser solely to private funds that has less than $150 million in assets under management in the United States.[184] We are proposing a new rule 203(m)–1 that would provide the exemption and address several interpretive questions raised by section 203(m). We will refer to this exemption as the "private fund adviser exemption."

1. Advises Solely Private Funds

Proposed rule 203(m)–1 would, like section 203(m) of the Advisers Act, limit an adviser relying on the exemption to advising "private funds" as that term is defined in that Act.[185] An adviser that acquires a different type of client would have to register under the Advisers Act unless another exemption is available. An adviser could advise an unlimited number of private funds, provided the aggregate value of the adviser's private fund assets is less than $150 million.

In the case of an adviser with a principal office and place of business outside of the United States (a "non-U.S. adviser"), we propose to provide the exemption as long as *all* of the adviser's clients that are United States persons are qualifying private funds.[186] As a consequence, a non-U.S. adviser could enter the U.S. market and take advantage of the exemption without regard to the type or number of its non-U.S. clients. Under this approach, a non-U.S. adviser would not lose the private fund adviser exemption as a result of its business activities outside the United States. Recognizing that non-U.S. activities of non-U.S. advisers are less likely to implicate U.S. regulatory interests and in consideration of general principles of international comity, our rules have taken a similar approach by permitting a non-U.S. adviser to count only clients that are U.S. persons when determining whether it has 14 or fewer clients, and is thus eligible for the private adviser exemption.[187]

We request comment on our proposed application of the statute to non-U.S. advisers. Should we, alternatively, interpret section 203(m) as denying the private fund adviser exemption to a non-U.S. adviser that has other types of clients outside of the United States? This interpretation would have the effect of treating non-U.S. and U.S. advisers equally with respect to the types of clients they may have, but could also have the result of requiring many non-U.S. advisers to register because of the scope and nature of their non-U.S. advisory business, an outcome which the "assets under management in the United States" limitation in section 203(m) suggests was not a consideration relevant to the scope of the exemption.

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[178] *See* proposed rule 203(l)–1(a)(5); *supra* discussion in section II.A.4 of this Release.

[179] *See* proposed rule 203(l)–1(a)(4); *supra* discussion in section II.A.3 of this Release.

[180] *See* proposed rule 203(l)–1(a)(1); *supra* discussion in section II.A.1.b of this Release.

[181] *See* proposed rule 203(l)–1(a)(3); *supra* discussion in section II.A.2 of this Release.

[182] *See supra* discussion in sections II.A.1.e and II.A.6 of this Release.

[183] *See* Breslow & Schwartz, *supra* note 144, at § 2:4.1 (private equity fundraising may take six to 12 months following the initial closing, depending upon whether the adviser has an existing investor base or a successful performance record).

[184] Section 408 of the Dodd-Frank Act, which is codified in section 203(m) of the Advisers Act. *See supra* note 22.

[185] *See* proposed rule 203(m)–1(a) and (b). A "private fund" includes a private fund that invests in other private funds.

[186] Proposed rule 203(m)–1(b)(1).

[187] Rule 203(b)(3)–1(b)(5) ("If you have your principal office and place of business outside the United States, you are not required to count clients that are not United States residents, but if your principal office and place of business is in the United States, you must count all clients."). *See infra* note 207.

Under such an approach, moreover, the exemption would be unavailable to a non-U.S. adviser unless all of the non-U.S. funds it manages are offered to investors in the United States (and therefore meet the definition of "private fund").[188] If we adopt this alternative approach, should the exemption apply to a non-U.S. adviser even if not all of the non-U.S. funds it manages are offered in the United States?

2. Private Fund Assets

Under proposed rule 203(m)–1, an adviser would have to aggregate the value of all assets of private funds it manages in the United States to determine if the adviser remains below the $150 million threshold.[189] Proposed rule 203(m)–1 would require advisers to calculate the value of private fund assets by reference to Form ADV, under which we propose to provide a uniform method of calculating assets under management for regulatory purposes under the Advisers Act.[190] In the case of a sub-adviser, it would have to count only that portion of the private fund assets for which it has responsibility.[191]

In addition to assets appearing on a private fund's balance sheet, advisers would include any uncalled capital commitments, which are contractual obligations of an investor to acquire an interest in, or provide the total commitment amount over time to, a private fund, when called by the fund.[192] Advisers to private funds that use capital commitments seek investments early in the life of the fund in anticipation of all investors fully paying in these capital commitments during the life of the fund, and fees payable to the adviser are calculated as a percentage of total capital commitments.[193] Many of these types of private funds are managed following investment guidelines and restrictions that are determined as a percentage of overall capital commitments, rather than as a percentage of current net asset value.[194] We request comment on whether the method for calculating the relevant assets under management should deviate from the method in the proposed amendments to Form ADV instructions by, for example, excluding proprietary assets, assets managed without compensation, or uncalled capital commitments.

Under proposed rule 203(m)–1, each adviser would have to determine the amount of its private fund assets quarterly, based on the fair value of the assets at the end of the quarter.[195] We propose that advisers use the fair value of private fund assets in order to ensure that, for purposes of this exemption, advisers value private fund assets on a meaningful and consistent basis. Use of the cost basis (*i.e.,* the value at which the assets were originally acquired), for example, could under certain circumstances understate significantly the value of appreciated assets, and thus result in advisers availing themselves of the exemption. Use of the fair valuation method by all advisers, moreover, would result in more consistent asset calculations and reporting across the industry and, therefore, in a more coherent application of the Advisers Act's regulatory requirements and of our staff's risk assessment program.

We understand that many, but not all, private funds value assets based on their fair value in accordance with U.S. generally accepted accounting principles ("GAAP") or other international accounting standards.[196] Some private funds do not use fair value methodologies, which may be more difficult to apply when the fund holds illiquid or other types of assets that are not traded on organized markets.[197] Would the proposed approach result in advisers valuing their private fund assets in a generally uniform manner and in comparability of the valuations? We are not proposing to require advisers to determine fair value in accordance with GAAP. Should we adopt such a requirement? If not, should we specify that advisers may only determine the fair value of private fund assets in accordance with a body of accounting principles used in preparing financial statements? We understand that GAAP does not require some funds to fair value certain investments. Should we provide for an exception from the proposed fair valuation requirement with respect to any of those investments?

Should we adopt a different approach altogether and allow advisers to use a method other than fair value? Are there other methods that would not understate the value of fund assets? Should the rule permit advisers to rely exclusively on the method set forth in a fund's governing documents, or the method used to report the value of assets to investors or to calculate fees (or other compensation) for investment advisory services? What method should apply if a fund uses different methods for different purposes? Should we modify the proposed rule to require that the valuation be derived from audited financial statements or subject to review

[188] *See supra* note 174–175 and accompanying paragraph.

[189] Proposed rule 203(m)–1(c).

[190] *See* proposed rules 203(m)–1(a)(2); 203(m)–1(b)(2); 203(m)–1(e)(1) (defining "assets under management" to mean "regulatory assets under management" in proposed item 5.F of Form ADV, Part 1A); 203(m)–1(e)(4) (defining "private fund assets" to mean the assets under management attributable to a qualifying private fund). This uniform method of calculation would be used to determine whether an adviser qualifies to register with the Commission rather than the states, as well as to determine eligibility for the private fund adviser exemption and the foreign private adviser exemption discussed in this Release. Under the proposed Form ADV instructions, advisers would include in their "regulatory assets under management" any proprietary assets, assets managed without receiving compensation, and assets of non-U.S. clients, all of which an adviser may currently exclude, as well as, in the case of private funds, uncalled capital commitments. Moreover, the adviser could not deduct liabilities, such as accrued fees and expenses or the amount of any borrowing. *See* Implementing Release, *supra* note 25, at section II.A.3 (discussing the rationale underlying the proposed new instructions for calculating assets under management under Form ADV).

[191] *See* proposed Form ADV: Instructions for Part 1A, instr. 5.b(2).

[192] *See* proposed Form ADV: Instructions for Part 1A, instr. 5.b(1).

[193] *See supra* notes 143–145.

[194] *Id.*

[195] *See* proposed rule 203(m)–1(c); *supra* note 190; proposed Form ADV: Instructions for Part 1A, instr. 5.b(4). As discussed in the Implementing Release, we are proposing to require advisers to value private fund assets using fair value when calculating their assets under management for several purposes under the Advisers Act. *See* Implementing Release, *supra* note 25, at section II.A.3. A fund's governing documents may provide for a specific process for calculating fair value (*e.g.,* that the general partner, rather than the board of directors, determines the fair value of the fund's assets). An adviser would be able to rely on such a process also for purposes of calculating its assets under management.

[196] *See, e.g.,* Comment Letter of National Venture Capital Association (July 28, 2009), at 2 (the "vast majority of venture capital funds provide their LPs [*i.e.,* investors] quarterly and audited annual financial reports. These reports are prepared under generally accepted accounting principles, or GAAP, and audited under the standards established for all investment companies, including the largest mutual fund complexes."); Comment Letter of Managed Funds Association (July 28, 2009), at 3 (a "substantial proportion of hedge fund managers, whether or not they are registered with the Commission, provide independently audited financial statements of the [hedge] fund to investors."). These comment letters were submitted in connection with the Commission's proposed amendments to the custody rule, *Custody of Funds or Securities of Clients by Investment Advisers,* Investment Advisers Act Release No. 2876 (May 20, 2009) [74 FR 25354 (May 27, 2009)], and are available on the Commission's Internet Web site at *http://www.sec.gov/comments/s7–09–09/s70909.shtml.*

[197] Those assets include, for example, "distressed debt" (such as securities of companies or government entities that are either already in default, under bankruptcy protection, or in distress and heading toward such a condition) or certain types of emerging market securities that are not readily marketable. *See* Gerald T. Lins *et al.,* Hedge Funds and Other Private Funds: Reg and Comp § 5:22 (2009) ("At any given time, some portion of a hedge fund's portfolio holdings may be illiquid and/or difficult to value. This is particularly the case for certain types of hedge funds, such as those focusing on distressed securities, activist investing, etc.").

by auditors or another independent third party?

As discussed above, we are proposing that funds value assets no less frequently than quarterly, although such values are not subject to quarterly reporting to us.[198] As a consequence, short-term market value fluctuations would not affect the availability of the exemption between the ends of calendar quarters. We request comment on our proposed quarterly calculation. Should compliance with the $150 million threshold be determined more or less frequently than quarterly? For purposes of reporting on proposed amendments on Form ADV, registered investment advisers (and exempt reporting advisers) would be required to report their regulatory assets under management annually.[199] Should the availability of the exemption under proposed rule 203(m)–1 be conditioned on annual valuation rather than quarterly valuation?

3. Assets Managed in the United States

Under proposed rule 203(m)–1, all of the private fund assets of an adviser with a principal office and place of business in the United States would be considered to be "assets under management in the United States," even if the adviser has offices outside of the United States.[200] A non-U.S. adviser, however, would need only count private fund assets it manages from a place of business in the United States toward the $150 million asset limit under the exemption.[201]

Rule 203(m)–1 would deem all of the assets managed by an adviser to be managed "in the United States" if the adviser's "principal office and place of business" is in the United States. We would look to an adviser's principal office and place of business as the location where the adviser controls, or has ultimate responsibility for, the management of private fund assets, and therefore as *the* place where all the advisers' assets are managed, although day-to-day management of certain assets may also take place at another location. This approach is similar to the way we have identified the location of the adviser for regulatory purposes under our current rules,[202] which define an adviser's principal office and place of business as the location where it "directs, controls and coordinates" its global advisory activities, regardless of the location where some of the advisory activities might occur.[203] For most advisers, this approach would avoid difficult attribution determinations that would be required if assets are managed by teams located in multiple jurisdictions, or if portfolio managers located in one jurisdiction rely heavily on research or other advisory services performed by employees located in another jurisdiction.

We considered but decided not to propose an approach that would presume that a non-U.S. adviser to private funds offered in the United States would have no assets managed from a location in the United States if its principal office and place of business is not "in the United States."[204] Such an interpretation of the statute would treat U.S. advisers the same as non-U.S. advisers, but would seem to ignore the fact that day-to-day management of some assets of the private fund does in fact take place "in the United States," even though that management is ultimately controlled from outside of the United States. Moreover, it would permit an adviser engaging in substantial advisory activities in the United States to escape our regulatory oversight merely because the adviser's principal office and place of business is outside the United States. This consequence seems at odds not only with section 203(m), but also with the "foreign private adviser" exemption discussed below in which Congress specifically set forth circumstances under which a non-U.S. adviser may be exempt provided it does not have any place of business in the United States, among other conditions.[205]

We request comment on our proposed approach, which is similar to the way we have administered the current private adviser exemption in section 203(b)(3) of the Advisers Act with respect to non-U.S. advisers. Under that exemption (as discussed above), an adviser with a principal office and place of business outside of the United States need only count clients that are residents of the United States towards the 14 client limit.[206] As with other Commission rules that adopt a territorial approach, the private adviser exemption is available to a non-U.S. adviser (regardless of its non-U.S. advisory activities) in recognition of the fact that non-U.S. activities of non-U.S. advisers are less likely to implicate U.S. regulatory interests and in consideration of general principles of international comity.[207] This approach to the exemption is designed to encourage the participation of non-U.S. advisers in the

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[198] The proposed frequency of the calculation is consistent with section 2(a)(41)(A) of the Investment Company Act, which specifies the valuation of the assets of an issuer for purposes of determining whether it meets the definition of investment company under section 3 of that Act.

[199] *See* proposed rules 204–1(a) and 204–4(a) and proposed General Instruction 3 to Form ADV. *See* Implementing Release, *supra* note 25, at section II.B.3. *See also* Form ADV Release, *supra* note 132, at 15 ("Advisers must update the amount of their assets under management annually (as part of their annual updating amendment) and make interim amendments only for material changes in assets under management when they are filing an 'other than annual amendment' for a separate reason.").

[200] Proposed rule 203(m)–1(a). The proposed rule also would define the United States to have the same meaning as in rule 902(l) of Regulation S under the Securities Act, which is "the United States of America, its territories and possessions, any State of the United States, and the District of Columbia." Proposed rule 203(m)–1(e)(7).

[201] Proposed rule 203(m)–1(b). Any assets managed from a U.S. place of business for clients other than private funds would make the exemption unavailable. We understand that others have supported a jurisdictional approach to regulation, which focuses on the primary market in which an adviser conducts its business. *See, e.g.,* G20 Working Group Report, *supra* note 136, at 16; Testimony of W. Todd Groome, Chairman, The Alternative Investment Management Association, before the House Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises, May 7, 2009, at 3. These commenters propose an approach that looks to the location where the primary business is conducted, which is similar to our territorial approach.

[202] *See* rule 203A–3(c); rule 222–1. Both rules define "principal place of business" of an investment adviser as the executive office of the investment adviser from which the officers, partners or managers of the investment adviser direct, control and coordinate the activities of the investment adviser.

[203] *See* proposed rule 203(m)–1(e)(3) (defining "principal office and place of business" as the adviser's executive office from which the officers, partners, or managers of the adviser direct, control, and coordinate the adviser's activities); proposed rule 203(m)–1(e)(2) (defining "place of business," by reference to proposed rule 222–1(a), as (i) an office where the investment adviser regularly provides investment advisory services, solicits, meets with, or otherwise communicates with clients, and (ii) any other location that it holds out to the general public as a place where those activities take place).

[204] Under our proposed rule, assets under management for purposes of the exemption are those assets for which the adviser provides "continuous and regular supervisory or management services." *See* proposed rule 203(m)–1(e)(1); proposed Form ADV: Instructions for Part 1A, instr. 5.b(3). For a non-U.S. adviser, the assets for which the adviser provides such services from a place of business in the United States would count towards the $150 million asset threshold under the exemption. *See* proposed rule 203(m)–1(b)(2). *See also supra* note 203 for the definition of "place of business" under proposed rule 203(m)–1(e)(2).

[205] *See* section II.C of this Release.

[206] Rule 203(b)(3)–1(b)(5) (adviser with principal office and place of business outside of the United States not required to count clients that are not United States residents, but adviser with principal office and place of business is in the United States must count all clients). Our staff has taken the position that under the existing private adviser exemption, a non-U.S. adviser need not count its non-U.S. clients, including an offshore fund, even if there are U.S. investors in the fund. *See* ABA Letter, *supra* note 172, at 2 and discussion *infra* section II.C.1 of this Release.

[207] *See, e.g.,* Regulation S (adopting a territorial approach to offers and sales of securities); rule 15a–6 under the Exchange Act (17 CFR 240.15a–6) (providing an exemption from U.S. registration for non-U.S. broker-dealers who limit their activities and satisfy certain conditions).

U.S. market by applying the U.S. securities laws in a manner that does not impose U.S. regulatory and operational requirements on an adviser's non-U.S. advisory business.[208]

Should we adopt a different approach that more broadly applies the availability of the private fund adviser exemption to U.S. advisers? We could treat U.S. and non-U.S. advisers alike, in which case a U.S. adviser could exclude assets it manages through non-U.S. offices. Under the proposed rule, would some or most advisers with non-U.S. branch offices re-organize those offices as subsidiaries in order to avoid attributing assets managed to the non-U.S. office? We understand that U.S. advisers that manage private fund assets in a non-U.S. country typically do so through one or more separate subsidiaries organized in such non-U.S. jurisdictions.[209] If so, the proposed rule may have a limited effect on multi-national advisory firms, which for tax or business reasons keep their non-U.S. advisory activities separate from their U.S. advisory activities. Is this understanding correct? Such U.S. advisers would not generally have to count the assets managed by the non-U.S. affiliates under the proposed rule.[210] Should our rule determine "private fund assets" on an aggregated basis if, for example, U.S. and non-U.S. affiliates share advisory duties for a private fund, or if one affiliate provides subadvisory services to another affiliate?

Alternatively, should we interpret "assets under management in the United States" by reference to the source of the assets (*i.e.,* U.S. private fund investors)? Under this approach, a non-U.S. adviser would count the assets of private funds attributable to U.S. investors towards the $150 million threshold, regardless of the location where it manages the private funds. We note that this approach could have the result that fewer non-U.S. advisers would be eligible for the exemption if there are significant assets of U.S. investors in those funds that the advisers manage from a non-U.S. location. This approach could also mean that a U.S. adviser managing assets from, for example, an office in New York City, could manage substantially in excess of $150 million in assets of one or more private funds as long as the investors in those funds were not U.S persons.

Do commenters view either of these alternatives, separately or in combination with our proposed approach, as more closely reflecting the intent of Congress in using the term "assets under management in the United States" and our regulatory interests? Would either alternative approach be easier for advisers to comply with than the one we are proposing to adopt? Would it be easier for investors to understand the rationale for why an adviser is eligible for the exemption under the proposed approach or either of the alternative approaches?

4. United States Person

Under proposed rule 203(m)–1(b), a non-U.S. adviser could not rely on the exemption if it advised any client that is a United States person other than a private fund.[211] We propose to define a "United States person" generally by incorporating the definition of a "U.S. person" in our Regulation S.[212] Regulation S looks generally to the residence of an individual to determine whether the individual is a United States person,[213] and also addresses the circumstances under which a legal person, such as a trust, partnership or a corporation, is a United States person.[214] Regulation S generally treats legal partnerships and corporations as Unites States persons if they are organized or incorporated in the United States, and trusts by reference to the residence of the trustee.[215] It treats discretionary accounts generally as United States persons if the fiduciary is a resident of the United States.[216]

We are proposing to incorporate Regulation S because it would provide a well-developed body of law that would, in our view, appropriately address many of the questions that will arise under rule 203(m)–1. Moreover, managers to private funds and their counsel must today be familiar with the definition of "U.S. person" under Regulation S in order to comply with other provisions of the federal securities laws.[217] We ask comment on the proposed use of the Regulation S definition of U.S. person. Should we use a different definition of United States person? We have previously suggested that advisers may rely on an alternative to Regulation S for certain types of clients.[218] Would that approach be less prone to abuse or circumvention or provide greater clarity?

Proposed rule 203(m)–1 contains a special rule for discretionary accounts maintained outside of the United States for the benefit of United States persons.[219] Under the proposed rule, an adviser must treat a discretionary or other fiduciary account as a United States person if the account is held for the benefit of a United States person by a non-U.S. fiduciary who is a related person of the adviser. An adviser could not rely on the exemption if it established discretionary accounts for the benefit of U.S. clients with an offshore affiliate that would then delegate the actual management of the account back to the adviser.[220] We request comment on this special rule. Does our proposed rule adequately

[208] *See generally* Division of Investment Management, SEC, *Protecting Investors: A Half Century of Investment Company Regulation,* May 1992, at 223–227 (recognizing that non-U.S. advisers that registered with the Commission were arguably subject to all of the substantive provisions of the Advisers Act with respect to their U.S. and non-U.S. clients, which could result in inconsistent regulatory requirements or practices imposed by the regulations of their local jurisdiction and the U.S. securities laws; in response, advisers could form separate and independent subsidiaries but this could result in U.S. clients having access to a limited number of advisory personnel and reduced access by the U.S. subsidiary to information or research by non-U.S. affiliates).

[209] *See, e.g.,* James D. Rosener, *Legal Considerations for Establishing Operations in the United States,* Pepper Hamilton LLP, June 25, 2002, *http://www.pepperlaw.com/publications_article.aspx?ArticleKey=186* (creating separate subsidiaries offers benefits, including the ability to offset profits from one subsidiary against losses in another); *see also* Edward F. Greene, et al., U.S. Regulation of the International Securities and Derivatives Markets, § 11.02[2].

[210] *See infra* note 270.

[211] Proposed rule 203(m)–1(b)(1).

[212] Proposed rule 203(m)–1(e)(8).

[213] 17 CFR 230.902(k)(1)(i).

[214] *See, e.g.,* 17 CFR 230.902(k)(1) and (2).

[215] 17 CFR 230.902(k)(1)(ii) and (iv).

[216] 17 CFR 230.902(k)(1)(vii).

[217] For instance, our staff has generally taken the interpretive position that an investor that is not a U.S. person under Regulation S is not a U.S. person when determining whether a non-U.S. private fund meets the counting or qualification requirements that apply to U.S. beneficial owners or owners of a private fund under sections 3(c)(1) or 3(c)(7) of the Investment Company Act. We understand that many U.S. and non-U.S. advisers currently follow our staff's guidance and rely on this definition when determining whether a pooled investment vehicle qualifies as a private fund. *See* Goodwin Procter Letter, *supra* note 175; ABA Letter, *supra* note 172. Advisers apply the Regulation S definition of "U.S. person" also for other purposes. *See infra* note 259.

[218] In connection with adopting rule 203(b)(3)–2 under the Advisers Act, we previously noted that commenters had suggested that we incorporate the definition of U.S. person from Regulation S. Pending our reconsideration of the use of the Regulation S definition, we indicated at the time that we would not object if advisers identified U.S. persons by looking: "(i) In the case of individuals to their residence, (ii) in the case of corporations and other business entities to their principal office and place of business, (iii) in the case of personal trusts and estates to the rules set out in Regulation S, and (iv) in the case of discretionary or non-discretionary accounts managed by another investment adviser to the location of the person for whose benefit the account is held." *See* Hedge Fund Adviser Registration Release, *supra* note 17, at n.201. We reconsidered the use of Regulation S and concluded it is appropriate as modified in our proposed rule.

[219] Proposed rule 203(m)–1(e)(8).

[220] Under Regulation S, a discretionary account maintained by a non-U.S. fiduciary (such as an investment adviser) is not a "U.S. person" even if the account is owned by a U.S. person. *See* rule 902(k)(1)(vii); rule 902(k)(2)(i).

address the concern that an adviser could avoid the limitation of the exemption through non-U.S. discretionary accounts?

5. Transition Rule

We propose to include in proposed rule 203(m)–1 a provision giving an adviser one calendar quarter (three months) to register with the Commission after becoming ineligible to rely on the exemption due to an increase in the value of its private fund assets.[221] Because qualification for the exemption depends on remaining below the $150 million threshold on a quarterly basis, an adviser could exceed the limit based on market fluctuations without any new investments from existing or new investors. This three month period would enable the adviser to take steps to register and otherwise come into compliance with the requirements of the Advisers Act applicable to registered investment advisers, including the adoption and implementation of compliance policies and procedures.[222] It would be available only to an adviser that has complied with all applicable Commission reporting requirements.[223] We are not required to provide the safe harbor, and we do not believe it would be appropriate for an adviser to rely on it if the adviser has failed to comply with its reporting requirements. We request comment on this transition period. Is the calendar quarter period sufficient? Should the transition period be longer, such as two calendar quarters, or shorter, such as 30 days? If the adviser determines to expand its advisory business to manage assets other than private funds (*e.g.,* separate accounts), should the transition period also be available? Should a transition period be available at all?

C. Foreign Private Advisers

Section 403 of the Dodd-Frank Act replaces the current private adviser exemption from registration under the Advisers Act with a new exemption for a "foreign private adviser," as defined in new section 202(a)(30).[224] The new exemption is codified as amended section 203(b)(3).

Under section 202(a)(30), a foreign private adviser is any investment adviser that: (i) Has no place of business in the United States; (ii) has, in total, fewer than 15 clients in the United States and investors in the United States in private funds advised by the investment adviser; (iii) has aggregate assets under management attributable to clients in the United States and investors in the United States in private funds advised by the investment adviser of less than $25 million; [225] and (iv) does not hold itself out generally to the public in the United States as an investment adviser.[226] Section 202(a)(30) provides the Commission with authority to increase the $25 million threshold "in accordance with the purposes of this title." [227]

We are proposing a new rule, 202(a)(30)–1, which would define certain terms in section 202(a)(30) for use by advisers seeking to avail themselves of the foreign private adviser exemption. Because eligibility for the new foreign private adviser exemption, like the current private adviser exemption, is determined, in part, by the number of clients an adviser has, we propose to include in rule 202(a)(30)–1 the safe harbor rules and many of the client counting rules that appear in rule 203(b)(3)–1, as currently in effect.[228] In addition, we propose to define other terms used in the definition of "foreign private adviser" in section 202(a)(30), including: (i) "investor;" (ii) "in the United States;" (iii) "place of business;" and (iv) "assets under management." [229]

1. Clients

For purposes of the definition of "foreign private adviser," proposed rule 202(a)(30)–1 would include the safe harbor for counting clients currently in rule 203(b)(3)–1, as modified to account for its use in the foreign private adviser context and to eliminate a provision allowing advisers not to count those clients from which they receive no compensation. We note, however, that the foreign private adviser exemption provides a much more limited exemption in this regard than our current rule 203(b)(3)–1 because section 202(a)(30) requires an adviser to also count the number of "investors" of an issuer that is a "private fund" (a term that is defined in section 202(a)(29)) managed by the adviser.[230]

Specifically, proposed rule 202(a)(30)–1, like current rule 203(b)(3)–1, would allow an adviser to treat as a single client a natural person and: (i) That person's minor children (whether or not they share the natural person's principal residence); (ii) any relative, spouse, or relative of the spouse of the natural person who has the same principal residence; (iii) all accounts of which the natural person and/or the person's minor child or relative, spouse, or relative of the spouse who has the same principal residence are the only primary beneficiaries; and (iv) all trusts of which the natural person and/or the person's minor child or relative, spouse, or relative of the spouse who has the same principal residence are the only primary beneficiaries.[231] Proposed rule 202(a)(30)–1 would also retain other provisions of rule 203(b)(3)–1 that permit an adviser to treat as a single "client" (i) a corporation, general partnership, limited partnership, limited liability company, trust, or other legal organization to which the adviser provides investment advice based on the organization's investment objectives, and (ii) two or more legal organizations

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[221] Proposed rule 203(m)–1(d). In effect, an adviser would register by the end of the calendar quarter following the quarter-end date at which private fund assets equaled or exceeded $150 million. If, however, on the succeeding calendar quarter end date, private fund assets have declined below $150 million, then registration would not be required.

[222] *See* rule 206(4)–7.

[223] *See* proposed rule 203(m)–1(d); *see also, e.g.,* proposed rule 204–4 under the Advisers Act (discussed in the Implementing Release, *supra* note 25, at section II.B).

[224] Section 402 of the Dodd-Frank Act (providing a definition of "foreign private adviser," to be codified at section 202(a)(30) of the Advisers Act). *See supra* note 23 and accompanying text.

[225] Subparagraph (B) of section 202(a)(30) refers to the number of "clients and investors in the United States in private funds," while subparagraph (C) refers to assets of "clients *in the United States* and investors in the United States in private funds" (emphasis added). We interpret these provisions consistently so that only clients *in the United States* and investors in the United States should be counted for purposes of subparagraph (B).

[226] In addition, the exemption is not available to an adviser that "acts as (I) an investment adviser to any investment company registered under the [Investment Company Act]; or (II) a company that has elected to be a business development company pursuant to section 54 of [that Act] and has not withdrawn its election." Section 202(a)(30)(D)(ii). We interpret subparagraph (II) to prevent an adviser *that advises* a business development company from relying on the exemption.

[227] Section 202(a)(30)(C).

[228] Rule 203(b)(3)–1, as currently in effect, provides a safe harbor for determining who may be deemed a single client for purposes of the private adviser exemption. We would not, however, carry over from rule 203(b)(3)-1 a provision that distinguishes between advisers whose principal places of business are inside or outside of the United States. Under the definition of "foreign private adviser," an adviser may not have any place of business in the United States. *See* section 402 of the Dodd-Frank Act (defining "foreign private adviser"); rule 203(b)(3)–1(b)(5). We would also not include rule 203(b)(3)–1(b)(7), which specifies that a client who is an owner of a private fund is a resident where the client resides at the time of the client's investment in the fund. The provision was vacated by *Goldstein. See supra* note 18. As discussed below, we are proposing to include another, similar, provision in rule 202(a)(30)–1, which would apply to both clients and investors for purposes of the foreign private adviser exemption. *See infra* note 257 and accompanying text.

[229] Proposed rule 202(a)(30)–1(c).

[230] *See supra* note 9.

[231] Proposed rule 202(a)(30)–1(a)(1). If a client relationship involving multiple persons does not fall within the rule, the question of whether the relationship may appropriately be treated as a single "client" must be determined on the basis of the facts and circumstances involved.

that have identical shareholders, partners, limited partners, members, or beneficiaries.[232]

We would not include the "special rule" providing advisers with the option of not counting as a client any person for whom the adviser provides investment advisory services without compensation.[233] As noted above, we propose to require advisers to include the assets of such clients in their "regulatory assets under management," [234] and we propose the same approach with respect to counting clients.[235]

Finally, we propose to add a provision that would avoid double-counting private funds and their investors by advisers.[236] This provision would specify that an adviser need not count a private fund as a client if the adviser counted any investor, as defined in the rule, in that private fund as an investor in that private fund for purposes of determining the availability of the exemption.[237]

We are proposing to include the current rule 203(b)(3)–1 safe harbor for counting clients in proposed rule 202(a)(30)–1 because we believe that application of this provision (as we propose to modify it) will operate to effect the purposes of the foreign private adviser exemption. Congress replaced the private adviser exemption with the foreign private adviser exemption, both of which require advisers to count clients. As Congress was aware of rule 203(b)(3)–1's counting guidelines when it incorporated a limitation on the number of "clients" in the definition of "foreign private adviser," we believe it would be consistent with Congress's amendment to preserve generally the method for counting clients, together with the requirement to count clients.

We request comment generally on our approach to counting "clients" in proposed rule 202(a)(30)–1 and on each of the specific proposed provisions. Is it appropriate to derive the definition of "client" in proposed rule 202(a)(30)–1 from rule 203(b)(3)–1's definition? Are there alternative approaches we should consider instead? Is including the "special rules" in proposed rule 202(a)(30)–1 appropriate? Are there any that are not appropriate in this context and should not be included in the proposed rule? In particular, should we have maintained the special rule allowing an adviser not to count as a client any person for whom the adviser provides investment advisory services without compensation, even though such person may be treated as a client for other purposes (*e.g.,* reporting on Form ADV)? Should we modify the proposed rule that allows an adviser not to count a private fund as a client if it counts any investor in that private fund by also providing that an adviser may avoid counting as a client any person it counts as an investor? Finally, are there any further modifications to the definition that we should make?

2. Private Fund Investor

Section 202(a)(30) provides that a "foreign private adviser" eligible for the new registration exemption cannot have more than 14 clients "or investors in the United States in private funds" advised by the adviser. We propose to define "investor" in a private fund in rule 202(a)(30)–1 as any person who would be included in determining the number of beneficial owners of the outstanding securities of a private fund under section 3(c)(1) of the Investment Company Act, or whether the outstanding securities of a private fund are owned exclusively by qualified purchasers under section 3(c)(7) of that Act.[238] In order to avoid double-counting, an adviser would be able to treat as a single investor any person who is an investor in two or more private funds advised by the investment adviser.[239]

The term "investor" is not currently defined under the Advisers Act or the rules under the Advisers Act. Defining the term as proposed would ensure consistent application of the statutory provision and prevent, for example, non-U.S. advisers from circumventing the limitations in section 203(b)(3) by using nominee accounts that would aggregate investors into a single nominal investor for purposes of the counting requirement of section 202(a)(30). Under section 203(b)(3), an adviser relying on the foreign private adviser exemption may only have advisory relationships with private funds with a limited number of U.S. investors. Advisers should not be able to avoid this limitation by setting up intermediate accounts through which investors may access a private fund and not be counted for purposes of the exemption.

Defining investors by reference to sections 3(c)(1) and 3(c)(7) of the Investment Company Act may best achieve these purposes. Funds and their advisers must determine who is a beneficial owner for purposes of section 3(c)(1) or whether an owner is a qualified purchaser for purposes of section 3(c)(7).[240] Typically, a prospective investor in a private fund must complete a subscription agreement that includes representations or confirmations that it is qualified to invest in the fund and whether it is a U.S. person. This information is designed to allow the adviser (on behalf of the fund) to make the above determination. Therefore, an adviser seeking to rely on the foreign private adviser exemption will have ready access to this information.

More important, defining the term "investor" by reference to sections 3(c)(1) and 3(c)(7) appears to appropriately limit the ability of a non-U.S. adviser to avoid application of the registration provisions of the Advisers Act. For example, under the proposed rule, holders of both equity and debt securities would be counted as

[232] Proposed rule 202(a)(30)–1(a)(2). In addition, proposed rule 202(a)(30)–1(b)(1) through (3) would retain the following related "special rules": (1) An adviser must count a shareholder, partner, limited partner, member, or beneficiary (each, an "owner") of a corporation, general partnership, limited partnership, limited liability company, trust, or other legal organization, as a client if the adviser provides investment advisory services to the owner separate and apart from the legal organization; (2) an adviser is not required to count an owner as a client solely because the adviser, on behalf of the legal organization, offers, promotes, or sells interests in the legal organization to the owner, or reports periodically to the owners as a group solely with respect to the performance of or plans for the legal organization's assets or similar matters; and (3) any general partner, managing member or other person acting as an investment adviser to a limited partnership or limited liability company must treat the partnership or limited liability company as a client.

[233] *See* rule 203(b)(3)–1(b)(4).

[234] In the Implementing Release, we are proposing to adopt a uniform method for calculating assets under management for purposes of registration pursuant to which an adviser would count assets that are managed without compensation. In this Release, we propose to apply the proposed method of calculation to the foreign private adviser exemption and the private fund adviser exemption. *See infra* section II.C.5 of this Release; Implementing Release, *supra* note 25, at section II.A.3.

[235] As discussed in the Implementing Release, our proposed changes to the method of calculating assets under management would remove the option of excluding certain assets from an adviser's calculation in order to avoid registration with the Commission and regulatory requirements associated with registration. *See* Implementing Release, *supra* note 25, nn.44–50 and accompanying and following text. Allowing an adviser not to count as clients persons in the United States that do not compensate the adviser would similarly allow certain advisers to avoid registration through reliance on the foreign private adviser exemption despite the fact that the adviser provides advisory services to such persons.

[236] *See* proposed rule 202(a)(30)–1(b)(4).

[237] *See* proposed rule 202(a)(30)–1(b)(4); 202(a)(30)–1(c)(1). *See also infra* section II.C.2 of this Release (discussing the definition of investor).

[238] *See* proposed rule 202(a)(30)–1(c)(1); *supra* notes 8–13 and accompanying text. Under the proposed rule, knowledgeable employees with respect to the private fund (and certain persons related to them) and beneficial owners of short-term paper issued by the private fund would also count as investors. *See infra* note 246 and accompanying text.

[239] *See* proposed rule 202(a)(30)–1(c)(1), at note to paragraph (c)(1).

[240] *See supra* notes 11 and 13.

investors.[241] Advisers, moreover, would have to "look though" nominee and similar arrangements to the underlying holders of private fund-issued securities to determine whether they have fewer than 15 clients and private fund investors in the United States.[242]

Under the proposed rule, an adviser would determine the number of investors in a private fund based on facts and circumstances and in light of the applicable prohibition not to do indirectly, or through or by any other person, what is unlawful to do directly.[243] In the following circumstances, for example, an adviser relying on the exemption would have to count as an investor a person who is not the nominal owner of a private fund's securities. First, the adviser to a master fund in a master-feeder arrangement would have to treat as investors the holders of the securities of any feeder fund formed or operated for the purpose of investing in the master fund rather than the feeder funds, which act as conduits.[244] Second, an adviser would need to count as an investor any holder of an instrument, such as a total return swap, that effectively transfers the risk of investing in the private fund from the record owner of the private fund's securities. The record owner of private fund securities could enter into a total return swap transaction to transfer to a third party any profits or losses that the record owner could incur as a result of its investment in the private fund. Thus, even though the record owner would remain the nominal owner of private fund securities, the associated risks of an investment in the securities would have been transferred to the third party who has made the determination to invest in the private fund indirectly through the record owner. In such a case, the third party would be counted as a beneficial owner under section 3(c)(1), or be required to be a qualified purchaser under section 3(c)(7).[245] Accordingly, the third party would be counted as an investor in the private fund for purposes of the foreign private adviser exemption.

We are also proposing to treat as investors beneficial owners (i) who are "knowledgeable employees" with respect to the private fund, and certain other persons related to such employees (we refer to these, collectively, as "knowledgeable employees"); [246] and (ii) of "short-term paper" [247] issued by the private fund,[248] even though these persons are not counted as beneficial owners for purposes of section 3(c)(1), and knowledgeable employees are not required to be qualified purchasers under section 3(c)(7).[249] We are proposing to count knowledgeable employees as investors under the same approach we take with our proposal that advisers count in their calculation of assets under management assets they manage without being compensated, which often include assets of knowledgeable employees.[250] Under our proposed rule, holders of short-term paper, like other debt holders, would also be counted as investors because a private fund's losses directly affect these holders' interest in the fund just as they affect the interest of other debt holders in the fund.[251]

We request comment on our definition of "investor." Does the term require further definition? Does our definition of "investor" appropriately reflect Congress's intent in providing an exemption for foreign private advisers? Under our proposal, advisers would not be able to consolidate investors for counting purposes in the same manner they would be able to consolidate clients under certain circumstances. Should we consider extending to investors the "special rules" for counting clients under proposed rule 202(a)(30)–1? Would this lead to either under-counting or over-counting of investors? Is it appropriate to count as a single investor a person that invests in two or more private funds advised by the adviser? Is it appropriate to treat as investors beneficial owners who are "knowledgeable employees" with respect to the private fund, and of short-term paper issued by the fund?

3. In the United States

Section 202(a)(30)'s definition of "foreign private adviser" employs the term "in the United States" in several contexts including: (i) Limiting the number of—and assets under management attributable to—an adviser's "clients" "in the United States" and "investors" "in the United States" in private funds advised by the adviser; (ii) exempting only those advisers without

[241] Sections 3(c)(1) and 3(c)(7) of the Investment Company Act refer to beneficial owners and owners, respectively, of "securities" (which is broadly defined in section 2(a)(36) of that Act to include debt and equity).

[242] Proposed rule 202(a)(30)–1(c)(1). *See generally* sections 3(c)(1) and 3(c)(7) of the Investment Company Act.

[243] *See* section 208(d) of the Advisers Act.

[244] A "master-feeder fund" is an arrangement in which one or more funds with identical investment objectives ("feeder funds") invest all of their assets in a single fund ("master fund") with the same investment objective and strategies. We have taken the same approach within our rules that expressly require a private fund to "look-through" any investor that is formed for the specific purpose of investing in a private fund. *See* rule 2a51–3(a) under the Investment Company Act (17 CFR 270.2a51–3(a)) (a company is not a qualified purchaser if it is "formed for the specific purpose of acquiring the securities" of an investment company that is relying on section 3(c)(7) of the Investment Company Act, unless each of the company's beneficial owners is also a qualified purchaser). *See also Privately Offered Investment Companies,* Investment Company Act Release No. 22597 (Apr. 3, 1997) [62 FR 17512 (Apr. 9, 1997)] ("NSMIA Release") (explaining that rule 2a51–3(a) would limit the possibility that "a company will be able to do indirectly what it is prohibited from doing directly [by organizing] * * * a 'qualified purchaser' entity for the purpose of making an investment in a particular Section 3(c)(7) Fund available to investors that themselves did not meet the definition of 'qualified purchaser.' ").

[245] As noted above, we have recognized that in certain circumstances it is appropriate to "look through" an investor (*i.e.,* attribute ownership of a private fund to another person who is the ultimate owner). *See, e.g.,* NSMIA Release, *supra* note 244 ("The Commission understands that there are other forms of holding investments that may raise interpretative issues concerning whether a Prospective Qualified Purchaser 'owns' an investment. For instance, when an entity that holds investments is the 'alter ego' of a Prospective Qualified Purchaser (as in the case of an entity that is wholly owned by a Prospective Qualified Purchaser who makes all the decisions with respect to such investments), it would be appropriate to attribute the investments held by such entity to the Prospective Qualified Purchaser.").

[246] *See* proposed rule 202(a)(30)–1(c)(1)(A) (referencing rule 3c–5 under the Investment Company Act (17 CFR 270.3c–5(b)), which excludes from the determinations under sections 3(c)(1) and 3(c)(7) of that Act any securities beneficially owned by knowledgeable employees of a private fund; a company owned exclusively by knowledgeable employees; and any person who acquires securities originally acquired by a knowledgeable employee through certain transfers of interests, such as a gift or a bequest).

[247] *See* proposed rule 202(a)(30)–1(c)(1)(B) (referencing the definition of "short-term paper" contained in section 2(a)(38) of the Investment Company Act, which defines "short-term paper" to mean "any note, draft, bill of exchange, or banker's acceptance payable on demand or having a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof payable on demand or having a maturity likewise limited; and such other classes of securities, of a commercial rather than an investment character, as the Commission may designate by rules and regulations.")

[248] *See* proposed rule 202(a)(30)–1(c)(1).

[249] *See* section 3(c)(1) of the Investment Company Act; rule 3c–5(b) under the Investment Company Act.

[250] *See supra* note 190. As discussed above, our proposed changes to the method of calculating assets under management would preclude some advisers from excluding certain assets from their calculation in order to avoid registration with the Commission and regulatory requirements associated with registration. Allowing an adviser not to count as investors persons that do not compensate the adviser, such as knowledgeable employees, would similarly allow certain advisers to avoid registration by relying on the foreign private adviser exemption.

[251] Various types of investment vehicles make significant use of short-term paper for financing purposes so holders of this type of security are, in practice, exposed to the investment results of the security's issuer. *See* Money Market Fund Reform Release, *supra* note 134, at nn. 37–39 and preceding and accompanying text (discussing how money market funds were exposed to substantial losses during 2007 as a result of exposure to debt securities issued by structured investment vehicles).

a place of business "in the United States"; and (iii) exempting only those advisers that do not hold themselves out to the public "in the United States" as an investment adviser.[252] We are proposing to define "in the United States" to provide clarification of the term for all of the above purposes as well as provide specific instruction as to the relevant time for making the related determination.

Proposed rule 202(a)(30)–1 defines "in the United States" generally by incorporating the definition of a "U.S. person" and "United States" under Regulation S.[253] In particular, we would define "in the United States" in proposed rule 202(a)(30)–1(c)(2) to mean: (i) With respect to any place of business located in the "United States," as that term is defined in Regulation S; [254] (ii) with respect to any client or private fund investor in the United States, any person that is a "U.S. person" as defined in Regulation S,[255] except that any discretionary account or similar account that is held for the benefit of a person "in the United States" by a non-U.S. dealer or other professional fiduciary is deemed "in the United States" if the dealer or professional fiduciary is a related person of the investment adviser relying on the exemption; and (iii) with respect to the public in the "United States," as that term is defined in Regulation S.[256] In addition, we are proposing to add a note to paragraph (c)(2)(i) specifying that for purposes of that definition, a person that is "in the United States" may be treated as not being "in the United States" if such person was not "in the United States" at the time of becoming a client or, in the case of an investor in a private fund, at the time the investor acquires the securities issued by the fund.[257] We believe that without this note this rule might be burdensome because an adviser would have to monitor the location of clients and investors on an ongoing basis, and might have to choose between registering with us or terminating the relationship with any client that moved to the United States, or redeeming the interest in the private fund of any investor that moved to the United States.

We believe that the use of Regulation S is appropriate for purposes of the foreign private adviser exemption because Regulation S provides more specific rules when applied to various types of legal structures.[258] Advisers, moreover, already apply the Regulation S definition of U.S. person with respect to both clients and investors for other purposes and therefore are familiar with the definition.[259] The proposed references to Regulation S with respect to a place of business "in the United States" and the public in the "United States" would also allow us to maintain consistency across our rules.

Similar to our approach in proposed rule 203(m)–1(e)(8),[260] we treat as persons "in the United States" for purposes of the foreign private adviser, certain persons that would not be considered "U.S. persons" under Regulation S. We are proposing to treat as a U.S. person discretionary accounts owned by a U.S. person and managed by a non-U.S. affiliate of the adviser in order to discourage non-U.S. advisers from creating such discretionary accounts with the goal of circumventing the exemption's limitation with respect to persons in the United States.[261]

We request comment on the definition of "in the United States" in proposed rule 202(a)(30)–1(c)(2). Is our definition appropriate as it relates to a "place of business?" Is it appropriate as it relates to "clients" and "investors in a private fund?" Is it appropriate as it relates to the "public?" Is it necessary to define "in the United States" for purposes of the definition of "foreign private adviser" in new section 202(a)(30)? Is our understanding of non-U.S. advisers' application of the Regulation S definition correct? Since private funds already rely on the Regulation S definition of U.S. person to determine which investors must qualify to invest in the fund, would adopting a different definition increase regulatory burdens associated with determining eligibility for the proposed exemption? [262] Are there alternatives that would better reflect the intent of Congress in creating a new category of "foreign private advisers" and providing them with an exemption from registration? Is our proposed note regarding the relevant time for determining whether a person is "in the United States" appropriate? If not, how should we modify it?

4. Place of Business

Proposed rule 203(a)(30)–1, by reference to proposed rule 222–1,[263] defines "place of business" to mean any office where the investment adviser regularly provides advisory services, solicits, meets with, or otherwise communicates with clients, and any location held out to the public as a place where the adviser conducts any such activities.[264] We believe this definition appropriately identifies a location where an adviser is doing business for purposes of section 202(a)(30) of the Advisers Act and thus provides a basis for an adviser to determine whether it can rely on the exemption in section 203(b)(3) of the Advisers Act for foreign private advisers. Because both the Commission and the state securities authorities use this definition to identify an unregistered foreign adviser's place of business for purposes of determining regulatory jurisdiction,[265] it appears to be logical as well as efficient to use the rule 222–1(a) definition of "place of

[252] *See* section 402 of the Dodd-Frank Act.

[253] Proposed rule 202(a)(30)–1(c)(2). As discussed above, we are also proposing to reference Regulation S's definition of a "U.S. person" for purposes of the definition of "United States person" in rule 203(m)–1. *See* sections II.B.3 and II.B.4 of this Release (discussing proposed rules 203(m)–1(e)(7) through (8)).

[254] *See* 17 CFR 230.902(l).

[255] *See* 17 CFR 230.902(k).

[256] *See* 17 CFR 230.902(l).

[257] Proposed rule 202(a)(30)–1, at note to paragraph (c)(2)(i) ("A person that is in the United States may be treated as not being in the United States if such person was not in the United States at the time of becoming a client or, in the case of an investor in a private fund, at the time the investor acquires the securities issued by the fund.").

[258] *See supra* notes 214–216 and accompanying text. *See also* Letter of Paul, Hastings, Janofsky & Walker LLP (Oct. 29, 2010) ("Paul Hastings Letter") (addressing the foreign private adviser exemption in response to our request for public views, and recommending that we rely on a modified Regulation S definition of "U.S. person" for purposes of defining "in the United States" with respect to clients and investors). *See generally supra* note 24.

[259] Many non-U.S. advisers identify whether a client is a "U.S. person" under Regulation S in order to determine whether such client may invest in certain private funds and certain private placement offerings exempt from registration under the Securities Act. With respect to "investors," our staff has generally taken the interpretive position that an investor that does not meet that definition is not a U.S. person when determining whether a non-U.S. private fund meets the section 3(c)(1) and 3(c)(7) counting or qualification requirements. *See supra* note 217. Many non-U.S. advisers, moreover, currently determine whether a private fund investor is a "U.S. person" under Regulation S for purposes of the safe harbor for offshore offers and sales.

[260] *See supra* discussion in section II.B.4 of this Release regarding the definition of United States persons and the treatment of discretionary accounts.

[261] *See supra* notes 219–220 and accompanying paragraph.

[262] *See supra* note 217 and accompanying and following text.

[263] Rule 222–1(a) (defining "place of business" of an investment adviser as: "(1) An office at which the investment adviser regularly provides investment advisory services, solicits, meets with, or otherwise communicates with clients; and (2) Any other location that is held out to the general public as a location at which the investment adviser provides investment advisory services, solicits, meets with, or otherwise communicates with clients.").

[264] Proposed rule 202(a)(30)–1(c)(3).

[265] Under section 222(d) of the Advisers Act, a state may not require an adviser to register if the adviser does not have a "place of business" within, and has fewer than six clients resident in, the state.

business" for purposes of the foreign private adviser exemption.

We request comment on our definition of "place of business" as it relates to the definition of "foreign private adviser." Is this definition of "place of business" appropriate in this context? Do commenters recommend any alternative definitions?

5. Assets Under Management

For purposes of rule 202(a)(30)–1 we propose to define "assets under management" by reference to the calculation of "regulatory assets under management" for Item 5 of Form ADV.[266] As discussed above, in Item 5 of Form ADV we are proposing to implement a uniform method of calculating assets under management that can be used for several purposes under the Advisers Act, including the foreign private adviser exemption.[267] Because the foreign private adviser exemption is also based on assets under management, we believe that all advisers should use the same method for calculating assets under management to determine if they are required to register or may be eligible for the exemption. We believe that uniformity in the method for calculating assets under management would result in more consistent asset calculations and reporting across the industry and, therefore, in a more coherent application of the Advisers Act's regulatory requirements and of our staff's risk assessment program.[268]

We request comment on our definition of "assets under management" as it relates to the definition of "foreign private adviser." Is this definition of "assets under management" appropriate in this context? Are there any special considerations relevant to foreign private advisers? Do commenters recommend any alternative definitions? Should assets under management be calculated at a particular point of time? Should we, as proposed, require foreign private advisers to calculate assets under management consistent with the proposed "regulatory assets under management" calculation for Form ADV? Or should we require a different calculation? For example, should foreign private advisers be permitted to exclude proprietary assets or assets they manage without compensation?

D. Subadvisory Relationships and Advisory Affiliates

We generally interpret advisers as including subadvisers,[269] and therefore believe it is appropriate to permit subadvisers to rely on each of the new exemptions, provided that subadvisers satisfy all terms and conditions of the applicable proposed rules. We are aware that in many subadvisory relationships a subadviser has contractual privity with a private fund's primary adviser rather than the private fund itself. Although both the private fund and the fund's primary adviser may be viewed as clients of the subadviser, we would consider a subadviser eligible to rely on section 203(m) if the subadviser's services to the primary adviser relate solely to private funds and the other conditions of the exemptions are met. Similarly, a subadviser may be eligible to rely on section 203(l) if the subadviser's services to the primary adviser relate solely to venture capital funds and the other conditions of the rule are met.

We anticipate that an adviser with advisory affiliates will encounter interpretative issues as to whether it may rely on any of the exemptions discussed in this Release without taking into account the activities of its affiliates. The adviser, for example, might have advisory affiliates that are registered or that provide advisory services that are inconsistent with an exemption on which the adviser may seek to rely.[270] We request comment on whether any proposed rule should provide that an adviser must take into account the activities of its advisory affiliates when determining eligibility for an exemption. For example, should the rule specify that the exemption is not available to an affiliate of a registered investment adviser?[271]

III. Request for Comment

The Commission requests comment on the proposed rules in this Release. We also request suggestions for additional changes to existing rules, and comments on other matters that might have an effect on the proposals contained in this Release. Commenters are requested to provide empirical data to support their views.

IV. Paperwork Reduction Act Analysis

The proposed rules do not contain a "collection of information" requirement within the meaning of the Paperwork Reduction Act of 1995.[272] Accordingly, the Paperwork Reduction Act is not applicable.

V. Cost-Benefit Analysis

The Commission is sensitive to the costs and benefits imposed by its rules. We have identified certain costs and benefits of the proposed rules, and we request comment on all aspects of this cost-benefit analysis, including identification and assessment of any costs and benefits not discussed in this analysis. We seek comment and data on the value of the benefits identified. We also welcome comments on the accuracy of the cost estimates in this analysis, and request that commenters provide data that may be relevant to these cost estimates. In addition, we seek estimates and views regarding these benefits and costs for advisers solely to venture capital funds, private fund advisers with less than $150 million in aggregate assets under management and foreign private advisers as well as any other costs or benefits that may result from the adoption of the proposed rules. Where possible, we request commenters

[266] *See* proposed rule 202(a)(30)–1(c)(4); instructions to Item 5.F of Form ADV, Part 1A. As discussed above, we are proposing to take the same approach under proposed rule 203(m)–1. *See supra* section II.B.2 of this Release.

[267] *See supra* note 190 and accompanying text.

[268] *Id. See also* Letter of Shearman and Sterling LLP (Nov. 3, 2010) ("Shearman & Sterling Letter") (in response to our request for public views, arguing that "[w]hile each [exemption related asset threshold established by the Dodd-Frank Act] serves a different purpose, it appears to us that any steps that might be taken in the way of harmonization will facilitate both compliance with the requirements by the industry and their administration by the Commission and its Staff," and suggesting that as an example, we raise the assets under management threshold under the foreign private adviser exemption to $150 million in line with the assets threshold under the private fund adviser exemption). *See generally supra* note 24.

[269] *See, e.g.,* Pay to Play Release, *supra* note 10, at n.391–94 and accompanying and following text; Hedge Fund Adviser Registration Release, *supra* note 17, at n.243.

[270] Generally, a separately formed advisory entity that operates independently of an affiliate may be eligible for an exemption if it meets all of the criteria set forth in the relevant rule. However, the existence of separate legal entities may not by itself be sufficient to avoid integration of the affiliated entities. The determination of whether the advisory businesses of two separately formed affiliates may be required to be integrated is based on the facts and circumstances. Our staff has taken this position in Richard Ellis, Inc., SEC Staff No-Action Letter (Sept. 17, 1981) (discussing the staff's views of factors relevant to the determination of whether a separately formed advisory entity operates independently of an affiliate).

[271] We have received a number of letters requesting interpretative guidance on whether and to what extent certain prior staff positions would apply to the new exemptions provided by the Dodd-Frank Act. *See, e.g.,* Letter of Katten Muchin Rosenman LLP (Sept. 14, 2010); Letter of TA Jones (Sept. 25, 2010); Letter of Ropes & Gray LLP (Nov. 1, 2010) in response to our solicitation for public views. *See generally supra* note 24. We acknowledge that such determinations will depend on the particular facts and circumstances of non-U.S. advisers. Advisers should consider whether they may avail themselves of either the foreign private adviser exemption or the private fund adviser exemption as proposed in this Release, and are encouraged to submit comment letters addressing with particularity and specificity interpretative issues that may not be addressed in our proposed rules.

[272] 44 U.S.C. 3501.

provide empirical data to support any positions advanced.

As discussed above, we are proposing rules 203(l)–1, 203(m)–1 and 202(a)(30)–1 to implement certain provisions of the Dodd-Frank Act. As a result of the Dodd-Frank Act's repeal of the private adviser exemption, some advisers that previously were eligible to rely on that exemption will be required to register under the Advisers Act unless these advisers are eligible for a new exemption. Thus, the benefits and costs associated with registration are attributable to the Dodd-Frank Act. The Commission has discretion, however, to adopt rules to define the terms used in the Advisers Act, and we undertake below to discuss the benefits and costs of the defined terms that we are proposing.

A. Definition of Venture Capital Fund

Our proposed rule is designed to: (i) implement the directive from Congress to define the term venture capital fund in a manner that reflects Congress' understanding of what venture capital funds are, and as distinguished from other private equity funds and hedge funds; and (ii) facilitate the transition to the new exemption. Our proposal would define the term venture capital fund consistently with what we believe Congress understood venture capital funds to be, and in light of other provisions of the federal securities laws that seek to achieve similar objectives.[273]

Using these characteristics as our model, we propose to define a venture capital fund as a private fund that: (i) Invests in equity securities of private companies in order to provide operating and business expansion capital (*i.e.,* "qualifying portfolio companies") and at least 80 percent of each company's equity securities owned by the fund were acquired directly from the qualifying portfolio company; (ii) directly, or through its investment advisers, offers or provides significant managerial assistance to, or controls, the qualifying portfolio company; (iii) does not borrow or otherwise incur leverage (other than limited short-term borrowing); (iv) does not offer its investors redemption or other similar liquidity rights except in extraordinary circumstances; (v) represents itself as a venture capital fund to investors; and (vi) is not registered under the Investment Company Act and has not elected to be treated as a BDC.[274]

We propose to define a "qualifying portfolio company" as any company that: (i) Is not publicly traded; (ii) does not incur leverage in connection with the investment by the private fund; (iii) uses the capital provided by the fund for operating or business expansion purposes rather than to buy out other investors; and (iv) is not itself a fund (*i.e.,* is an operating company).[275]

We also propose to grandfather existing funds by including in the definition of "venture capital fund" any private fund that: (i) Represented to investors and potential investors at the time the fund offered its securities that it is a venture capital fund; (ii) prior to December 31, 2010, has sold securities to one or more investors that are not related persons of any investment adviser of the venture capital fund; and (iii) does not sell any securities to, including accepting any additional capital commitments from, any person after July 21, 2011 (the "grandfathering provision").[276] An adviser seeking to rely on the exemption under section 203(l) of the Advisers Act would be eligible for the venture capital exemption only if it exclusively advised venture capital funds that met all of the elements of the proposed definition or grandfathering provision.

1. Benefits

Based on the testimony presented to Congress and our research, we believe that venture capital funds today would meet most, if not all, of the elements of our proposed definition of venture capital fund. Our proposed definition includes one specific element, however, that may not be characteristic of some existing venture capital funds. The proposed rule defines a venture capital fund as one that does not issue debt or provide guarantees except on a short-term basis (and correspondingly defines a qualifying portfolio company as one that does not borrow or otherwise incur leverage in connection with the venture capital fund investment). We propose this element of the qualifying portfolio company definition because of the focus on leverage in the Dodd-Frank Act as a potential contributor to systemic risk as discussed by the Senate Committee report,[277] and the testimony before Congress that stressed the lack of leverage in venture capital investing.[278] Our research suggests that on occasion, however, some venture capital funds may provide financing on a short-term basis to portfolio companies as a "bridge" between funding rounds.[279] It is possible that certain types of bridge financing currently used by venture capital funds may not satisfy the definition of equity security under our proposed rule.

Although the limitation on acquiring debt securities from portfolio companies may not be characteristic of some existing venture capital funds, the failure of existing venture capital funds to meet the proposed definition would not preclude advisers to those funds from relying on the exemption in section 203(l) of the Advisers Act under our proposed rule. An adviser of existing venture capital funds could avail itself of the exemption under the proposed grandfathering provision provided that each fund (i) Has represented to investors that it is a venture capital fund, (ii) has initially sold interests by December 31, 2010, and (iii) does not sell any additional interests after July 21, 2011.[280] We expect that all advisers to existing venture capital funds that currently rely on the private adviser exemption would be exempt from registration in reliance on the proposed grandfathering provision. As a result of this provision, we expect that advisers to existing venture capital funds that do not meet our proposed definition would benefit because those advisers could continue to manage existing funds without having to (i) Weigh the relative costs and benefits of registration and modification of fund operations to conform existing funds with our proposed definition and (ii) incur the costs associated with registration with the Commission or modification of existing funds. Advisers to venture capital funds that are in formation that would be able to launch by December 31, 2010 and meet the July 21, 2011 deadline for sales of all securities also would benefit from the grandfathering provision because they would not have to incur these costs.

Going forward, we recognize that some advisers to existing venture capital funds that seek to rely on the exemption in section 203(l) of the Advisers Act might have to structure new funds

[273] *See supra* notes 38–43 and accompanying and following text.

[274] Proposed rule 203(l)–1(a).

[275] Proposed rule 203(l)–1(c)(4).

[276] Proposed rule 203(l)–1(b).

[277] *See supra* note 99. *See also* S. Rep. No. 111–176, *supra* note 7, at 73–74 (stating that advisers of venture capital funds are not required to register with the SEC because they do not present the same risks as advisers to other private funds that are required to register, and specifying that the Commission shall require advisers of private funds to report systemic risk data including, among other things, information on the "use of leverage, counterparty credit risk exposure, trading and investment positions"). *See also supra* notes 136–137 and accompanying text.

[278] *See supra* note 100.

[279] *See, e.g., supra* note 83 and accompanying text.

[280] Proposed rule 203(l)–1(b).

differently to meet the proposed limitation on qualified portfolio company leverage. To the extent that advisers choose not to change how they structure or manage new funds they launch, those advisers would have to register with the Commission,[281] which offers many benefits to the investing public and facilitates our mandate to protect investors. Registered investment advisers are subject to periodic examinations by our staff and are also subject to our rules including rules on recordkeeping, custody of client funds and compliance programs. We believe that in general Congress considered registration to be beneficial to investors because of, among other things, the added protections offered by registration. Accordingly, Congress limited the section 203(l) exemption to advisers to venture capital funds. As noted above, we proposed certain elements in the portfolio company definition because of the focus on leverage in the Dodd-Frank Act as a potential contributor to systemic risk as discussed by the Senate Committee report,[282] and the testimony before Congress that stressed the lack of leverage in venture capital investing.[283] We expect that distinguishing between venture capital funds and other private funds that pursue investment strategies involving financial leverage that Congress highlighted for concern would benefit financial regulators mandated by the Dodd-Frank Act (such as the Financial Stability Oversight Council) with monitoring and assessing potential systemic risks. Because advisers that manage funds with these characteristics would be required to register, we expect that financial regulators could more easily obtain information and data regarding these financial market participants, which should benefit those regulators to the extent it helps to reduce the overall cost of systemic risk monitoring and assessment.[284]

In addition to the benefits discussed above, we expect that investment advisers that seek to rely on the exemption would benefit from the flexibility in the proposed definition of venture capital fund than a more rigid or narrow definition, which should allow them more easily to structure and operate funds that meet the definition. This flexibility should facilitate compliance with the proposed rule and transition to the new exemption. For example, we propose to define equity securities broadly to cover many types of equity securities in which venture capital funds typically invest, rather than limit the definition solely to common stock.[285] To meet the proposed definition, at least 80 percent (not 100 percent) of the equity securities of a portfolio company in which a venture capital fund invests must be acquired directly from the issuing portfolio company (including securities that have been converted into equity securities), but there is no limit as to how the remaining 20 percent could be acquired.[286] Furthermore, under the proposed definition, the venture capital fund may offer or provide managerial assistance to or alternatively control the qualified portfolio company directly, or may do so through its advisers. As noted above, we have modeled this element of the definition in part on existing provisions under the Advisers Act and Investment Company Act dealing with BDCs.[287] Our proposed definition also is designed to be a simplified version of the definition of "making available significant managerial assistance" under the BDC provisions, which we expect would reduce confusion and facilitate understanding of the proposed rule.[288] This approach would preserve flexibility for venture capital funds that invest as a group to determine which members of the group are best qualified, or best able, to control the portfolio company or alternatively to offer (and/or provide) managerial assistance to the portfolio company.

Our proposed definition of qualifying portfolio company is similarly broad because the definition does not restrict qualifying companies to "small or start-up" companies. As we have noted above, we believe that such definitions would be too restrictive and provide venture capital fund advisers with too little flexibility and limited options with respect to potential portfolio company investments.[289] In addition, we propose to define a "qualifying portfolio company" as a company that does not borrow from, or issue debt in connection with the investment from, venture capital funds. Thus, a qualifying portfolio company could borrow for working capital or other operating needs from other lenders, such as banks, without jeopardizing the venture capital fund adviser's eligibility for the exemption. These proposed broad definitions and criteria should benefit advisers that intend to rely on the exemption because they give the adviser flexibility to structure transactions and investments in underlying portfolio companies in a manner that meets their business objectives without unduly creating systemic or other risks of the kind that Congress suggested should require registration of the fund's adviser. For commenters recommending more narrow elements for our definition, we request comment on the costs to advisers of having to change their business practices to comply with such narrower elements.

We believe that the grandfathering provision would promote efficiency because it will allow advisers to existing venture capital funds to continue to rely on the exemption without having to restructure funds that may not meet the proposed definition. It also would allow advisers to funds that are currently in formation and can meet the requirements of the grandfathering provision to rely on the exemption without the potential costs of having to renegotiate with potential investors and restructure those funds within the limited period before the rule must be adopted. Advisers that seek to form new funds should have sufficient time and notice to structure those funds to meet the proposed definition should they seek to rely on the exemption in section 203(l) of the Advisers Act.

Finally, we believe that our proposed definition would include an additional benefit for investors and regulators. Section 203(l) of the Advisers Act provides an exemption specifically for

[281] *See infra* text following note 294; notes 299–303 and accompanying text for a discussion of potential costs for advisers that would have to choose between registering or restructuring venture capital funds formed in the future.

[282] *See supra* note 99.

[283] *See supra* note 100.

[284] *See* S. Rep. No. 111–176, *supra* note 7, at 39 (explaining the requirement that private funds disclose information regarding their investment positions and strategies, including information on fund size, use of leverage, counterparty credit risk exposure, trading and investment positions and any other information that the Commission in consultation with the Financial Stability Oversight Council determines is necessary and appropriate to protect investors or assess systemic risk).

[285] *See supra* notes 85–87 and accompanying text.

[286] *See supra* section II.A.1.d of this Release.

[287] *See supra* notes 123–128 and accompanying text.

[288] *See supra* note 128 and accompanying and following text. For example, unlike the BDC provision, the proposed definition does not specifically define managerial assistance by referring to a fund's directors, officers, employees or general partners. In addition, like the BDC provision, the proposed definition would require the venture capital fund to control the qualifying portfolio company (if it does not offer or provide significant managerial assistance), but without reference to exercising a controlling influence because the ability to exercise a controlling influence is inherent in the control relationship. *See* section 202(a)(12) of the Advisers Act (defining control to mean the power to exercise a controlling influence over the management or policies of a company unless such power is solely the result of an official position with such company). *See supra* note 129 for the definition of "making available significant managerial assistance" by a BDC.

[289] *See supra* discussion in section II.A.1.a of this Release.

advisers that "solely" advise venture capital funds. Currently none of our rules requires that an adviser exempt from registration specify the basis for the exemption. We are proposing, however, to require exempt reporting advisers to identify the exemption(s) on which they are relying.[290] Requiring that venture capital funds represent themselves as such to investors should allow the Commission and the investing public (particularly potential investors in venture capital funds) to determine, and confirm, an adviser's rationale for remaining unregistered with the Commission. This element is designed to deter advisers to private funds other than venture capital funds from claiming to rely on an exemption from registration for which they are not eligible.

We request comment on the potential benefits we have identified above. Are there benefits of the proposed definition that we have not identified?

2. Costs

Costs for advisers to existing venture capital funds. As discussed above, we do not expect that the proposed rule would result in any significant costs for unregistered advisers to venture capital funds currently in existence and operating. We estimate that currently there are 800 advisers to venture capital funds.[291] We expect that all these advisers, which we assume currently are not registered in reliance on the private adviser exemption, would continue to be exempt after the repeal of that exemption on July 21, 2011 in reliance on the proposed grandfathering provision.[292] We anticipate that such advisers to grandfathered funds would incur minimal costs, at most, to confirm that existing venture capital funds managed by the adviser meet the conditions of the grandfathering provision. We estimate that these costs would be no more than $800 to hire outside counsel to assist in this determination.[293]

We recognize, however, that advisers to funds that are currently in the process of being formed and negotiated with investors may incur costs to determine whether they qualify for the grandfathering provision. For example, these advisers may need to assess the impact on the fund of selling interests to initial third party investors by December 31, 2010 and selling interests to all investors no later than July 21, 2011. We do not expect that the cost of evaluating the grandfathering provision would be significant, however, because we believe that most funds in formation represent themselves as being venture capital funds or funds that pursue a venture capital investing strategy to their potential investors and the typical fundraising period for a venture capital fund is approximately 12 months.[294] Thus, we do not anticipate that venture capital fund advisers would have to alter typical business practice to structure or raise capital for venture capital funds being formed. Nevertheless, we recognize that after the final rule goes into effect, exempt advisers of such funds in formation may forgo the opportunity to accept investments from investors that may seek to invest after July 21, 2011 in order to comply with the grandfathering provision.

We request comment on the potential costs of this aspect of our proposed rule. Are there advisers to existing venture capital funds or venture capital funds in formation that would not be covered by the grandfathering provision? We request commenters to quantify the number of these advisers and provide us with specific examples of why such advisers would not be able to rely on the grandfathering provision.

Costs for new advisers and advisers to new venture capital funds. We expect that existing advisers that seek to form new venture capital funds and investment advisory firms that seek to enter the venture capital industry would incur one-time "learning costs" to determine how to structure new funds they may manage to meet the elements of our proposed definition. We estimate that on average, there are 24 new advisers to venture capital funds each year.[295] We expect that the one-time learning costs would be no more than between $2,800 and $4,800 on average for an adviser if it hires an outside consulting or law firm to assist in determining how the elements of our proposed definition may affect intended business practices.[296] Thus, we estimate the aggregate cost to existing advisers of determining how the proposed definition would affect funds they plan to launch would be from $67,200 to $115,200.[297] We request comment on whether these estimates accurately reflect the fees an adviser would be likely to pay to consulting and law firms it hires. As they launch new funds and negotiate with potential investors, these advisers would have to determine whether it is more cost effective to register or to structure the venture capital funds they manage to meet the proposed definition. Such considerations of legal or other requirements, however, comprise a typical business and operating expense of conducting new business. New advisers that enter into the business of managing venture capital funds also would incur such ordinary costs of doing business in a regulated industry.[298]

We believe that existing advisers to venture capital funds meet most, if not all, of the elements of the proposed

[290] *See* Implementing Release, *supra* note 25, at n.130 and accompanying text.

[291] *See* NVCA Yearbook 2010, *supra* note 41, at figure 1.04 (providing number of "active" venture capital advisers who have raised a venture capital partnership within the past eight years).

[292] We estimate that these advisers (and any other adviser that seeks to remain unregistered in reliance on the exemption under section 203(l) of the Advisers Act) would incur, on average, $2,041 per year to complete and update related reports on Form ADV, including Schedule D information relating to private funds. *See* Implementing Release, *supra* note 25, at section IV.B.2. This estimate includes internal costs to the adviser of $1,764 to prepare and submit an initial report on Form ADV and $277 to prepare and submit annual amendments to the report. These estimates are based on the following calculations: $1,764 = ($3,528,000 aggregate costs ÷ 2,000 advisers); $277 = ($554,400 aggregate costs ÷ 2,000 advisers). *Id.,* at nn.337, 339 and accompanying text. We estimate that one exempt reporting adviser would file Form ADV–H per year at a cost of $204 per filing. *Id.,* at n.344 and accompanying text. We further estimate that three exempt reporting advisers would file Form ADV–NR per year at a cost of $57 per filing. *Id.,* at nn.347, 349 and accompanying text. We anticipate that filing fees for exempt reporting advisers would be the same as those for registered investment advisers. *See infra* note 300. These reporting costs are attributable to the Dodd-Frank Act, which directs the Commission to require advisers to venture capital funds to provide such annual and other reports as we determine necessary or in the public interest or for the protection of investors. *See* section 203(l) of the Advisers Act.

[293] We expect that a venture capital adviser would need no more than 2 hours of legal advice to learn the differences between its current business practices and the conditions for reliance on the proposed grandfathering provision. We estimate that this advice would cost $400 per hour per firm based on our understanding of the rates typically charged by outside consulting or law firms.

[294] *See* Breslow & Schwartz, *supra* note 144, at 2–22 ("Once the first closing [of a private equity fund] has occurred, subsequent closings are typically held over a defined period of time [the marketing period] of approximately six to twelve months."). *See also* Dow Jones Report, *supra* note 145, at 22.

[295] This is the average annual increase in the number of venture capital advisers between 1980 and 2009. *See* NVCA Yearbook 2010, *supra* note 41, at figure 1.04.

[296] We expect that a venture capital adviser would need between 7 and 12 hours of consulting or legal advice to learn the differences between its current business practices and the proposed definition, depending on the experience of the firm and its familiarity with the elements of the proposed rule. We estimate that this advice would cost $400 per hour per firm based on our understanding of the rates typically charged by outside consulting or law firms.

[297] This estimate is based on the following calculations: $2,800 x 24 = $67,200; 24 x $4,800 = $115,200.

[298] For estimates of the costs of registration for those advisers that would choose to register, *see infra* notes 299–304.

definition because it is modeled on current business practices of venture capital funds. We thus do not anticipate that many venture capital fund advisers would have to change significantly the structure of new funds they launch. Under our proposed definition, an adviser would not be able to rely on the exemption if a venture capital fund invested in securities that were not equity securities issued by qualifying portfolio companies. Although we believe this practice is not common in the industry, this element of our proposed rule may result in some venture capital funds incurring costs to structure and acquire equity investments that possess terms and protections typically found in debt instruments. To the extent that venture capital funds might not be able to structure equity investments in this way, and portfolio companies would have to forgo debt issuance, the proposal could have an adverse effect on capital formation.

We also recognize that some existing venture capital funds may have characteristics that differ from the elements of the proposed definition other than the limitation on investments in debt securities issued by portfolio companies. To the extent that investment advisers seek to form new venture capital funds with these characteristics, those advisers would have to choose whether to structure new venture capital funds to conform to the proposed definition, forgo forming new funds, or register with the Commission. In any case, each investment adviser would assess the costs associated with registering with the Commission relative to the costs of remaining unregistered (and hence structuring funds to meet our proposed definition in order to be eligible for the exemption). We expect that this assessment would take into account many factors, including the size, scope and nature of its business and investor base. Such factors will vary from adviser to adviser, but each adviser would determine whether registration, relative to other choices, is the most cost-effective or strategic business option for itself.

To the extent that advisers choose to structure new venture capital funds to conform to the proposed definition, or choose not to form new funds in order to avoid registration, these choices could result in fewer investment choices for investors, less competition and less capital formation. To the extent that advisers choose to register in order to structure new venture capital funds without regard to the proposed definitional elements or in order to expand their business (*e.g.,* pursue additional investment strategies beyond venture capital investing or expand the potential investor base to include investors that are required to invest with registered advisers), these choices may result in greater investment choices for investors, greater competition and greater capital formation.

Investment advisers to new venture capital funds that would not meet the proposed definition would have to register and incur the costs associated with registration (assuming the adviser could not rely on the private fund adviser exemption). We estimate that the internal cost to register with the Commission would be $11,526 on average for a private fund adviser,[299] excluding the initial filing fees and annual filing fees to the Investment Adviser Registration Depository ("IARD") system operator.[300] These registration costs include the costs attributable to completing and periodically amending Form ADV, preparing brochure supplements, and delivering codes of ethics to clients.[301] In addition to the internal costs described above, we estimate that for an adviser choosing to use outside legal services to complete its brochure, such costs would be $3,000 to $5,000.[302]

New registrants would also face costs to bring their business operations into compliance with the Advisers Act and the rules thereunder. These costs would vary depending on the size, scope and nature of the adviser's business, but in any case would be an ordinary business and operating expense of entering into any business that is regulated. We estimate that the one-time costs to new registrants to establish a compliance infrastructure would range from $10,000 to $45,000, while ongoing annual costs of compliance and examination would range from $10,000 to $50,000.[303]

We do not believe that the proposed definition of venture capital fund is likely to affect whether advisers to venture capital funds would choose to launch new funds or whether persons would choose to enter into the business of advising venture capital funds because, as noted above, we believe the proposed definition reflects the way most venture capital funds currently operate. For this reason, we expect that the proposed definition is not likely to significantly affect the way in which investment advisers to these funds do business and thus compete. For the same reason, we do not believe that our proposed rule is likely to have a significant effect on overall capital formation.

We request comment on the costs we have discussed above. Are there costs of the proposed definition that we have not identified? How many advisers to venture capital funds are likely to choose to register or structure new venture capital funds differently from their existing funds in order to meet the proposed definition? How costly would it be for advisers to structure new venture capital funds to conform to the proposed definition in order to qualify

[299] This estimate is based upon the following calculations: $11,526 = ($7,699,860 aggregate costs to complete Form ADV ÷ 750 advisers) + ($1,197,000 aggregate costs to complete private fund reporting requirements ÷ 950 advisers). *See* Implementing Release, *supra* note 25, at nn.355–361. This also assumes that an adviser's registration process would be conducted by a senior compliance examiner and a compliance manager at an estimated cost of $210 and $294 per hour, respectively. *See* Implementing Release, *supra* note 25, at nn.354 and accompanying text.

[300] The initial filing fee and annual filing fee for advisers with $25 million to $100 million of assets under management is $150 and for advisers with $100 million or more of assets under management is $200. *See* Electronic Filing for Investment Advisers on IARD: IARD Filing Fees, *available at http://www.sec.gov/divisions/investment/iard/iardfee.shtml.*

[301] Part 1 of Form ADV requires advisers to answer basic identifying information about their business, their affiliates and their owners, information that is readily available to advisers, and thus should not result in significant costs to complete. Registered advisers must also complete Part 2 of Form ADV and file it electronically with us. Part 2 requires disclosure of certain conflicts of interest and could be prepared based on information already contained in materials provided to investors, which could reduce the costs of compliance even further.

[302] *See* Implementing Release, *supra* note 25, at n.363, 421 (noting the cost estimate for compliance consulting services related to initial preparation of the amended Form ADV ranges from $3,000 for smaller advisers to $5,000 for medium-sized advisers).

[303] We expect that most advisers that might choose to register have already built compliance infrastructures as a matter of good business practice. Nevertheless, we expect advisers will incur costs for outside legal counsel to evaluate their compliance procedures initially and on an ongoing basis. We estimate that the costs to advisers to establish the required compliance infrastructure will be, on average, $20,000 in professional fees and $25,000 in internal costs including staff time. These estimates were prepared in consultation with attorneys who, as part of their private practice, have counseled private fund advisers establishing their registrations with the Commission. We have included a range because we believe there are a number of unregistered private funds whose compliance operations are already substantially in compliance with the Advisers Act and that would therefore experience only minimal incremental ongoing costs as a result of registration. In connection with previous estimates we have made regarding compliance costs for registered advisers, we received comments from small advisers estimating that their annual compliance costs would be $25,000 and could be as high as $50,000. *See, e.g.,* Comment Letter of Joseph L. Vidich (Aug. 7, 2004). *Cf.* Comment Letter of Venkat Swarna (Sept. 14, 2004) (estimating costs of $20,000 to $25,000). These comment letters were submitted in connection with Hedge Fund Adviser Registration Release, *supra* note 17, and are available on the Commission's Internet Web site at *http://www.sec.gov/rules/proposed/s73004.shtml.*

for an exemption from registration? Would advisers choose not to launch new funds or not enter the venture capital industry in order to avoid the costs associated with structuring venture capital funds to conform to the definition or registration? [304]

B. Exemption for Investment Advisers Solely to Private Funds With Less Than $150 Million in Assets Under Management

As discussed in Section II.B., proposed rule 203(m)–1 would exempt any investment adviser solely to private funds that has less than $150 million in assets under management in the United States. Our proposed rule is designed to implement the private fund adviser exemption, as directed by Congress, in section 203(m) of the Advisers Act and includes provisions for determining the amount of an adviser's private fund assets for purposes of the exemption and when those assets are deemed managed in the United States.[305]

1. Benefits

As discussed above and in the Implementing Release, we are proposing a uniform method of calculating assets under management in the instructions to Form ADV, which would be used to determine whether an adviser qualifies to register with the Commission rather than the states, and to determine eligibility for the private fund adviser exemption under section 203(m) of the Advisers Act and the foreign private adviser exemption under section 203(b)(3) of the Advisers Act.[306] We anticipate that this uniform approach would benefit regulators (both state and federal) as well as advisers, because only a single determination of assets under management would be required for purposes of registration and exemption from federal registration.

The instructions to Form ADV currently permit, but do not require, advisers to exclude certain types of managed assets.[307] As a result, it is not possible to conclude that two advisers reporting the same amount of assets under management are necessarily comparable because either adviser may elect to exclude all or some portion of certain specified assets that it manages. By specifying that assets under management must be calculated according to the instructions to Form ADV, our proposed approach should benefit advisers by increasing administrative efficiencies because advisers would have to calculate assets under management only once for multiple purposes.[308] We expect this would minimize costs relating to software modifications, recordkeeping, and training required to determine assets under management for regulatory purposes. We also anticipate that the consistent calculation and reporting of assets under management would benefit investors and regulators because it would provide enhanced transparency and comparability of data, and allow investors and regulators to analyze on a more cost effective basis whether any particular adviser may be required to register with the Commission or is eligible for an exemption.

We anticipate that the valuation of private fund assets under proposed rule 203(m)–1 would benefit private fund advisers that seek to rely on the exemption.[309] Under proposed rule 203(m)–1, each adviser would determine the amount of its private fund assets based on the fair value of the assets at the end of each quarter. We propose that advisers use fair value of private fund assets in order to ensure that, for purposes of this exemption, advisers value private fund assets on a meaningful and consistent basis. We understand that many, but not all, advisers to private funds value assets based on their fair value in accordance with GAAP or other international accounting standards.[310] We acknowledge that some advisers to private funds may not use fair value methodologies, which may be more difficult to apply when the fund holds illiquid or other types of assets that are not traded on organized markets.

Proposed rule 203(m)–1(c) specifies that an adviser relying on the exemption would determine the amount of its private fund assets quarterly, which we believe would benefit advisers. We understand that a quarterly calculation of assets under management is consistent with business practice—many types of private funds calculate fees payable to advisers and other service providers on at least a quarterly basis.[311] The quarterly calculation also would allow advisers that rely on the exemption to maintain the exemption despite short-term market value fluctuations that might result in the loss of the exemption if, for example, the rule required daily valuation. We expect that quarterly valuation would also benefit these advisers by allowing them to avoid the cost of more frequent valuations, including costs (such as third party quotes) associated with valuing illiquid assets, which may be particularly difficult to value more often because of the lack of frequency with which such assets are traded.

Under proposed rule 203(m)–1(a), all of the private fund assets of an adviser with a principal office and place of business in the United States would be considered to be "assets under management in the United States," even if the adviser has offices outside of the United States.[312] A non-U.S. adviser would need only count private fund assets it manages from a place of business in the U.S. toward the $150 million limit under the exemption. As discussed below, we believe that this interpretation of "assets under management in the United States" would offer greater flexibility to advisers and reduce many costs associated with compliance. These costs could include difficult attribution determinations that would be required if assets are managed by teams located in multiple jurisdictions or if portfolio managers located in one jurisdiction rely heavily on research or other

[304] Commission staff estimates that the one-time costs of registration for a venture capital fund adviser with $150 million in assets under management in the United States (*i.e.*, an adviser that would not qualify for the exemption under section 203(m) of the Advisers Act), would be approximately 0.01% of assets, and annual costs of compliance and examination would range from 0.007% to 0.03% of assets under management. These figures are based on the following calculations: ($11,526 (registration costs) + $3,000 (lower estimate of external costs to prepare brochure)) ÷ $150,000,000 = 0.000097; ($11,526 (registration costs) + $5,000 (higher estimate of external costs to prepare brochure)) ÷ $150,000,000 = 0.0001); $10,000 (lower estimate of ongoing costs) ÷ $150,000,000 = 0.000067; $50,000 (higher estimate of ongoing costs) ÷ $150,000,000 = 0.000333).

[305] *See supra* sections II.B.2–3 of this Release.

[306] *See supra* note 190 and accompanying text; Implementing Release, *supra* note 25, at nn.58–59 and accompanying text. Thus, under proposed rule 203(m)–1, to determine its assets under management for purposes of the proposed private fund adviser exemption, an adviser would calculate its "regulatory assets under management" attributable to private funds according to the instructions to Form ADV. Proposed rule 203(m)–1(a)(2), (b)(2) (conditioning the exemption on an adviser managing private fund assets of less than $150 million); proposed rule 203(m)–1(e)(1) (defining "assets under management" for purposes of the proposed rule's exemption); proposed rule 203(m)–1(e)(4) (defining "private fund assets" as the investment adviser's assets under management attributable to a qualifying private fund).

[307] *See* proposed Form ADV: Instructions to Part 1A, instr. 5.b(1).

[308] *See* Shearman & Sterling Letter, *supra* note 268.

[309] *See* proposed rule 203(m)–1(c); Implementing Release, *supra* note 25, proposed Form ADV: Instructions to Part 1A, instr. 5.b(4).

[310] *See supra* note 196.

[311] *See supra* section II.B.2 of this Release; *see, e.g.*, Breslow & Schwartz, *supra* note 144, at § 2.8.2[C].

[312] As discussed above, the proposed rule looks to an adviser's principal office and place of business as the location where it directs, controls and coordinates its global advisory activities. Proposed rule 203(m)–1(e)(3). *See supra* notes 202–203 and accompanying text.

advisory services performed by employees located in another jurisdiction.

To the extent that this interpretation may increase the number of advisers subject to registration under the Advisers Act, we anticipate that our proposal also would benefit investors by providing more information about those advisers (*e.g.*, information that would become available through Form ADV, Part I). We further anticipate that this would enhance investor protection by increasing the number of advisers registering pursuant to the Advisers Act and by improving the Commission's ability to exercise its investor protection and enforcement mandates over those newly registered advisers. As discussed above, registration offers benefits to the investing public, including periodic examination of the adviser and compliance with rules requiring recordkeeping, custody of client funds and compliance programs.[313]

Under proposed rule 203(m)–1(b), a non-U.S. adviser with no U.S. place of business could avail itself of the exemption under section 203(m) even if it advised non-U.S. clients that are not private funds, provided that it did not advise any U.S. clients other than private funds.[314] We anticipate that the proposed approach to the exemption under section 203(m) of the Advisers Act, which would look primarily to the principal office and place of business of an adviser to determine eligibility for the exemption, would increase the number of non-U.S. advisers that may be eligible for the exemption. As with other Commission rules that adopt a territorial approach, the private fund adviser exemption would be available to a non-U.S. adviser (regardless of its non-U.S. advisory activities) in recognition that non-U.S. activities of non-U.S. advisers are less likely to implicate U.S. regulatory interests and in consideration of general principles of international comity. This approach to the exemption is designed to encourage the participation of non-U.S. advisers in the U.S. market by applying the U.S. securities laws in a manner that does not impose U.S. regulatory and operational requirements on an adviser's non-U.S. advisory business.[315] We anticipate that our proposed interpretation of the availability of the private fund adviser exemption for non-U.S. advisers may benefit those advisers by facilitating their continued participation in the U.S. market with limited disruption to their non-U.S. advisory business practices.[316] This approach also might benefit U.S. investors and facilitate competition in the market for advisory services to the extent that it would maintain or increase U.S. investors' access to potential advisers. Furthermore, because non-U.S. advisers that elect to avail themselves of the exemption would be subject to certain reporting requirements,[317] our proposed approach would increase the availability of information publicly available to U.S. investors who invest in the private funds advised by such exempt but reporting non-U.S. advisers.

We request comment on the potential benefits we have identified above. Are there benefits of the proposed rule that we have not identified?

2. Costs

As noted above, under proposed rule 203(m)–1, we would look to an adviser's principal office and place of business as the location where the adviser directs, controls or has responsibility for, the management of private fund assets and therefore as the place where all the adviser's assets are managed. Thus, a U.S. adviser would include all its private fund assets under management in determining whether it exceeds the $150 million limit under the exemption. We also look to where day-to-day management of private fund assets may occur for purposes of a non-U.S. adviser, whose principal office and place of business is outside the United States.[318] A non-U.S. adviser therefore would count only the private fund assets it manages from a place of business in the United States in determining the availability of the exemption. This approach is similar to the way we have defined the location of the adviser for regulatory purposes under our current rules,[319] and thus we believe it is the way in which most advisers would interpret the exemption without our proposed rule.[320] We anticipate that our proposed approach would promote efficiency because advisers are familiar with it, and we do not anticipate that U.S. investment advisers to private funds would likely change their business models, the location of their private funds, or the location where they manage assets as a result of the proposed rule. We anticipate, however that non-U.S. advisers may incur minimal costs to determine whether they have assets under management in the U.S. We estimate that these costs would be no greater than $6,940 to hire U.S. counsel and perform an internal review to assist in this determination, in particular to assess whether a non-U.S. affiliate manages a discretionary account for the benefit of a United States person under the proposed rule.[321]

As noted above, because our rule is designed to encourage the participation of non-U.S. advisers in the U.S. market, we anticipate that it would have minimal regulatory and operational burdens on foreign advisers and their U.S. clients. Non-U.S advisers would be able to rely on proposed rule 203(m)–1 if they manage U.S. private funds with more than $150 million in assets from a non-U.S. location as long as the private fund assets managed from a U.S. place of business are less than $150 million. This could affect competition with U.S. advisers, which must register when they have $150 million in private fund assets under management regardless of where the assets are managed.

To avail themselves of proposed rule 203(m)–1, some advisers might choose to move their principal office and place of business outside the United States and manage private funds from that location. This might result in costs to U.S. investors in private funds that are managed by these advisers because they would not have the investor protection and other benefits that result from an adviser's registration under the Advisers Act. We do not expect that many advisers would be likely to relocate for

[313] *See supra* text following note 281 and preceding and accompanying text.

[314] By contrast, a U.S. adviser could "solely advise private funds" as specified in the statute. *Compare* proposed rule 203(m)–1(a)(1) *with* proposed rule 203(m)–1(b)(1).

[315] *See supra* note 208 and accompanying text.

[316] *See supra* section II.B.3 of this Release.

[317] *See* Implementing Release, *supra* note 25, at section II.B.

[318] *See supra* paragraph accompanying note 205.

[319] *See supra* note 202 and accompanying text.

[320] We do not believe that the statutory text refers to where the assets themselves may be located or traded or the location of the account where the assets are held. In today's market, using the location of assets would raise numerous questions of where a security with no physical existence is "located." Although physical stock certificates were once sent to investors as proof of ownership, stock certificates are now centrally held by securities depositories, which perform electronic "book-entry" changes in their records to document ownership of securities. This arrangement reduces transmittal costs and increases efficiencies for securities settlements. *See generally* Bank for International Settlements, The Depository Trust Company: Response to the Disclosure Framework for Securities Settlement Systems (2002), *http://www.bis.org/publ/cpss20r3.pdf*. An account also has no physical location even if the prime broker, custodian or other service that holds assets on behalf of the customer does. Each of these approaches would be confusing and extremely difficult to apply on a consistent basis.

[321] We expect that a non-U.S. adviser would need no more than 10 hours of external legal advice (at $400 per hour) and 10 hours of internal review by a senior compliance officer (at $294 per hour) to evaluate whether the adviser would qualify for the exemption under section 203(l).

purposes of avoiding registration, however, because we understand that the primary reasons for advisers to locate in a particular jurisdiction involve tax and other business considerations. We also note that if an adviser did relocate, it would incur the costs of regulation under the laws of most of the foreign jurisdictions in which it may be likely to relocate. We do not believe, in any case, that the adviser would relocate if relocation would result in a material decrease in the amount of assets managed because that loss would likely not justify the benefits of avoiding registration, and thus we do not believe our proposed rule would have an adverse effect on capital formation.

Our proposed rule incorporates the valuation methodology in the instructions to Form ADV. More specifically, proposed instruction 5.b(4) to Form ADV would require advisers to use fair value of private fund assets for determining regulatory assets under management. We acknowledge that there may be some private fund advisers that may not use fair value methodologies.[322] The costs incurred by these advisers to use fair valuation methodology would vary based on factors such as the nature of the asset, the number of positions that do not have a market value, and whether the adviser has the ability to value such assets internally or would rely on a third party for valuation services.[323] Nevertheless, we do not believe that the requirement to use fair value methodologies would result in significant costs for these advisers. We understand that private fund advisers, including those that may not use fair value methodologies for reporting purposes, perform administrative services, including valuing assets, internally as a matter of business practice.[324] Commission staff estimates that such an adviser would incur $1,224 in internal costs to conform its internal valuations to a fair value standard.[325] In the event a fund does not have an internal capability for valuing specific illiquid assets, we expect that it could obtain pricing or valuation services from an outside administrator or other service provider. In the event a fund does not have an internal capability for valuing specific illiquid assets, we expect that it could obtain pricing or valuation services from an outside administrator or other service provider. Staff estimates that the cost of such a service would range from $1,000 to $120,000 annually, which could be borne by several funds that invest in similar assets or have similar investment strategies.[326] We request comment on these estimates. Do advisers that do not use fair value methodologies for reporting purposes have the ability to fair value private fund assets internally? If not, what would be the costs to retain a third party valuation service? Are there certain types of advisers (*e.g.*, advisers to real estate private funds) that would experience special difficulties in performing fair value analyses? If so, why?

Our earlier discussion of the proposed rule also seeks comment on an alternative interpretation of "assets under management in the United States," which would reference the source of the assets (*i.e.,* U.S. private fund investors).[327] Under this approach, a non-U.S. adviser would count the assets of private funds attributable to U.S. investors towards the $150 million threshold, regardless of the location where it manages private funds, and a U.S. adviser would exclude assets that are not attributable to U.S. investors. As a result, under this alternative more U.S. advisers might be able to rely on rule 203(m)–1 than under our proposed approach. To the extent that non-U.S. advisers have U.S. investors in funds that they manage from a non-U.S. location, fewer non-U.S. advisers would be eligible for the exemption under this approach than under our proposal. Thus, this alternative could increase costs for those non-U.S. advisers who would have to register but reduce costs for those U.S. advisers who would not have to register. We seek comment on the number of U.S. advisers that would be able to avail themselves of the private fund adviser exemption under this alternative approach, but would not be able to rely on proposed rule 203(m)–1.

This alternative approach could discourage U.S. advisers that may want to avoid registration from managing U.S. investor assets, which could affect competition for the management of those assets. We believe this is unlikely however, because to the extent the adviser would manage fewer assets we do not believe the loss of managed assets would justify the savings from avoiding registration.

Under either the proposed approach or the alternative, each adviser may incur costs to evaluate whether it would be able to avail itself of the exemption. We estimate that each adviser may incur between $800 to $4,800 in legal advice to learn whether it may rely on the exemption.[328] Each adviser that registers would incur registration costs, which we estimate would be $11,526.[329] They also would incur estimated initial compliance costs ranging from $10,000 to $45,000 and ongoing annual compliance costs from $10,000 to $50,000.[330] Nevertheless, to the extent there would be an increase in registered advisers, as we have noted above, there

[322] *See supra* note 310 and accompanying and following text.

[323] *See supra* note 197.

[324] For example, a hedge fund adviser may value fund assets for purposes of allowing new investments in the fund or redemptions by existing investors, which may be permitted on a regular basis after an initial lock-up period. An adviser to private equity funds may obtain valuation of portfolio companies in which the fund invests in connection with financing obtained by those companies. Advisers to private funds also may value portfolio companies each time the fund makes (or considers making) a follow-on investment in the company. Private fund advisers could use these valuations as a basis for complying with the fair valuation requirement we propose with respect to private fund assets.

[325] This estimate is based upon the following calculation: 8 hours × $153/hour = $1,224. The hourly wage is based on data for a fund senior accountant from SIFMA's *Management and Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

[326] These estimates are based on conversations with valuation service providers. We understand that the cost of valuation for illiquid fixed income securities generally ranges from $1.00 to $5.00 per security, depending on the difficulty of valuation, and is performed for clients on weekly or monthly basis. We understand that appraisals of privately placed equity securities may cost from $3,000 to $5,000 with updates to such values at much lower prices. For purposes of this cost benefit analysis, we are estimating the range of costs for (i) a private fund that holds 50 fixed income securities at a cost of $5.00 to price and (ii) a private fund that holds privately placed securities of 15 issuers that each cost $5,000 to value initially and $1,000 thereafter. We believe that costs for funds that hold both fixed-income and privately placed equity securities would fall within the maximum of our estimated range. We note that funds that have significant positions in illiquid securities are likely to have the in-house capacity to value those securities or already subscribe to a third party service to value them. We note that many private funds are likely to have many fewer fixed income illiquid securities in their portfolios, some or all of which may cost less than $5.00 per security to value. Finally, we note that obtaining valuation services for a small number of fixed income positions on an annual basis may result in a higher cost for each security or require a subscription to the valuation service for those that do not already purchase such services. The staff's estimate is based on the following calculations: (50 × $5.00 × 4 = $1,000; (15 × $5,000) + (15 × $1,000 × 3) = $120,000).

[327] *See supra* paragraph following note 210.

[328] We expect that a private fund adviser would obtain between 2 and 12 hours of external legal advice (at a cost of $400 per hour) to determine whether it would be eligible for the private fund adviser exemption.

[329] This range is attributable to the amount of assets under management, which affects the magnitude of filing fees associated with registration, and whether the adviser chooses to retain outside legal services to prepare its brochure. *See supra* notes 300–302 and accompanying text.

[330] *See supra* note 303 and accompanying text.

are benefits to registration for both investors and the Commission.[331]

We seek comment on our analysis of the costs associated with the approach we have proposed and the costs of the alternative on which we seek comment. Are there costs of the proposed rule or the alternative approach that we have not identified?

C. Foreign Private Adviser Exemption

Section 403 of the Dodd-Frank Act replaces the current private adviser exemption from registration under the Advisers Act with a new exemption for a "foreign private adviser," as defined in new section 202(a)(30) of the Advisers Act.[332] We are proposing new rule 202(a)(30)–1, which would define certain terms in section 202(a)(30) for use by advisers seeking to avail themselves of the foreign private adviser exemption.[333] Because eligibility for the new foreign private adviser exemption, like the current private adviser exemption, is determined, in part, by the number of clients an adviser has, we propose to include in rule 202(a)(30)–1 the safe harbor and many of the client counting rules that appear in rule 203(b)(3)–1, as currently in effect.[334] In addition, we propose to define other terms used in the definition of "foreign private adviser" under section 202(a)(30) including: (i) "Investor;" (ii) "in the United States;" (iii) "place of business;" and (iv) "assets under management."[335]

Proposed rule 202(a)(30)–1 clarifies several provisions used in the statutory definition of "foreign private adviser." First, the proposed rule would include the safe harbor for counting clients currently in rule 203(b)(3)–1, as modified to account for its use in the foreign private adviser context. Under the safe harbor, an adviser would count certain natural persons as a single client under certain circumstances.[336] Proposed rule 202(a)(30)–1 would also retain another provision of rule 203(b)(3)–1 that permits an adviser to treat as a single "client" an entity that receives investment advice based on the entity's investment objectives and two or more entities that have identical owners.[337] As mentioned above, we would not include the "special rule" that allows advisers not to count as a client any person for whom the adviser provides investment advisory services without compensation.[338] Finally, we propose to add a provision that would permit advisers to avoid double-counting private funds and their investors.[339]

Second, section 202(a)(30) provides that a "foreign private adviser" eligible for the new registration exemption cannot have more than 14 clients "or investors." We propose to define "investor" in a private fund in rule 202(a)(30)–1 as any person that would be included in determining the number of beneficial owners of the outstanding securities of a private fund under section 3(c)(1) of the Investment Company Act, or whether the outstanding securities of a private fund are owned exclusively by qualified purchasers under section 3(c)(7) of that Act.[340] We are also proposing to treat as investors beneficial owners (i) who are "knowledgeable employees" with respect to the private fund;[341] and (ii) of "short-term paper"[342] issued by the private fund, even though these persons are not counted as beneficial owners for purposes of section 3(c)(1), and knowledgeable employees are not required to be qualified purchasers under section 3(c)(7).[343]

Third, proposed rule 202(a)(30)–1 defines "in the United States" generally by incorporating the definition of a "U.S. person" and "United States" under Regulation S.[344] In particular, we would define "in the United States" in proposed rule 202(a)(30)–1 to mean: (i) With respect to any place of business located in the "United States," as that term is defined in Regulation S;[345] (ii) with respect to any client or private fund investor in the United States, any person that is a "U.S. person" as defined in Regulation S,[346] except that under the proposed rule, any discretionary account or similar account that is held for the benefit of a person "in the United States" by a non-U.S. dealer or other professional fiduciary is a person "in the United States" if the dealer or professional fiduciary is a related person of the investment adviser relying on the exemption; and (iii) with respect to the public in the "United States," as that term is defined in Regulation S.[347] Fourth, proposed rule 202(a)(30)–1 defines "place of business" to have the same meaning as in Advisers Act rule 222–1(a).[348] Finally, for purposes of rule 202(a)(30)–1 we propose to define "assets under management" by reference to "regulatory assets under management" as determined under Item 5 of Form ADV.[349]

1. Benefits

We are proposing to define certain terms included in the statutory definition of "foreign private adviser" in order to clarify the meaning of these terms and reduce the potential administrative and regulatory burdens for advisers that seek to rely on the

[331] *See supra* text following note 281.

[332] *See supra* note 224 and accompanying text. The new exemption is codified as amended section 203(b)(3).

[333] *See supra* section II.C of this Release.

[334] *See supra* section II.C.1 of this Release. Rule 203(b)(3)–1, as currently in effect, provides a safe harbor for determining who may be deemed a single client for purposes of the private adviser exemption. We would not, however, carry over rules 203(b)(3)–1(b)(4), (5), or (7). *See supra* notes 228 and 233 and accompanying text.

[335] Proposed rule 202(a)(30)–1(c). *See supra* section II.C.2–4 of this Release.

[336] Proposed rule 202(a)(30)–1(a)(1).

[337] Proposed rule 202(a)(30)–1(a)(2)(i)–(ii). In addition, proposed rule 202(a)(30)–1(b)(1) through (3) would retain the following related "special rules": (1) An adviser must count a shareholder, partner, limited partner, member, or beneficiary (each, an "owner") of a corporation, general partnership, limited partnership, limited liability company, trust, or other legal organization, as a client if the adviser provides investment advisory services to the owner separate and apart from the legal organization; (2) an adviser is not required to count an owner as a client solely because the adviser, on behalf of the legal organization, offers, promotes, or sells interests in the legal organization to the owner, or reports periodically to the owners as a group solely with respect to the performance of or plans for the legal organization's assets or similar matters; and (3) any general partner, managing member or other person acting as an investment adviser to a limited partnership or limited liability company must treat the partnership or limited liability company as a client.

[338] *See* rule 203(b)(3)–1(b)(4); *supra* notes 233–235 and accompanying text.

[339] *See* proposed rule 202(a)(30)–1(b)(4) (specifying that an adviser would not be required to count a private fund as a client if it counted any investor, as defined in the proposed rule, in that private fund as an investor in the United States in that private fund).

[340] *See* proposed rule 202(a)(30)–1(c)(1); *supra* section II.C.2 of this Release. In order to avoid double-counting, we would allow an adviser to treat as a single investor any person that is an investor in two or more private funds advised by the investment adviser. *See* proposed rule 202(a)(30)–1(c)(1), at note to paragraph (c)(1).

[341] *See* proposed rule 202(a)(30)–1(c)(1)(A); *supra* note 246 and accompanying text.

[342] *See* proposed rule 202(a)(30)–1(c)(1)(B); *supra* notes 247–248 and accompanying text.

[343] *See* rule 3c–5(b) under the Investment Company Act; section 3(c)(1) of the Investment Company Act. *See also supra* note 249 and accompanying text.

[344] Proposed rule 202(a)(30)–1(c)(2). *See supra* notes 253–261 and accompanying paragraphs.

[345] *See* 17 CFR 230.902(l).

[346] *See* 17 CFR 230.902(k). We would allow foreign advisers to determine whether a client or investor is "in the United States" by reference to the time the person became a client or an investor. *See* proposed rule 202(a)(30)–1's note to paragraph (c)(2)(i).

[347] *See* 17 CFR 230.902(l).

[348] *See* proposed rule 202(a)(30)–1(c)(3); proposed rule 222–1(a) (defining "place of business" of an investment adviser as: "(i) An office at which the investment adviser regularly provides investment advisory services, solicits, meets with, or otherwise communicates with clients; and (ii) Any other location that is held out to the general public as a location at which the investment adviser provides investment advisory services, solicit, meets with, or otherwise communicates with clients."). *See supra* section II.C.4 of this Release.

[349] *See* proposed rule 202(a)(30)–1(c)(4); proposed Form ADV: Instructions to Part 1A, instr. 5.b(4). *See also supra* section II.C.5 of this Release.

foreign private adviser exemption. As discussed above, our proposed rule references definitions set forth in other Commission rules under the Advisers Act, the Investment Company Act and the Securities Act, all of which are likely to be familiar to foreign advisers active in the U.S. capital markets. We anticipate that by defining these terms, we would benefit foreign advisers by providing clarity with respect to the proposed terms that advisers would otherwise be required to interpret (and which they would likely interpret with reference to the rules we reference).[350] The proposal would provide consistency among these other rules and the new exemption. This would limit foreign advisers' need to undertake additional analysis with respect to these terms for purposes of determining the availability of the foreign private adviser exemption.[351] We believe that the consistency and clarity that would result from the proposed rule would promote efficiency for foreign advisers and the Commission.

For example, for purposes of determining eligibility for the foreign private adviser exemption, advisers would count clients substantially in the same manner they count clients under the current private adviser exemption.[352] In identifying "investors," advisers could rely on the determination made to assess whether the private fund meets the counting or qualification requirements under sections 3(c)(1) and 3(c)(7) of the Investment Company Act.[353] In determining whether a client, an investor, or a place of business is "in the United States," or whether it holds itself out as an investment adviser to the public "in the United States," an adviser would apply the same analysis it would otherwise apply under Regulation S.[354] In identifying whether it has a place of business in the United States, an adviser would use the definition of "place of business" under section 222 of the Advisers Act, which is used to determine whether a state may assert regulatory jurisdiction over the adviser.[355]

As noted above, the proposed definitions of "investor" and "United States" under our proposed rule would rely on existing definitions, with slight modifications.[356] Our proposed rule also would incorporate the current safe harbor in rule 203(b)(3)–1 for counting clients, except that it would no longer allow an adviser to disregard clients for whom the adviser provides services without compensation.[357] We propose these modifications in order to preclude some advisers from excluding certain assets or clients from their calculation so as to avoid registration with the Commission and the regulatory requirements associated with registration.[358] We believe that without a definition of these terms, advisers would likely rely on the same definitions we propose to cross reference in rule 202(a)(30)–1, but without the proposed modifications. Our proposal, therefore, would likely have the practical effect of narrowing the scope of the exemption, and thus would result in more advisers registering.

We believe that any increase in registration as compared to the number of foreign advisers that might register if we did not propose rule 202(a)(30)–1 would benefit investors. Investors whose assets are, directly or indirectly, managed by the foreign advisers that would be required to register would benefit from the increased protection afforded by federal registration of the adviser and application to the adviser of all of the requirements of the Advisers Act. As noted above, registration offers benefits to the investing public, including periodic examination of the adviser and compliance with rules requiring recordkeeping, custody of client funds and compliance programs.[359]

We request comment on the potential benefits we have identified above. Are there benefits of the proposed rule that we have not identified?

2. Costs

We do not believe that the proposed definitions would result in significant costs for foreign advisers. We anticipate that each foreign adviser that seeks to avail itself of the foreign private adviser exemption may incur costs to determine whether it is eligible for the exemption. We expect that these advisers would consult with outside U.S. counsel and perform an internal review of the extent to which an advisory affiliate manages discretionary accounts owned by a U.S. person that would be counted toward the limitation on clients and investors in the United States. We estimate these costs would be $6,940.[360]

Without the proposed rule, we expect that most advisers would interpret the new statutory provision by reference to the same rules we propose to cross reference in rule 202(a)(30)–1. Without our proposal, some advisers would likely incur additional costs because they would seek guidance in interpreting the terms used in the statutory exemption. By defining the statutory terms in a rule, we believe that we can provide certainty for foreign advisers and limit the time, compliance costs and legal expenses foreign advisers might incur in seeking an interpretation, all of which costs could inhibit capital formation or reduce efficiency. We expect that advisers also would be less likely to seek additional assistance from us because they could rely on relevant guidance we have previously provided with respect to the definitions we propose to cross reference. We also believe that foreign advisers' ability to rely on the definitions that we have referenced in the proposed rule and the guidance provided with respect to the referenced rules may reduce Commission resources that would be otherwise applied to administering the private foreign adviser exemption, which resources could be allocated to other matters.

We anticipate that our proposed instruction allowing foreign advisers to determine whether a client or investor is "in the United States" by reference to the time the person became a client or an investor, would also reduce advisers' costs.[361] Advisers would make the determination only once and would not be required to monitor changes in the

[350] *See* Paul Hastings Letter, *supra* note 258 (in response to our request for public views, urging us to provide guidance on the interpretation of the terms of the statutory definition of "foreign private adviser"). *See generally supra* note 24.

[351] This is true for all of the proposed definitions except for "assets under management." An adviser that relies on the foreign private adviser exemption would need to calculate its assets under management according to the proposed instructions to Item 5 of Form ADV only for purposes of the availability of the exemption. As discussed, above, proposed rule 202(a)(30)–1 includes a reference to Item 5 of Form ADV in order to ensure consistency in the calculation of assets under management for various purposes under the Advisers Act. *See supra* note 266 and accompanying text.

[352] *See supra* section II.C.1 of this Release.

[353] *See supra* paragraph accompanying note 240.

[354] *See supra* notes 258–259 and accompanying paragraph.

[355] *See supra* section II.C.3 of this Release. Under section 222 of the Advisers Act a state may not require an adviser to register if the adviser does not have a "place of business" within, and has fewer than 6 client residents of, the state.

[356] *See supra* notes 238, 246–251, 253–257 and accompanying text.

[357] *See supra* notes 336–339 and accompanying text.

[358] *See supra* notes 246–251, 253–257 and accompanying text. *See also infra* notes 362–363 and accompanying text for an estimate of the costs associated with registration.

[359] *See supra* text accompanying and following note 281.

[360] This estimate is based on consultation with outside counsel (at a cost of $400 per hour) of 10 hours and an internal review of discretionary accounts owned by U.S. persons performed by a senior compliance officer (at a cost of $294 per hour) of 10 hours. The calculation is as follows: (10 hours × $400) + (10 hours × $294) = $6,940.

[361] *See* proposed rule 202(a)(30)–1, at note to paragraph (c)(2)(i); *supra* notes 267–268 and accompanying text.

status of each client and private fund investor. Moreover, if a client or an investor moved to the United States, under our approach the adviser would not be forced to choose among registering with us, terminating the relationship with the client, or forcing the investor out of the the private fund.

The proposed modifications may result in some costs for foreign advisers who might change their business practices in order to rely on the exemption. Some foreign advisers may have to choose to limit the scope of their contacts with the United States in order to rely on the statutory exemption for foreign private advisers or to register with us. As noted above, we have estimated the costs of registration to be $11,526.[362] In addition, registered advisers would incur initial costs to establish a compliance infrastructure, which we estimate would range from $10,000 to $45,000 and ongoing annual costs of compliance and examination, which we estimate would range from $10,000 to $50,000.[363] In either case, foreign advisers would assess the costs of registering with the Commission relative to relying on the exemption. This assessment, however, would take into account many factors, which would vary from one adviser to another, to determine whether registration, relative to other options, is the most cost-effective business option for the adviser to pursue. If a foreign adviser limited its activities within the United States in order to rely on the exemption, the modifications might have the effect of reducing competition in the market for advisory services. Were the foreign adviser to register, competition among registered advisers would increase. Furthermore, to the extent that the modifications included in the definition of "investor" (in particular the one concerning knowledgeable employees) would limit a foreign adviser's ability to attract certain private fund investors, those modifications may have an adverse effect on capital formation.

By referencing the method of calculating assets under management under Form ADV, certain foreign private advisers would use the valuation method provided in the instructions to Form ADV to verify compliance with the $25 million asset threshold included in the foreign private adviser exemption.[364] More specifically, proposed instruction 5.b(4) to Form ADV would require advisers to use fair value of private fund assets for determining regulatory assets under management. Some foreign advisers to private funds may value assets based on their fair value in accordance with GAAP or other international accounting standards, while other advisers to private funds may not use fair value methodologies.[365] As discussed above, the costs associated with fair valuation would vary based on factors such as the nature of the asset, the number of positions that do not have a market value, and whether the adviser has the ability to value such assets internally or would rely on a third party for valuation services.[366] Nevertheless, we do not believe that the requirement to use fair value methodologies would result in significant costs for these advisers to these funds.[367] Commission staff estimates that such advisers would each incur $1,224 in internal costs to conform its internal valuations to a fair value standard.[368] In the event a fund does not have an internal capability for valuing illiquid assets, we expect that it could obtain pricing or valuation services from an outside administrator or other service provider. Staff estimates that the annual cost of such a service would range from $1,000 to $120,000 annually which could be borne by several funds that invest in similar assets or have similar investment strategies.[369] We request comment on these estimates. Do foreign advisers that do not use fair value methodologies for reporting purposes have the ability to fair value private fund assets internally? If not, what would be the costs to retain a third party valuation service? Are there certain types of foreign advisers (*e.g.,* advisers to real estate private funds) that would experience special difficulties in performing fair value analyses? If so, why?

We request comment on the potential costs we have identified above. Are there costs of the proposed rule that we have not identified?

D. Request for Comment

The Commission requests comments on all aspects of the cost-benefit analysis, including the accuracy of the potential costs and benefits identified and assessed in this Release, as well as any other costs or benefits that may result from the proposals. We encourage commenters to identify, discuss, analyze, and supply relevant data regarding these or additional costs and benefits. For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996,[370] the Commission also requests information regarding the potential annual effect of the proposals on the U.S. economy. Commenters are requested to provide empirical data to support their views.

VI. Regulatory Flexibility Act Certification

Pursuant to section 605(b) of the Regulatory Flexibility Act,[371] the Commission hereby certifies that proposed rules 203(l)–1 and 203(m)–1 under the Advisers Act would not, if adopted, have a significant economic impact on a substantial number of small entities. Under Commission rules, for the purposes of the Advisers Act and the Regulatory Flexibility Act, an investment adviser generally is a small entity if it: (i) Has assets under management having a total value of less than $25 million; (ii) did not have total assets of $5 million or more on the last day of its most recent fiscal year; and (iii) does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of $25 million or more, or any person (other than a natural person) that had $5 million or more on the last day of its most recent fiscal year ("small adviser").[372]

Investment advisers solely to venture capital funds and advisers solely to private funds in each case with assets under management of less than $25 million would remain generally ineligible for registration with the Commission under section 203A of the Advisers Act.[373] We expect that any small adviser solely to existing venture capital funds that would not be ineligible to register with the Commission would be able to avail itself of the exemption from registration under the grandfathering provision. If an adviser solely to a new venture capital fund could not avail itself of the exemption because, for example, the fund it advises did not meet the proposed definition of "venture capital fund," we anticipate that the adviser could avail itself of the exemption in section 203(m) of the Advisers Act as

[362] *See supra* note 299 and accompanying text.

[363] *See supra* note 303 and accompanying text.

[364] *See supra* section II.C.5 of this Release.

[365] *See supra* note 310 and accompanying and following text.

[366] *See supra* notes 322–325 and accompanying paragraph.

[367] *See supra* note 324 and accompanying text.

[368] *See supra* note 325.

[369] *See supra* note 326 and accompanying text.

[370] 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).

[371] 5 U.S.C. 605(b).

[372] Rule 0–7(a) (17 CFR 275.0–7(a)).

[373] Section 203A of the Advisers Act (prohibiting an investment adviser that is regulated or required to be regulated as an investment adviser in the State in which it maintains its principal office and place of business from registering with the Commission unless the adviser has $25 million or more in assets under management or is an adviser to a registered investment company).

implemented by proposed rule 203(m)–1. Similarly, we expect that any small adviser solely to private funds would be able to rely on the exemption in section 203(m) of the Advisers Act as implemented by proposed rule 203(m)–1. We further believe that these advisers would be able to avail themselves of the exemption for private fund advisers regardless of whether our implementing rules required them to calculate assets under management as proposed approach or under the alternative method on which we request comment.[374]

Thus, we believe that small advisers solely to venture capital funds and small advisers to other private funds would generally be ineligible to register with the Commission. Those small advisers that may not be ineligible to register with the Commission, we believe, would be able to rely on the venture fund exemption under section 203(l) of the Advisers Act or the private fund adviser exemption under section 203(m) of that Act as implemented by our proposed rules. For these reasons, we are certifying that proposed rules 203(l)–1 and 203(m)–1 under the Advisers Act would not, if adopted, have a significant economic impact on a substantial number of small entities.

The Commission requests written comments regarding this certification. The Commission requests that commenters describe the nature of any impact on small businesses and provide empirical data to support the extent of the impact.

VII. Statutory Authority

The Commission is proposing rule 202(a)(30)–1 under the authority set forth in sections 403 and 406 of the Dodd-Frank Act, to be codified at sections 203(b) and 211(a) of the Advisers Act, respectively (15 U.S.C. 80b–3(b), 80b–11(a)). The Commission is proposing rule 203(l)–1 under the authority set forth in sections 406 and 407 of the Dodd-Frank Act, to be codified at sections 211(a) and 203(l) of the Advisers Act, respectively (15 U.S.C. 80b–11(a), 80b–3(l)). The Commission is proposing rule 203(m)–1 under the authority set forth in sections 406 and 408 of the Dodd-Frank Act, to be codified at sections 211(a) and 203(m) of the Advisers Act, respectively (15 U.S.C. 80b–11(a), 80b–3(m)).

List of Subjects in 17 CFR Part 275

Reporting and recordkeeping requirements; Securities.

[374] *See supra* section II.B.2 of this Release.

Text of Proposed Rules

For reasons set out in the preamble, the Commission proposes to amend Title 17, Chapter II of the Code of Federal Regulations as follows:

PART 275—RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

1 . The general authority citation for Part 275 is revised to read as follows:

Authority: 15 U.S.C. 80b–2(a)(11)(G), 80b–2(a)(11)(H), 80b–2(a)(17), 80b–3, 80b–4, 80b–6(4), 80b–6(a), and 80b–11, unless otherwise noted.

* * * * *

2. Section 275.202(a)(30)–1 is added to read as follows:

§ 275.202(a)(30)–1 Foreign private advisers.

(a) *Client.* You may deem the following to be a single client for purposes of section 202(a)(30) of the Act (15 U.S.C. 80b–2(a)(30)):

(1) A natural person, and:

(i) Any minor child of the natural person;

(ii) Any relative, spouse, or relative of the spouse of the natural person who has the same principal residence;

(iii) All accounts of which the natural person and/or the persons referred to in this paragraph (a)(1) are the only primary beneficiaries; and

(iv) All trusts of which the natural person and/or the persons referred to in this paragraph (a)(1) are the only primary beneficiaries;

(2)(i) A corporation, general partnership, limited partnership, limited liability company, trust (other than a trust referred to in paragraph (a)(1)(iv) of this section), or other legal organization (any of which are referred to hereinafter as a "legal organization") to which you provide investment advice based on its investment objectives rather than the individual investment objectives of its shareholders, partners, limited partners, members, or beneficiaries (any of which are referred to hereinafter as an "owner"); and

(ii) Two or more legal organizations referred to in paragraph (a)(2)(i) of this section that have identical owners.

(b) *Special rules regarding clients.* For purposes of this section:

(1) You must count an owner as a client if you provide investment advisory services to the owner separate and apart from the investment advisory services you provide to the legal organization, provided, however, that the determination that an owner is a client will not affect the applicability of this section with regard to any other owner;

(2) You are not required to count an owner as a client solely because you, on behalf of the legal organization, offer, promote, or sell interests in the legal organization to the owner, or report periodically to the owners as a group solely with respect to the performance of or plans for the legal organization's assets or similar matters;

(3) A limited partnership or limited liability company is a client of any general partner, managing member or other person acting as investment adviser to the partnership or limited liability company; and

(4) You are not required to count a private fund as a client if you count any investor, as that term is defined in paragraph (c)(1) of this section, in that private fund as an investor in the United States in that private fund.

Note to paragraphs (a) and (b): These paragraphs are a safe harbor and are not intended to specify the exclusive method for determining who may be deemed a single client for purposes of section 202(a)(30) of the Act (15 U.S.C. 80b–2(a)(30)).

(c) *Definitions.* For purposes of section 202(a)(30) of the Act (15 U.S.C. 80b–2(a)(30)),

(1) *Investor* means any person that would be included in determining the number of beneficial owners of the outstanding securities of a private fund under section 3(c)(1) of the Investment Company Act of 1940 (15 U.S.C. 80a–3(c)(1)), or whether the outstanding securities of a private fund are owned exclusively by qualified purchasers under section 3(c)(7) of that Act (15 U.S.C. 80a–3(c)(7)), except that any of the following persons is also an investor:

(i) Any beneficial owner of the private fund that pursuant to § 270.3c–5 of this title would not be included in the above determinations under section 3(c)(1) and 3(c)(7) of the Investment Company Act of 1940 (15 U.S.C. 80a–3(c)(1), (7)); and

(ii) Any beneficial owner of any outstanding *short-term paper,* as defined in section 2(a)(38) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(38)), issued by the private fund.

Note to paragraph (c)(1): You may treat as a single investor any person that is an investor in two or more private funds you advise.

(2) *In the United States* means with respect to:

(i) Any client or investor, any person that is a "U.S. person" as defined in § 230.902(k) of this title, except that any discretionary account or similar account that is held for the benefit of a person in the United States by a dealer or other

professional fiduciary is in the United States if the dealer or professional fiduciary is a related person of the investment adviser relying on this section and is not organized, incorporated, or (if an individual) resident in the United States.

Note to paragraph (c)(2)(i): A person that is in the United States may be treated as not being in the United States if such person was not in the United States at the time of becoming a client or, in the case of an investor in a private fund, at the time the investor acquires the securities issued by the fund.

(ii) Any place of business, *in the United States,* as that term is defined in § 230.902(l) of this chapter; and

(iii) The public, *in the United States,* as that term is defined in § 230.902(l) of this chapter.

(3) *Place of business* has the same meaning as in § 275.222–1(a).

(4) *Assets under management* means the regulatory assets under management as determined under Item 5.F of Form ADV (§ 279.1 of this chapter).

(d) *Holding out.* If you are relying on this section, you shall not be deemed to be holding yourself out generally to the public in the United States as an investment adviser, within the meaning of section 202(a)(30) of the Act (15 U.S.C. 80b–2(a)(30)), solely because you participate in a non-public offering in the United States of securities issued by a private fund under the Securities Act of 1933 (15 U.S.C. 77a).

3. Section 275.203(l)–1 is added to read as follows:

§ 275.203(l)–1 Venture capital fund defined.

(a) *Venture capital fund defined.* For purposes of section 203(l) of the Act (15 U.S.C. 80b–3(l)), a venture capital fund is any private fund that:

(1) Represents to investors and potential investors that it is a venture capital fund;

(2) Owns solely:

(i) Equity securities issued by one or more qualifying portfolio companies, and at least 80 percent of the equity securities of each qualifying portfolio company owned by the fund was acquired directly from the qualifying portfolio company; and

(ii) Cash and cash equivalents, as defined in § 270.2a51–1(b)(7)(i), and U.S. Treasuries with a remaining maturity of 60 days or less;

(3) With respect to each qualifying portfolio company, either directly or indirectly through each investment adviser not registered under the Act in reliance on section 203(l) thereof:

(i) Has an arrangement whereby the fund or the investment adviser offers to provide, and if accepted, does so provide, significant guidance and counsel concerning the management, operations or business objectives and policies of the qualifying portfolio company; or

(ii) Controls the qualifying portfolio company;

(4) Does not borrow, issue debt obligations, provide guarantees or otherwise incur leverage, in excess of 15 percent of the private fund's aggregate capital contributions and uncalled committed capital, and any such borrowing, indebtedness, guarantee or leverage is for a non-renewable term of no longer than 120 calendar days;

(5) Only issues securities the terms of which do not provide a holder with any right, except in extraordinary circumstances, to withdraw, redeem or require the repurchase of such securities but may entitle holders to receive distributions made to all holders pro rata; and

(6) Is not registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a–8), and has not elected to be treated as a business development company pursuant to section 54 of that Act (15 U.S.C. 80a–53).

(b) *Certain pre-existing venture capital funds.* For purposes of section 203(l) of the Act (15 U.S.C. 80b–3(l)) and in addition to any venture capital fund as set forth in paragraph (a) of this section, a venture capital fund also includes any private fund that:

(1) Has represented to investors and potential investors at the time of the offering of the private fund's securities that it is a venture capital fund;

(2) Prior to December 31, 2010, has sold securities to one or more investors that are not related persons, as defined in § 275.204–2(d)(7), of any investment adviser of the private fund; and

(3) Does not sell any securities to (including accepting any committed capital from) any person after July 21, 2011.

(c) *Definitions.* For purposes of this section:

(1) *Committed capital* means any commitment pursuant to which a person is obligated to acquire an interest in, or make capital contributions to, the private fund.

(2) *Equity securities* has the same meaning as in section 3(a)(11) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(11)) and § 240.3a11–1 of this chapter.

(3) *Publicly traded* means, with respect to a company, being subject to the reporting requirements under section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)), or having a security listed or traded on any exchange or organized market operating in a foreign jurisdiction.

(4) *Qualifying portfolio company* means any company that:

(i) At the time of any investment by the private fund, is not publicly traded and does not control, is not controlled by or under common control with another company, directly or indirectly, that is publicly traded;

(ii) Does not borrow or issue debt obligations, directly or indirectly, in connection with the private fund's investment in such company;

(iii) Does not redeem, exchange or repurchase any securities of the company, or distribute to pre-existing security holders cash or other company assets, directly or indirectly, in connection with the private fund's investment in such company; and

(iv) Is not an investment company, a private fund, an issuer that would be an investment company but for the exemption provided by § 270.3a–7, or a commodity pool.

4. Section 275.203(m)–1 is added to read as follows:

§ 275.203(m)–1 Private fund adviser exemption.

(a) *United States investment advisers.* For purposes of section 203(m) of the Act (15 U.S.C. 80b–3(m)), an investment adviser with its principal office and place of business in the United States is exempt from the requirement to register under section 203 of the Act if the investment adviser:

(1) Acts solely as an investment adviser to one or more qualifying private funds; and

(2) Manages private fund assets of less than $150 million.

(b) *Non-United States investment advisers.* For purposes of section 203(m) of the Act (15 U.S.C. 80b–3(m)), an investment adviser with its principal office and place of business outside of the United States is exempt from the requirement to register under section 203 of the Act if:

(1) The investment adviser has no client that is a United States person except for one or more qualifying private funds; and

(2) All assets managed by the investment adviser from a place of business in the United States are solely attributable to private fund assets, the total value of which is less than $150 million.

(c) *Calculations.* For purposes of this section, private fund assets are calculated as the total value of such assets as of the end of each calendar quarter.

(d) *Transition rule.* With respect to the calendar quarter period immediately

following the calendar quarter end date that the investment adviser ceases to be exempt from registration under section 203(m) of the Act (15 U.S.C. 80b–3(m)) due to having $150 million or more in private fund assets, the Commission will not assert a violation of the requirement to register under section 203 of the Act (15 U.S.C. 80b–3) by an investment adviser that was previously exempt in reliance on section 203(m) of the Act; provided that such investment adviser has complied with all applicable Commission reporting requirements.

(e) *Definitions.* For purposes of this section,

(1) *Assets under management* means the regulatory assets under management as determined under Item 5.F of Form ADV (§ 279.1 of this chapter).

(2) *Place of business* has the same meaning as in § 275.222–1(a).

(3) *Principal office and place of business* of an investment adviser means the executive office of the investment adviser from which the officers, partners, or managers of the investment adviser direct, control, and coordinate the activities of the investment adviser.

(4) *Private fund assets* means the investment adviser's assets under management attributable to a qualifying private fund.

(5) *Qualifying private fund* means any private fund that is not registered under section 8 of the Investment Company Act of 1940 (15 U.S.C 80a–8) and has not elected to be treated as a business development company pursuant to section 54 of that Act (15 U.S.C. 80a–53).

(6) *Related person* has the meaning set forth in § 275.204–2(d)(7).

(7) *United States* has the meaning set forth in § 230.902(l) of this chapter.

(8) *United States person* means any person that is a "U.S. person" as defined in § 230.902(k) of this chapter, except that any discretionary account or similar account that is held for the benefit of a United States person by a dealer or other professional fiduciary is a United States person if the dealer or professional fiduciary is a related person of the investment adviser relying on this section and is not organized, incorporated, or (if an individual) resident in the United States.

By the Commission.

Dated: November 19, 2010.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–29957 Filed 12–9–10; 8:45 am]

BILLING CODE P

Federal Register

Friday,
December 10, 2010

Part III

Environmental Protection Agency

40 CFR Parts 124, 144, 145, et al.
Federal Requirements Under the Underground Injection Control (UIC) Program for Carbon Dioxide (CO_2) Geologic Sequestration (GS) Wells; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 124, 144, 145, 146, and 147

[EPA–HQ–OW–2008–0390 FRL–9232–7]

RIN 2040–AE98

Federal Requirements Under the Underground Injection Control (UIC) Program for Carbon Dioxide (CO_2) Geologic Sequestration (GS) Wells

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This action finalizes minimum Federal requirements under the Safe Drinking Water Act (SDWA) for underground injection of carbon dioxide (CO_2) for the purpose of geologic sequestration (GS). GS is one of a portfolio of options that could be deployed to reduce CO_2 emissions to the atmosphere and help to mitigate climate change. This final rule applies to owners or operators of wells that will be used to inject CO_2 into the subsurface for the purpose of long-term storage. It establishes a new class of well, Class VI, and sets minimum technical criteria for the permitting, geologic site characterization, area of review (AoR) and corrective action, financial responsibility, well construction, operation, mechanical integrity testing (MIT), monitoring, well plugging, post-injection site care (PISC), and site closure of Class VI wells for the purposes of protecting underground sources of drinking water (USDWs). The elements of this rulemaking are based on the existing Underground Injection Control (UIC) regulatory framework, with modifications to address the unique nature of CO_2 injection for GS. This rule will help ensure consistency in permitting underground injection of CO_2 at GS operations across the United States and provide requirements to prevent endangerment of USDWs in anticipation of the eventual use of GS to reduce CO_2 emissions to the atmosphere and to mitigate climate change.

DATES: This regulation is effective January 10, 2011. For purposes of judicial review, this final rule is promulgated as of 1 p.m., Eastern time on December 24, 2010, as provided in 40 CFR 23.7.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–HQ–OW–2008–0390. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.,* 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 form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the OW Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OW Docket is (202) 566–2426.

FOR FURTHER INFORMATION CONTACT: Mary Rose (Molly) Bayer, Underground Injection Control Program, Drinking Water Protection Division, Office of Ground Water and Drinking Water (MC–4606M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 564–1981; fax number: (202) 564–3756; e-mail address: *bayer.maryrose@epa.gov.* For general information, visit the Underground Injection Control Geologic Sequestration Web site at *http://www.epa.gov/safewater/uic/wells_sequestration.html.*

SUPPLEMENTARY INFORMATION:

I. General Information

This regulation affects owners or operators of injection wells that will be used to inject CO_2 into the subsurface for the purposes of GS. Regulated categories and entities include, but are not limited to, the following:

Category	Examples of regulated entities
Private	Owners or Operators of CO_2 injection wells used for Class VI GS.
Private	Owners or Operators of existing CO_2 injection wells transitioning from Class I, II, or Class V injection activities to Class VI GS.

This table is not intended to be an exhaustive list; rather it provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your facility is regulated by this action, you should carefully examine the applicability criteria found at § 146.81 in the rule section of this action. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

Abbreviations and Acronyms

AoR Area of Review
BLM United States Department of the Interior, Bureau of Land Management
BOEMRE United States Department of the Interior, Bureau of Ocean Energy Management, Regulation and Enforcement
CAA Clean Air Act
CBI Confidential Business Information
CCS Carbon Capture and Storage
CERCLA Comprehensive Environmental Response, Compensation, and Liability Act
CO_2 Carbon Dioxide
DOE United States Department of Energy
ECBM Enhanced Coal Bed Methane
EFAB Environmental Financial Advisory Board
EGR Enhanced Gas Recovery
EIS Environmental Impact Statement
EISA Energy Independence and Security Act of 2007
EO Executive Order
EOR Enhanced Oil Recovery
EPA United States Environmental Protection Agency
ER Enhanced Recovery
FPR Federally Permitted Releases
GAO General Accountability Office
GHG Greenhouse Gas
GS Geologic Sequestration
Gt CO_2 Gigatons CO_2
GWPC Ground Water Protection Council
HHS United States Department of Health and Human Services
ICR Information Collection Request
IOGCC Interstate Oil and Gas Compact Commission
IPCC Intergovernmental Panel on Climate Change
IRS United States Internal Revenue Service
LBNL Lawrence Berkeley National Laboratory
Mg/L Milligrams per liter
MI Mechanical Integrity
MIT Mechanical Integrity Test
MMS United States Department of the Interior, Minerals Management Service
MPRSA Marine Protection, Research, and Sanctuaries Act of 1972
MRA Miscellaneous Receipts Act
MRR Mandatory Reporting Rule
MRV Monitoring, Reporting, and Verification
NAICS North American Industry Classification System
NASA National Aeronautics and Space Administration
NCER National Center for Environmental Research
NDWAC National Drinking Water Advisory Council
NEPA National Environmental Protection Act
NETL National Energy Technology Laboratory
NGO Non-Governmental Organization
NIWG National Indian Work Group
NOAA National Oceanic and Atmospheric Administration
NODA Notice of Data Availability
NOI Notice of Intent

NTC National Tribal Caucus
NTTAA National Technology Transfer and Advancement Act of 1995
NTWC National Tribal Water Council
O&M Operation and Maintenance
OAR Office of Air and Radiation
OCS Outer Continental Shelf
OCSLA Outer Continental Shelf Lands Act
OMB Office of Management and Budget
ORD Office of Research and Development
PBMS Performance Based Measurement System
Pg Petagram
PISC Post-Injection Site Care
PRA Paperwork Reduction Act
PWSS Public Water System Supervision
QASP Quality Assurance and Surveillance Plan
RA Regulatory Alternative
RCRA Resource Conservation and Recovery Act
RCSP Regional Carbon Sequestration Partnership
RFA Regulatory Flexibility Act
RIC Regional Indian Coordinators
SDWA Safe Drinking Water Act
STAR Science To Achieve Results
STC3 State-Tribal Climate Change Council
SWP Southwest Regional Partnership on Carbon Sequestration
TCLP Toxicity Characteristic Leaching Procedure
TDS Total Dissolved Solids
TNW Tangible Net Worth
UIC Underground Injection Control
UICPG#83 Underground Injection Control Program Guidance # 83
UMRA Unfunded Mandates Reform Act
USDW Underground Source of Drinking Water
USGS United States Department of the Interior, United States Geological Survey
WRI World Resources Institute

Definitions

Annulus: The space between the well casing and the wall of the bore hole; the space between concentric strings of casing; the space between casing and tubing.

Area of review (AoR): The region surrounding the geologic sequestration project where USDWs may be endangered by the injection activity. The area of review is delineated using computational modeling that accounts for the physical and chemical properties of all phases of the injected carbon dioxide stream and displaced fluids, and is based on available site characterization, monitoring, and operational data as set forth in § 146.84.

Automatic shut-off device: A valve which closes when a pre-determined pressure or flow value is exceeded. Shut-off devices in injection wells can automatically shut down injection activities preventing an excursion outside of the permitted values.

Ball valve: A valve consisting of a hole drilled through a ball placed in between two seals. The valve is closed when the ball is rotated in the seals so the flow path no longer aligns and is blocked.

Biosphere: The part of the Earth's crust, waters, and atmosphere that supports life.

Buoyancy: Upward force on one phase (*e.g.,* a fluid) produced by the surrounding fluid (*e.g.,* a liquid or a gas) in which it is fully or partially immersed, caused by differences in pressure or density.

Capillary force: Adhesive force that holds a fluid in a capillary or a pore space. Capillary force is a function of the properties of the fluid, and surface and dimensions of the space. If the attraction between the fluid and surface is greater than the interaction of fluid molecules, the fluid will be held in place.

Caprock: See confining zone.

Carbon dioxide plume: The extent underground, in three dimensions, of an injected carbon dioxide stream.

Carbon dioxide (CO_2) stream: Carbon dioxide that has been captured from an emission source (*e.g.,* a power plant), plus incidental associated substances derived from the source materials and the capture process, and any substances added to the stream to enable or improve the injection process. This subpart does not apply to any carbon dioxide stream that meets the definition of a hazardous waste under 40 CFR part 261.

Casing: The pipe material placed inside a drilled hole to prevent the hole from collapsing. The two types of casing in most injection wells are (1) surface casing, the outermost casing that extends from the surface to the base of the lowermost USDW and (2) long-string casing, which extends from the surface to or through the injection zone.

Cement: Material used to support and seal the well casing to the rock formations exposed in the borehole. Cement also protects the casing from corrosion and prevents movement of injectate up the borehole. The composition of the cement may vary based on the well type and purpose; cement may contain latex, mineral blends, or epoxy.

Confining zone: A geologic formation, group of formations, or part of a formation stratigraphically overlying the injection zone(s) that acts as barrier to fluid movement. For Class VI wells operating under an injection depth waiver, confining zone means a geologic formation, group of formations, or part of a formation stratigraphically overlying and underlying the injection zone(s).

Corrective action: The use of Director-approved methods to ensure that wells within the area of review do not serve as conduits for the movement of fluids into USDWs.

Corrosive: Having the ability to wear away a material by chemical action. Carbon dioxide mixed with water forms carbonic acid, which can corrode well materials.

Dip: The angle between a planar feature, such as a sedimentary bed or a fault, and the horizontal plane. The dip of subsurface rock layers can provide clues as to whether injected fluids may be contained.

Director: The person responsible for permitting, implementation, and compliance of the UIC program. For UIC programs administered by EPA, the Director is the EPA Regional Administrator or his/her delegatee; for UIC programs in Primacy States, the Director is the person responsible for permitting, implementation, and compliance of the State, Territorial, or Tribal UIC program.

Ductility: The ability of a material to sustain stress until it fractures.

Enhanced Coal Bed Methane (ECBM) recovery: The process of injecting a gas (*e.g.,* CO_2) into coal, where it is adsorbed to the coal surface and methane is released. The methane can be captured and produced for economic purposes; when CO_2 is injected, it adsorbs to the surface of the coal, where it remains trapped or sequestered.

Enhanced Oil or Gas Recovery (EOR/EGR): Typically, the process of injecting a fluid (*e.g.,* water, brine, or CO_2) into an oil or gas bearing formation to recover residual oil or natural gas. The injected fluid thins (decreases the viscosity) and/or displaces extractable oil and gas, which is then available for recovery. This is also used for secondary or tertiary recovery.

Flapper valve: A valve consisting of a hinged flapper that seals the valve orifice. In Class VI wells, flapper valves can engage to shut off the flow of the CO_2 when acceptable operating parameters are exceeded.

Formation or geological formation: A layer of rock that is made up of a certain type of rock or a combination of types.

Geologic sequestration (GS): The long-term containment of a gaseous, liquid or supercritical carbon dioxide stream in subsurface geologic formations. This term does not apply to CO_2 capture or transport.

Geologic sequestration project: For the purpose of this regulation, an injection well or wells used to emplace a carbon dioxide stream beneath the lowermost formation containing a USDW; or, wells used for geologic sequestration of carbon dioxide that have been granted a waiver of the injection depth requirements pursuant to requirements

at § 146.95; or, wells used for geologic sequestration of carbon dioxide that have received an expansion to the areal extent of an existing Class II EOR/EGR aquifer exemption pursuant to §§ 146.4 and 144.7(d). It includes the subsurface three-dimensional extent of the carbon dioxide plume, associated area of elevated pressure, and displaced fluids, as well as the surface area above that delineated region.

Geophysical surveys: The use of geophysical techniques (*e.g.,* seismic, electrical, gravity, or electromagnetic surveys) to characterize subsurface rock formations.

Injectate: The fluids injected. For the purposes of this rule, this is also known as the CO_2 stream.

Injection zone: A geologic formation, group of formations, or part of a formation that is of sufficient areal extent, thickness, porosity, and permeability to receive CO_2 through a well or wells associated with a geologic sequestration project.

Lithology: The description of rocks, based on color, mineral composition and grain size.

Mechanical integrity (MI): The absence of significant leakage within the injection tubing, casing, or packer (known as internal mechanical integrity), or outside of the casing (known as external mechanical integrity).

Mechanical Integrity Test: A test performed on a well to confirm that a well maintains internal and external mechanical integrity. MITs are a means of measuring the adequacy of the construction of an injection well and a way to detect problems within the well system.

Model: A representation or simulation of a phenomenon or process that is difficult to observe directly or that occurs over long time frames. Models that support GS can predict the flow of CO_2 within the subsurface, accounting for the properties and fluid content of the subsurface formations and the effects of injection parameters.

Packer: A mechanical device that seals the outside of the tubing to the inside of the long string casing, isolating an annular space.

Pinch-out: A situation where a formation thins to zero thickness.

Pore space: Open spaces in rock or soil. These are filled with water or other fluids such as brine (*i.e.,* salty fluid). CO_2 injected into the subsurface can displace pre-existing fluids to occupy some of the pore spaces of the rocks in the injection zone.

Post-injection site care: Appropriate monitoring and other actions (including corrective action) needed following cessation of injection to ensure that USDWs are not endangered, as required under § 146.93.

Pressure front: The zone of elevated pressure that is created by the injection of carbon dioxide into the subsurface. For GS projects, the pressure front of a CO_2 plume refers to the zone where there is a pressure differential sufficient to cause the movement of injected fluids or formation fluids into a USDW.

Saline formations: Subsurface geographically extensive sedimentary rock layers saturated with waters or brines that have a high total dissolved solids (TDS) content (*i.e.,* over 10,000 mg/L TDS).

Site closure: The point/time, as determined by the Director following the requirements under § 146.93, at which the owner or operator of a GS site is released from post-injection site care responsibilities.

Sorption (absorption, adsorption): Absorption refers to gases or liquids being incorporated into a material of a different state; adsorption is the adhering of a molecule or molecules to the surface of a different molecule.

Stratigraphic zone (unit): A layer of rock (or stratum) that is recognized as a unit based on lithology, fossil content, age or other properties.

Supercritical fluid: A fluid above its critical temperature (31.1°C for CO_2) and critical pressure (73.8 bar for CO_2). Supercritical fluids have physical properties intermediate to those of gases and liquids.

Total Dissolved Solids (TDS): The measurement, usually in mg/L, for the amount of all inorganic and organic substances suspended in liquid as molecules, ions, or granules. For injection operations, TDS typically refers to the saline (*i.e.,* salt) content of water-saturated underground formations.

Transmissive fault or fracture: A fault or fracture that has sufficient permeability and vertical extent to allow fluids to move between formations.

Trapping: The physical and geochemical processes by which injected CO_2 is sequestered in the subsurface. Physical trapping occurs when buoyant CO_2 rises in the formation until it reaches a layer that inhibits further upward migration or is immobilized in pore spaces due to capillary forces. Geochemical trapping occurs when chemical reactions between dissolved CO_2 and minerals in the formation lead to the precipitation of solid carbonate minerals.

Underground Source of Drinking Water (USDW): An aquifer or portion of an aquifer that supplies any public water system or that contains a sufficient quantity of ground water to supply a public water system, and currently supplies drinking water for human consumption, or that contains fewer than 10,000 mg/l total dissolved solids and is not an exempted aquifer.

Viscosity: The property of a fluid or semi-fluid that offers resistance to flow. As a supercritical fluid, CO_2 is less viscous than water and brine.

Table of Contents

II. Background

Today's action finalizes minimum Federal requirements under SDWA for injection of CO_2 for the purpose of GS. The purpose of the rulemaking is to ensure that GS is conducted in a manner that protects USDWs from endangerment. GS refers to a suite of technologies that can be deployed to reduce CO_2 emissions to the atmosphere and help mitigate climate change. Due to the large CO_2 injection volumes anticipated at GS projects, the relative buoyancy of CO_2, its mobility within subsurface geologic formations, its corrosivity in the presence of water, and the potential presence of impurities in the captured CO_2 stream, the Agency has determined that tailored requirements, modeled on the existing UIC regulatory framework, are necessary to manage the unique nature of CO_2 injection for GS. This final rule applies to owners or operators of wells that will be used to inject CO_2 into the subsurface for the purpose of GS.

To support today's final regulatory action, EPA proposed *Federal Requirements Under the Underground Injection Control (UIC) Program for Carbon Dioxide (CO_2) Geologic Sequestration (GS) Wells* (73 FR 43492) on July 25, 2008; and the Agency published a supplemental publication, *Federal Requirements Under the Underground Injection Control (UIC) Program for Carbon Dioxide (CO_2) Geologic Sequestration (GS) Wells; Notice of Data Availability and Request for Comment* (74 FR 44802) on August 31, 2009. Final Class VI requirements are informed, in part, by comments and information submitted in response to these publications.

Today's rule defines a new class of injection well (Class VI), along with technical criteria that tailor the existing UIC regulatory framework to address the unique nature of CO_2 injection for GS. It sets minimum technical criteria for Class VI wells to protect USDWs from endangerment, including:

- Site characterization that includes an assessment of the geologic, hydrogeologic, geochemical, and geomechanical properties of the proposed GS site to ensure that Class VI wells are located in suitable formations.
- Computational modeling of the AoR for GS projects that accounts for the physical and chemical properties of the injected CO_2 and is based on available site characterization, monitoring, and operational data.
- Periodic reevaluation of the AoR to incorporate monitoring and operational data and verify that the CO_2 plume and the associated area of elevated pressure are moving as predicted within the subsurface.
- Well construction using materials that can withstand contact with CO_2 over the life of the GS project.
- Robust monitoring of the CO_2 stream, injection pressures, integrity of the injection well, ground water quality and geochemistry, and monitoring of the CO_2 plume and position of the pressure front throughout injection.
- Comprehensive post-injection monitoring and site care following cessation of injection to show the position of the CO_2 plume and the associated area of elevated pressure to demonstrate that neither pose an endangerment to USDWs.
- Financial responsibility requirements to ensure that funds will be available for all corrective action, injection well plugging, post-injection site care (PISC), site closure, and emergency and remedial response.

Today's rule will help ensure consistency in permitting underground injection of CO_2 at GS operations across the United States (US) and provide requirements to prevent endangerment of USDWs in anticipation of the potential role of carbon capture and storage (CCS) in mitigating climate change. Today's action also briefly discusses the relationship between today's rule and other Federal and State activities related to GS and CCS in Sections II.C and D, and E.2.b, and III.F.2.

A. Why is EPA taking this regulatory action?

1. What is GS?

GS is the process of injecting CO_2 into deep subsurface rock formations for long-term storage. It is part of the process known as CCS.

CO_2 is first captured from fossil-fueled power plants or other emission sources. To transport captured CO_2 for GS, operators typically compress CO_2 to convert it from a gaseous state to a supercritical state (IPCC, 2005; IEA, 2008). CO_2 exists as a supercritical fluid at high pressures, and in this state it exhibits properties of both a liquid and a gas. After capture and compression, the CO_2 is delivered to the sequestration site, frequently by pipeline, or alternatively using tanker trucks or ships (WRI, 2007; IEA, 2008).

At the GS site, the CO_2 is injected into deep subsurface rock formations through one or more wells, using technologies developed and refined by the oil, gas, and chemical manufacturing industries over the past several decades. EPA believes that many owners or operators will inject CO_2 in a supercritical state to depths greater than 800 meters (2,645 feet) for the purpose of maximizing capacity and storage.

When injected into an appropriate receiving formation, CO_2 is sequestered by a combination of trapping mechanisms, including physical and geochemical processes (Benson, 2008). Physical trapping occurs when the relatively buoyant CO_2 rises in the formation until it reaches a stratigraphic zone with low permeability (*i.e.,* geologic confining system) that inhibits further upward migration. Physical trapping can also occur as residual CO_2 is immobilized in formation pore spaces as disconnected droplets or bubbles at the trailing edge of the plume due to capillary forces. A portion of the CO_2 will dissolve from the pure fluid phase into native ground water and hydrocarbons. Preferential sorption occurs when CO_2 molecules attach to the surfaces of coal and certain organic-rich shales, displacing other molecules such as methane. Geochemical trapping occurs when chemical reactions between the dissolved CO_2 and minerals in the formation lead to the precipitation of solid carbonate minerals (IPCC, 2005). The timeframe over which CO_2 will be trapped by these mechanisms depends on properties of

the receiving formation and the injected CO_2 stream.

The effectiveness of physical CO_2 trapping is demonstrated by natural analogs in a range of geologic settings where CO_2 has remained trapped for millions of years (Holloway *et al.,* 2007). For example, CO_2 has been trapped for more than 65 million years under the Pisgah Anticline, northeast of the Jackson Dome in Mississippi and Louisiana (IPCC, 2005). Other natural CO_2 sources include the following geologic domes: McElmo Dome, Sheep Mountain, and Bravo Dome in Colorado and New Mexico.

Many of the injection and monitoring technologies that may be applicable to GS are commercially available today and will be more widely demonstrated over the next 10 to 15 years (Dooley *et al.,* 2009). The oil and natural gas industry in the United States has over 35 years of experience of injection and monitoring of CO_2 in the deep subsurface for the purposes of enhancing oil and natural gas production. This experience provides a strong foundation for the injection and monitoring technologies that will be needed for commercial-scale CCS. US and international experience with enhanced recovery (ER) and commercial CCS projects, as well as ongoing research, demonstration, and deployment programs throughout the world, provide critical experience and information to inform the safe injection of CO_2. For additional information about these projects, see section II.E.

Although CCS is occurring now on a relatively small scale, it could play a larger role in mitigating greenhouse gas (GHG) emissions from a wide variety of stationary sources. According to the Inventory of US Greenhouse Gas Emissions and Sinks: 1990–2007, stationary sources contributed 67 percent of the total CO_2 emissions from fossil fuel combustion in 2007 (USEPA, 2008a). These sources represent a wide variety of sectors amenable to CO_2 capture: electric power plants (existing and new), natural gas processing facilities, petroleum refineries, iron and steel foundries, ethylene plants, hydrogen production facilities, ammonia refineries, ethanol production facilities, ethylene oxide plants, and cement kilns. Furthermore, 95 percent of the 500 largest stationary sources are within 50 miles of a candidate GS reservoir (Dooley *et al.,* 2008). Estimated GS capacity in the United States is over 3,500 Gigatons CO_2 (Gt CO_2) (DOE NETL, 2007), although the actual capacity may be lower once site-specific technical and economic considerations are addressed. Even if only a fraction of that geologic capacity is used, CCS would play a sizeable role in mitigating US GHG emissions.

2. Why is GS under consideration as a climate change mitigation technology?

Climate change is happening now, and the effects can be seen on every continent and in every ocean. While certain effects of climate change can be beneficial, particularly in the short term, current and future effects of climate change pose considerable risks to human health and the environment. There is now clear evidence that the Earth's climate is warming (USEPA, 2010):

- Global surface temperatures have risen by 1.3 degrees Fahrenheit (°F) over the last 100 years.
- Worldwide, the last decade has been the warmest on record.
- The rate of warming across the globe over the last 50 years (0.24°F per decade) is almost double the rate of warming over the last 100 years (0.13°F per decade).

Most of this recent warming is very likely the result of human activities. Many human activities release greenhouse gases into the atmosphere (such as the combustion of fossil fuels). The levels of these gases are increasing at a faster rate than at any time in hundreds of thousands of years.

Fossil fuels are expected to remain the mainstay of energy production well into the 21st century, and increased concentrations of CO_2 are expected unless energy producers reduce CO_2 emissions to the atmosphere. For example, CCS would enable the continued use of coal in a manner that greatly reduces the associated CO_2 emissions while other safe and affordable alternative energy sources are developed in the coming decades. The development and deployment of clean coal technologies including CCS will be a key to achieving domestic emissions reductions.

GS is one of a portfolio of options that could be deployed to reduce CO_2 emissions to the atmosphere and help to mitigate climate change. Other options include energy conservation, efficiency improvements, and the use of alternative fuels and renewable energy sources. Ensuring that GS is done in a manner that is protective of USDWs will ensure the safety and efficacy of CO_2 injection for GS.

While predictions about large-scale availability and the rate of CCS project deployment are subject to uncertainty, EPA analyses of Congressional climate change legislative proposals (the American Power Act of 2010 and the American Clean Energy and Security Act H.R. 2454 of 2009, both in the 111th Congress) indicate that CCS has the potential to play a significant role in climate change mitigation scenarios. For example, analysis of the American Power Act indicates that CCS technology could account for 10 percent of CO_2 emission reductions in 2050 (USEPA, 2010f). These results indicate that CCS could play an important role in achieving national greenhouse gas reduction goals.

Today's final rule provides minimum Federal requirements for the injection of CO_2 to protect USDWs from endangerment as this key climate mitigation technology is developed and deployed. It clarifies requirements that apply to CO_2 injection for GS, provides consistency in requirements across the US, and affords transparency about what requirements apply to owners or operators.

3. What are the unique risks to USDWs associated with GS?

Large CO_2 injection volumes associated with GS, the buoyant and mobile nature of the injectate, the potential presence of impurities in the CO_2 stream, and its corrosivity in the presence of water could pose risks to USDWs. The purpose of today's Class VI requirements for GS is to ensure the protection of USDWs, recognizing that an improperly managed GS project has the potential to endanger USDWs. Proper siting, well construction, operation, and monitoring of GS projects are therefore necessary to reduce the risk of USDW contamination.

It is expected that GS projects will inject large volumes of CO_2. These volumes will be much larger than are typically injected in other well classes regulated through the UIC program, and could cause significant pressure increases in the subsurface. Supercritical or gaseous CO_2 in the subsurface is buoyant, and thus would tend to flow upwards if it were to come into contact with a migration pathway, such as a fault, fracture, or improperly constructed or plugged well. However, the pressures induced by injection will also influence CO_2 and mobilized fluids to flow away from the injection well in all directions, including laterally, upwards and downwards. When CO_2 mixes with formation fluids, a percentage of it will dissolve. The resulting aqueous mixture of CO_2 and water will sink due to a density differential between the mixture and the surrounding fluids. CO_2 is also highly mobile in the subsurface (*i.e.,* has a very low viscosity), and, in the presence of water, CO_2 can be corrosive. These properties (of CO_2), as well as the large

volumes that may be injected for GS result in several unique challenges for protection of USDWs in the vicinity of GS sites from endangerment.

While CO_2 itself is not a drinking water contaminant, CO_2 in the presence of water forms a weak acid, known as carbonic acid, that, in some instances, could cause leaching and mobilization of naturally-occurring metals or other contaminants from geologic formations into ground water (*e.g.,* arsenic, lead, and organic compounds). Another potential risk to USDWs is the presence of impurities in the captured CO_2 stream, which may include drinking water contaminants such as hydrogen sulfide or mercury. Additionally, pressures induced by injection may force native brines (naturally occurring salty water) into USDWs, causing degradation of water quality and affecting drinking water treatment processes. Research studies have shown that the potential migration of injected CO_2 or formation fluids into a USDW could cause impairment through one or several of these processes (*e.g.,* Birkholzer *et al.,* 2008a).

Today's action addresses endangerment to USDWs by establishing new minimum Federal requirements for the proper management of CO_2 injection and storage in several program areas, including permitting, site characterization, AoR and corrective action, well construction, mechanical integrity testing (MIT), financial responsibility, monitoring, well plugging, PISC, and site closure. EPA believes that proper GS project management will appropriately mitigate potential risks of endangerment to USDWs posed by injection activities.

B. Under what authority is this rulemaking promulgated?

Today's rule is focused on USDW protection under the authority of Part C of SDWA (SDWA, section 1421 *et seq.,* 42 U.S.C. 300h *et seq.*). Part C of the SDWA requires EPA to establish minimum requirements for State[1] UIC programs that regulate the subsurface injection of fluids onshore and offshore under submerged lands within the territorial jurisdiction of States[2].

SDWA is designed to protect the quality of drinking water sources in the US and prescribes that EPA issue regulations for State UIC programs that contain "minimum requirements for effective programs to prevent underground injection which endangers drinking water sources" (42 U.S.C. 300h *et seq.*). Congress further defined endangerment as follows:

> Underground injection endangers drinking water sources if such injection may result in the presence in underground water which supplies or can reasonably be expected to supply any public water system of any contaminant, and if the presence of such contaminant may result in such system's not complying with any national primary drinking water regulation or may otherwise adversely affect the health of persons (SDWA, section 1421(d)(2)).

Under this authority, the Agency promulgated a series of UIC regulations at 40 CFR parts 144 through 148 for federally approved UIC programs. The chief goal of any Federally approved UIC program (whether administered by a State, Territory, Tribe or EPA) is the protection of USDWs. This includes not only those formations that are presently being used for drinking water, but also those that can reasonably be expected to be used in the future. EPA has defined through its UIC regulations that USDWs are underground aquifers with less than 10,000 milligrams per liter (mg/L) total dissolved solids (TDS) and which contain a sufficient quantity of ground water to supply a public water system (40 CFR 144.3). Section 1421(b)(3)(A) of the SDWA also provides that EPA's UIC regulations shall "permit or provide for consideration of varying geologic, hydrological, or historical conditions in different States and in different areas within a State."

EPA promulgated administrative and permitting regulations, now codified in 40 CFR parts 144 and 146, on May 19, 1980 (45 FR 33290), and technical requirements, in 40 CFR part 146, on June 24, 1980 (45 FR 42472). The regulations were subsequently amended on August 27, 1981 (46 FR 43156), February 3, 1982 (47 FR 4992), January 21, 1983 (48 FR 2938), April 1, 1983 (48 FR 14146), May 11, 1984 (49 FR 20138), July 26, 1988 (53 FR 28118), December 3, 1993 (58 FR 63890), June 10, 1994 (59 FR 29958), December 14, 1994 (59 FR 64339), June 29, 1995 (60 FR 33926), December 7, 1999 (64 FR 68546), May 15, 2000 (65 FR 30886), June 7, 2002 (67 FR 39583), and November 22, 2005 (70 FR 70513).

Under the SDWA, the injection of any "fluid" must meet the requirements of the UIC program. A "fluid" is defined under 40 CFR 144.3 as any material or substance which flows or moves whether in a semisolid, liquid, sludge, gas or other form or state, and includes the injection of liquids, gases, and semisolids (*i.e.,* slurries) into the subsurface. The types of fluids currently injected into wells subject to UIC requirements include: CO_2 for the purposes of enhancing recovery of oil and natural gas, water that is stored to meet water supply demands in dry seasons, and wastes generated by industrial users. CO_2 injected for the purpose of GS is subject to the SDWA.

C. How does this rulemaking relate to the greenhouse gas (GHG) reporting program?

Today's rulemaking under SDWA authority complements the CO_2 Injection and GS Reporting rulemaking (subparts RR and UU) under the Greenhouse Gas Reporting Program's Clean Air Act (CAA) authority developed by EPA's Office of Air and Radiation (OAR).

The CAA defines EPA's responsibilities for protecting and improving the nation's air quality and the stratospheric ozone layer. The GHG Reporting Program requires reporting of GHG emissions and other relevant information from certain source categories in the U.S. The GHG Reporting Program, which became effective on December 29, 2009, includes reporting requirements for facilities and suppliers in 32 subparts. For more detailed background information on the GHG Reporting Program, see the preamble to the final rule establishing the GHG Reporting Program (74 FR 56260, October 30, 2009).

In a separate action being finalized concurrently with this UIC Class VI rulemaking, EPA is amending 40 CFR part 98, which provides the regulatory framework for the GHG Reporting Program, to add reporting requirements covering facilities that conduct GS (subpart RR) and all other facilities that inject CO_2 underground (subpart UU). This data will inform Agency policy decisions under CAA sections 111 and 112 related to the use of CCS for mitigating GHG emissions. In combination with data from other subparts of the GHG Reporting Program, data from subpart UU and subpart RR will allow EPA to track the flow of CO_2 across the CCS system. EPA will be able to reconcile subpart RR data on CO_2 received with CO_2 supply data in order to understand the quantity of CO_2 supply that is geologically sequestered.

Owners or operators subject to today's rule are required to report under subpart RR. Subpart RR establishes reporting requirements for facilities that inject a CO_2 stream for long-term containment into a subsurface geologic formation, including sub-seabed offshore formations. These facilities are required to develop and implement a site-specific

[1] Reference to "States" includes Tribes and Territories pursuant to 40 CFR 144.3.

[2] The Submerged Lands Act and Territorial Submerged Lands Act define the scope of territorial jurisdiction of States and Territories respectively.

Monitoring, Reporting, and Verification (MRV) plan which, once approved by EPA (in a process separate from the UIC permitting process), would be used to verify the amount of CO_2 sequestered and to quantify emissions in the event that injected CO_2 leaks to the surface. For more information on subpart RR, see *http://www.epa.gov/climatechange/emissions/ghgrulemaking.html.*

UIC requirements and Subpart RR requirements: EPA designed the reporting requirements under subpart RR with consideration of the requirements for Class VI well owners or operators in subpart H of part 146 of today's rule. Subpart RR builds on the Class VI requirements outlined in today's rule with the additional goals of verifying the amount of CO_2 sequestered and collecting data on any CO_2 surface emissions from GS facilities as identified under subpart RR of part 98.

The Agency acknowledges that there are similar data elements that must be reported pursuant to requirements in this action and those required to be reported under subpart RR. Specifically, owners or operators subject to both regulations must report the amount (flow rate) of injected CO_2. The Class VI and subpart RR rules differ, not only in purpose but in the specific requirements for the measurement unit and collection/reporting frequency. The UIC program Class VI rule requires that owners or operators report information on the CO_2 stream to ensure appropriate well siting, construction, operation, monitoring, post-injection site care, site closure, and financial responsibility to ensure protection of USDWS. Under subpart RR, owners or operators must report the amount (flow rate) of injected CO_2 for the mass balance equation that will be used to quantify the amount of CO_2 sequestered by a facility.

TABLE II–1—COMPARISON OF REPORTING REQUIREMENTS UNDER SUBPART RR AND SELECT UIC CLASS VI REQUIREMENTS

Reporting requirement	Subpart RR	UIC Class VI
Quantity of CO_2 transferred onsite	Yes	N/A.
Quantity (flow rate) of CO_2 injected	Yes	Yes.
Fugitive and vented emissions from surface equipment	Yes	N/A.
Quantity of CO_2 produced with oil or natural gas (ER)	Yes	N/A.
Percent of CO_2 estimated to remain with the oil and gas (ER)	Yes	N/A.
Quantity of CO_2 emitted from the subsurface	Yes	N/A.
Quantity of CO_2 sequestered in the subsurface	Yes	N/A.
Cumulative mass of CO_2 sequestered in the subsurface	Yes	N/A.
Monitoring plan for detecting air emissions	Yes	Yes.[1]
Monitoring plan for quantifying air emissions	Yes	N/A.

(1) UIC Class VI rule allows for surface air/soil gas monitoring for USDW protection at the discretion of the UIC Director.

EPA requires reporting of other data to satisfy various programmatic needs. See section III of this preamble and associated requirements in subpart H of part 146 and the preamble to subpart RR for additional information on these specific requirements and their purpose. Table II–1 provides a comparison of the major reporting requirements in subpart RR and the extent to which there is overlap with Class VI requirements. For the monitoring plan listed in Table II–1, EPA will accept a UIC Class VI permit to satisfy certain subpart RR MRV plan requirements. However, the reporter must include additional information to outline how monitoring will achieve surface detection and quantification of CO_2. EPA is pursuing ways to better integrate data management between the UIC and GHG Reporting Programs to ensure that data needs are harmonized and the burden to regulated entities is minimized.

D. How does this rulemaking relate to other federal authorities and GS and CCS activities?

While the SDWA provides EPA with the authority to develop regulations to protect USDWs from endangerment, it does not provide authority to develop regulations for all areas related to GS. EPA received a number of public comments on the proposal (73 FR 43492, July 25, 2008) indicating that the Agency should further explore environmental and regulatory issues beyond the scope of the proposed SDWA requirements for underground injection of CO_2 for GS.

In response to comments and as a result of the presidential memo "A Comprehensive Strategy on Carbon Capture and Storage" (*http://www.whitehouse.gov/the-press-office/presidential-memorandum-a-comprehensive-Federal-strategy-carbon-capture-and-storage*), the Agency continues to evaluate areas of potential applicability of other Federal environmental statutes including, but not limited to, the CAA (discussed in section II.C), the Resource Conservation and Recovery Act (RCRA; discussed in section III.F.2), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA; discussed in section III.F.2), and the Marine Protection, Research and Sanctuaries Act (MPRSA; discussed in this section) to various aspects of GS and CCS.

Additionally, EPA and the US Department of Energy (DOE) co-chaired the Interagency Task Force on Carbon Capture and Storage to develop a plan to overcome the barriers to the widespread, cost-effective deployment of CCS within 10 years, with a goal of bringing five to 10 commercial demonstration projects online by 2016. The Task Force's report is available at *http://www.whitehouse.gov/administration/eop/ceq/initiatives/ccs.*

This section clarifies the distinction between today's rulemaking and a number of other Federal rulemakings and initiatives.

National Environmental Protection Act (NEPA): The SDWA UIC program is exempt from performing an Environmental Impact Statement (EIS) under section 101(2)(C) and an alternatives analysis under section 101(2)(E) of NEPA under a functional equivalence analysis. See *Western Nebraska Resources Council* v. *US EPA,* 943 F.2d 867, 871–72 (8th Cir. 1991) and EPA Associate General Counsel Opinion (August 20, 1979).

Marine Protection, Research, and Sanctuaries Act (MPRSA) and London Protocol Implementation: Sub-seabed CO_2 injection for GS may, in certain circumstances, be defined as ocean dumping and subject to regulation under the MPRSA. Application of the MPRSA would entail coordination of the permitting processes under the SDWA and MPRSA, pursuant to MPRSA sections 106(a) and (d). The substantive environmental protection requirements of both statutes would need to be satisfied prior to the

commencement of GS. The MPRSA was enacted in 1972 and implements the London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (the "London Convention"). In 1996, the Protocol to the London Convention (the "London Protocol") was established. The Protocol stipulates that sub-seabed GS may be approved provided that: (1) Disposal is into a sub-seabed geologic formation; (2) the CO_2 stream consists overwhelmingly of CO_2, with only incidental associated substances derived from the source material and capture and sequestration process used; and, (3) no wastes or other matter are added for the purpose of disposal. The US has signed, but has not yet ratified, the Protocol. If the Protocol is ratified, and implementing legislation is enacted, EPA, in conjunction with other Federal agencies, will develop any necessary regulations for implementing the provisions relevant to sub-seabed GS.

Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE) Outer Continental Shelf Lands Act (OCSLA): BOEMRE, formerly the Minerals Management Service (MMS), an agency within the Department of the Interior, administers the OCSLA. As a result of recent OCSLA amendments by the Energy Policy Act of 2005, the OCSLA provides for the grant of leases, easements, or rights-of-way on the outer continental shelf to the extent that an activity "supports production, transportation, or transmission of energy from sources other than oil and gas" and complies with the other provisions of OCSLA section 8(p). Offshore geologic sequestration of CO_2 on the outer continental shelf may be subject to requirements under the OCSLA.

As indicated in the Report of the Interagency Task Force on Carbon Capture and Storage (2010), ratification of the London Protocol and associated amendment of the MPRSA as well as amendment of the Outer Continental Shelf Lands Act (OCSLA) will ensure a comprehensive statutory framework for the storage of CO_2 on the outer continental shelf.

Bureau of Land Management (BLM) Report to Congress: The BLM, another agency within the Department of Interior, was required by Section 714 of the Energy Independence and Security Act (EISA) of 2007 (Pub. L. 110–140, HR 6) to prepare a report outlining a regulatory framework that could be applied to lands managed by the Bureau for natural resource development, chiefly oil and gas. With assistance from both EPA and the DOE, BLM submitted a Report to Congress titled "Framework for Geological Carbon Sequestration on Public Land" (BLM, 2009). This report affirms BLM's role in appropriately managing Federal lands where GS injection projects may be sited. Additionally, the report makes recommendations regarding approaches for effective regulation of such activities under existing Federal authorities including the SDWA and UIC program requirements.

United States Geological Survey (USGS) GS Capacity Methodology: USGS, another agency within the Department of Interior and the primary Federal agency responsible for national geological research, has been an active participant with DOE and EPA at conferences and workshops on CCS. In 2008, in response to the EISA, USGS initiated development of a methodology for estimating the capacity to store CO_2 in geologic formations of the U.S. While previous capacity estimates published by DOE/National Energy Technology Laboratory (NETL) have been broad in scope (*i.e.,* geologic basin-wide), the USGS is focusing on small-scale, refined estimates. In 2009, USGS published a proposed, risk-based methodology for GS capacity estimation. After input from other agencies and stakeholders, USGS released a final report: *A Probabilistic Assessment Methodology for the Evaluation of Geologic Carbon Dioxide Storage* (USGS, 2010). The report is available at *http://pubs.usgs.gov/of/2010/1127/.* USGS continues to work on capacity estimation as required under the EISA.

Internal Revenue Service (IRS) Guidance for Tax Incentives for GS Projects: In response to the Energy Improvement and Extension Act of 2008, IRS, in consultation with EPA and DOE, issued guidance 2009–44 IRB (IRS, 2009) for taxpayers seeking to claim tax credits for capturing and sequestering CO_2 from a qualified facility in the U.S. Under section 45Q of the Internal Revenue Code, a taxpayer who stores CO_2 under the predetermined conditions may qualify for the tax credit ($10 per metric ton of qualified CO_2 at ER projects; $20 per metric ton of qualified CO_2 for non-ER projects). The taxpayer will be responsible for maintaining records for inspection by the IRS and tax credit amounts will be adjusted for inflation for any taxable year beginning after 2009. The Internal Revenue Service published IRS Notice 2009–83 (available at: *http://www.irs.gov/irb/2009–44_IRB/ar11.html#d0e1860*) to provide guidance regarding eligibility for the section 45Q tax credit, computation of the section 45Q tax credit, reporting requirements for taxpayers claiming the section 45Q tax credit, and rules regarding adequate security measures for "secure geological storage of CO_2."

Following publication of today's final Class VI requirements, and as clarified in the guidance, taxpayers claiming the section 45Q tax credit must follow the appropriate UIC requirements (*e.g.,* Class II or Class VI). The guidance also clarifies that taxpayers claiming section 45Q tax credit must follow the GS monitoring, reporting, and verification procedures finalized in the CO_2 Injection and GS Reporting Rule that is part of the GHG Reporting Program.

General Accountability Office Reports on GS and CCS: The United States General Accountability Office (GAO) has prepared, or is in the process of preparing, several reports for Congressional requestors related to the GS of CO_2. In September 2008, GAO (GAO–08–1080) completed a report related to assessing the application of CCS technologies entitled: *Climate Change—Federal Actions Will Greatly Affect the Viability of Carbon Capture and Storage as a Key Mitigation Option* (GAO, 2008). In September 2010, GAO released a report entitled: *Climate Change, A Coordinated Strategy Could Focus Federal Geoengineering Research and Inform Governance Efforts* (GAO–10–903) which describes innovative technologies that may alter climate change, details current research activities, and clarifies how coordination could inform subsequent climate science efforts. GAO initiated another report (GAO–10–675) focused on the methods by which coal-fired power plants may capture carbon emissions. The draft title of that study is: *Coal Power Plants—Opportunities Exist for DOE to Provide Better Information on the Maturity of Key Technologies to Reduce Carbon Emissions* (GAO, 2010).

EPA will continue to coordinate internally and with other Federal agencies to promote consistency in existing and future GS and CCS initiatives.

E. What steps did EPA take to develop this rulemaking?

Today's final rule builds upon longstanding programmatic requirements for underground injection that have been in place since the 1980s and that are used to manage over 800,000 injection wells nationwide. These programmatic requirements are designed to prevent fluid movement into USDWs by addressing the potential pathways through which injected fluids can migrate into USDWs and cause endangerment.

EPA coordinated with Federal and non-Federal entities on GS and CCS to

determine how best to tailor existing UIC requirements to CO_2 for GS.

EPA has taken a number of steps in advance of today's action including: (1) Developing guidance for experimental GS projects; (2) conducting research; (3) conducting stakeholder coordination and outreach; (4) issuing a proposed rulemaking and soliciting and reviewing public comment; and, (5) publishing a Notice of Data Availability (NODA) and Request for Comment to seek additional input on the rulemaking.

1. Developing Guidance for Experimental GS Projects

In 2007, EPA issued technical guidance to assist State and EPA Regional UIC programs in processing permit applications for pilot and other small scale experimental GS projects. The guidance was developed in cooperation with DOE and States, the Ground Water Protection Council (GWPC), the Interstate Oil and Gas Compact Commission (IOGCC), and other stakeholders. *UIC Program Guidance #83: Using the Class V Experimental Technology Well Classification for Pilot Carbon GS Projects* (USEPA, 2007) provides recommendations for permit writers regarding the use of the UIC Class V experimental technology well classification at demonstration GS projects while ensuring USDW protection. Program guidance #83 is available at: *http://www.epa.gov/safewater/uic/wells_sequestration.html.* EPA is preparing additional guidance for owners or operators and Directors regarding the use of Class V experimental technology wells for GS following promulgation of today's rule.

2. Conducting Research

EPA participated in and supported research to inform today's rulemaking including: Supporting and tracking the development and results of national and international CO_2 GS field and research projects; tracking GS-related State regulatory and legislative efforts; and conducting technical workshops on issues associated with CO_2 GS. EPA described these research activities in detail in the proposed rule (July 2008) and the NODA and Request for Comment (August 2009). Additional information pertaining to these activities, which are summarized below, may be found in the rulemaking docket.

a. Tracking the Results of CO_2 GS Research Projects

To inform today's rulemaking, EPA tracked the progress and results of national and international GS research projects. DOE leads field research on GS in the U.S. in conjunction with the Regional Carbon Sequestration Partnerships (RCSPs). Currently, DOE's NETL is developing and/or operating GS projects, a number of which have either completed injection or are in the process of injecting CO_2. The seven RCSPs are conducting pilot and demonstration projects to study site characterization (including injection and confining formation information, core data and site selection information); well construction (well depth, construction materials, and proximity to USDWs); frequency and types of tests and monitoring conducted (on the well and on the project site); modeling and monitoring results; and injection operation (injection rates, pressures, and volumes, CO_2 source and co-injectates). See section II.E.5 for more information on the status of these projects.

Lawrence Berkeley National Laboratory (LBNL) research: EPA and DOE are jointly funding work by the LBNL to study potential impacts of CO_2 injection on ground water aquifers and drinking water sources. The preliminary results have been used to inform today's rulemaking and are described in detail in section II.E.5.

In addition, EPA is funding an analysis by LBNL to integrate experimental and modeling information. LBNL will characterize ground water samples and aquifer mineralogies from select sites in the U.S. and conduct controlled laboratory experiments to assess the potential mobilization of hazardous constituents by dissolved CO_2. These experiments will provide data that will be used to validate previous predictive modeling studies (of aquifer vulnerabilities to potential CO_2 leaks) which may be applied to other GS sites in the future to assess the fate and migration of CO_2-mobilized constituents in ground water.

EPA's Office of Research and Development (ORD) GS research: EPA's ORD engages Agency scientists and engineers in targeted research to provide information to stakeholders and policy makers focused on areas of national environmental concern, including climate change and GS. In addition, ORD's National Center for Environmental Research (NCER) provides extramural research grants for similar investigations through a competitive solicitation process. In the fall of 2009, NCER awarded six Science To Achieve Results (STAR) grants to recipients from major universities and institutions. The awards were granted to projects focused on *Integrated Design, Modeling and Monitoring of GS of Anthropogenic CO_4 to Safeguard Sources of Drinking Water.* Work under the grants began in late 2009 and includes: Evaluating potential impacts on drinking water aquifers of CO_2-rich dissolved brines (Clemson University); reducing the hydrologic and geochemical uncertainties associated with CO_2 sequestration in deep, saline reservoirs (University of Illinois-Urbana); assessing appropriate monitoring approaches at GS sites (University of Texas at Austin); integrating design, monitoring, and modeling of GS to assist in developing a practical methodology for characterizing risks to USDWs (University of Utah); conducting laboratory experiments on shallow aquifer systems to improve our understanding of geochemical and microbiological reactions under low pH/high CO_2 stress (Columbia University); and, developing a set of computational tools to model CO_2 and brine movement associated with GS (Princeton University).

International projects: EPA is tracking the progress of international GS efforts. The largest and longest-running commercial, large-scale projects in operation today include: The Sleipner Project in the Norwegian North Sea (operating since 1996); the Weyburn enhanced oil recovery (EOR) project in Saskatchewan, Canada (operating since 2000); the In Salah Gas Project in Algeria (operating since 2004); and Snohvit, also in offshore Norway in the Barents Sea (operating since 2008). Other projects EPA is tracking include Otway in Australia (operating since 2008); Ketzin in Germany (operating since 2008); and Lacq in France (operating since 2009). EPA is also tracking two projects that are anticipated to begin injection in the near future: CarbFix in Iceland (anticipated to commence injection in 2010) and Gorgon in Australia (anticipated to start in 2014). EPA evaluated available information and experiences gained from these international projects to inform today's action, as appropriate. Additional information on how these and other international projects informed the GS rulemaking is contained in the rulemaking docket (USEPA, 2010a).

b. Tracking State Regulatory Efforts

EPA has made it a priority to engage States and State organizations throughout the rulemaking effort. EPA recognizes the complexity and importance of the States' approaches to managing GS and is aware that States are in various stages of developing statutory frameworks, regulations,

technical guidance, and strategies for addressing CCS and GS. Throughout the regulatory development process for the Class VI regulation, EPA monitored States' regulatory efforts and approaches and sought input on State activities related to addressing GS in the proposed rule and NODA. At present, several States have published GS regulations, while others are investigating and developing strategies to address GS issues (*e.g.,* management of multi-purpose injection wells in oil and gas reservoirs). EPA is tracking regulatory efforts in 18 States: Colorado, Illinois, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Montana, New Mexico, New York, North Dakota, Oklahoma, Pennsylvania, Texas, Utah, Washington, West Virginia, and Wyoming. EPA is considering this information as it develops guidance on the primacy application and approval process for Class VI wells. Information about these State activities may be found in the docket for today's rulemaking.

c. Conducting Technical Workshops on Issues Associated With CO_2 GS

EPA conducted a series of technical workshops with regulators, industry, utilities, and technical experts to identify and discuss questions relevant to the effective management of CO_2 GS. The workshops included the following: Measurement, Monitoring, and Verification (in New Orleans, Louisiana on January 16, 2008); Geological Setting and AoR Considerations for CO_2 GS (in Washington, DC on July 10–11, 2007); Well Construction and MIT (in Albuquerque, New Mexico on March 14, 2007); a State Regulators' Workshop on GS of CO_2 (in collaboration with DOE in San Antonio, Texas on January 24, 2007); an International Symposium on Site Characterization for CO_2 Geological Storage (co-sponsored with LBNL in Berkeley, California on March 20–22, 2006); Risk Assessment for Geologic CO_2 Storage (co-sponsored with the Ground Water Protection Council (GWPC) in Portland, Oregon on September 28–29, 2005); and Modeling and Reservoir Simulation for Geologic Carbon Storage (in Houston, Texas on April 6–7, 2005). Summaries of these workshops are available on EPA's Web site, at *http://www.epa.gov/safewater/uic/wells_sequestration.html.*

3. Conducting Stakeholder Coordination and Outreach

Throughout the rulemaking process, the Agency conducted public workshops and public hearings and consulted with specific groups. EPA representatives also attended meetings to explain the GS rulemaking effort to interested members of the public and stakeholder groups. Meeting information, notes, and summaries are available in the docket for this rulemaking.

Public stakeholder coordination: EPA held public meetings to discuss EPA's rulemaking approach, and consulted with other stakeholder groups including non-governmental organizations (NGOs) to gain an understanding of stakeholder interests and concerns. As part of this outreach, EPA conducted two public stakeholder workshops with participants from industry, environmental groups, utilities, academia, States, and the general public. These workshops were held in December 2007 and February 2008. Workshop summaries are available on EPA's Web site, at *http://www.epa.gov/safewater/uic/wells_sequestration.html.*

EPA also coordinated with GWPC, a State association that focuses on ensuring safe application of injection well technology and protecting ground water resources, and IOGCC, a chartered State association representing oil and gas producing States throughout the rulemaking process. Members of GWPC and IOGCC have specific expertise regulating the injection of CO_2 for the ER of oil and gas. EPA staff attended national meetings and calls of these organizations, as well as those held by technical and trade organizations, NGOs, States, and Tribal organizations to discuss the rulemaking process and GS-specific technical issues.

Consultation with the National Drinking Water Advisory Council (NDWAC): In November 2008, during the public comment period for the proposed rule, EPA met with NDWAC to discuss the proposed rule. At the meeting, EPA presented information about the rulemaking and responded to NDWAC questions and comments. NDWAC members indicated that they understood the role of GS as a climate mitigation tool and encouraged the Agency to continue to ensure the protection of USDWs. Since proposal publication, EPA has met with NDWAC to discuss the status of the rule and answer questions from NDWAC members. The notes of these meetings are in the rulemaking docket.

Consultations with States, Tribes, and Territories: EPA engaged States, Tribes, and Territories early and throughout the rulemaking process to promote open communication and solicit input and feedback on all aspects of the rule.

In April of 2008, prior to publication of the proposed rule, the Agency sent background information about the rulemaking to all Federally-recognized Indian Tribes and invited participation in a dedicated GS consultation effort. EPA Regional Indian Coordinators (RICs), the National Indian Workgroup (NIWG), the National Tribal Caucus (NTC) and the National Tribal Water Council (NTWC) contacts were also invited to participate in the consultation. EPA provided additional rulemaking updates after publication of the proposal with the above-mentioned groups as well as the National Water Program State-Tribal Climate Change Council (STC3). The Fort Peck Assiniboine and Sioux Tribes and the Navajo Nation received UIC program primacy for the Class II program (under section 1425 of the SDWA) during the proposal period for this rule (73 FR 65556; 73 FR 63639). Therefore, the Agency initiated an additional consultation effort with these Tribal co-regulators post-proposal. Summaries of the Tribal consultation conference calls are included in the docket for today's rulemaking.

To ensure that States were consulted, the Agency also sent background information about the rulemaking to States and State organizations including the National Governors' Association, National Conference of State Legislatures, Council of State Governments, and the National League of Cities, among others, and held a dedicated conference call on GS for interested State representatives in April 2008. Additionally, the Agency participated in rulemaking updates, as appropriate, during national meetings and conferences, and gave presentations to State organizations throughout development of the rule. A summary of these efforts is included in the docket for today's rulemaking.

Consultation with the United States Department of Health and Human Services (HHS): Pursuant to SDWA section 1421, EPA consulted with the U.S. Department of Health and Human Services during the rulemaking process. Prior to proposal publication and rule finalization, the Agency provided background information to HHS on the purpose and scope of the rule. In June of 2010, EPA met with HHS to discuss the GS rulemaking process as well as key elements of the proposed rule, the Notice of Data Availability and Request for Comment, and the final rule. During the June 2010 briefing, HHS participants asked about technical criteria for Class VI wells and monitoring technologies applicable to GS projects. The Agency addressed questions and comments and HHS certified that the EPA satisfied consultation obligations under the SDWA. The memo certifying this consultation is available in the docket for today's rulemaking.

4. Proposed Rulemaking

On July 25, 2008, EPA published the proposed *Federal Requirements Under the Underground Injection Control (UIC) Program for Carbon Dioxide (CO_2) Geologic Sequestration (GS) Wells* (73 FR 43492). The Agency proposed a new class of injection well (Class VI), along with technical criteria for permitting Class VI wells that tailored the existing UIC regulatory framework to address the unique nature of CO_2 injection for GS, including:

- Site characterization requirements that would apply to owners or operators of Class VI wells and require submission of extensive geologic, hydrogeologic, and geomechanical information on the proposed GS site to ensure that Class VI wells are located in suitable formations. EPA also proposed that owners or operators identify additional containment/confining zones, if required by the Director, to improve USDW protection.
- Enhanced AoR and corrective action requirements (*e.g.,* plugging abandoned wells) to delineate the AoR for GS projects using computational modeling that accounts for the physical and chemical properties of all phases of the injected CO_2 stream. EPA also proposed that owners or operators periodically reevaluate the AoR around the injection well to incorporate monitoring and operational data and verify that the CO_2 is moving as predicted within the subsurface.
- Well construction using materials that are compatible with and can withstand contact with CO_2 over the life of the GS project.
- Multi-faceted monitoring of the CO_2 stream, injection pressures, the integrity of the injection well, groundwater quality above the confining zone(s), and the position of the CO_2 plume and the pressure front throughout injection.
- Comprehensive post-injection monitoring and site care until it can be demonstrated that movement of the plume and pressure front have ceased and the injectate does not pose a risk to USDWs.
- Financial responsibility requirements to ensure that financial resources would be available for corrective action, injection well plugging, post-injection site care, and site closure, and emergency and remedial response.

Following publication of the proposed rule, EPA initiated a 120-day public comment period, which the Agency extended by 30 days to accommodate requests from interested parties. The public comment period for the proposed rule closed on December 24, 2008. EPA received approximately 400 unique submittals from 190 commenters, including late submissions. Commenters represented States; industry (including the oil and gas industry, electric utilities, and energy companies); environmental groups; and associations (including water organizations and CCS associations).

During the public comment period, the Agency held public hearings on the proposed rule in Chicago, IL on September 30, 2008 and in Denver, CO on October 2, 2008. The two hearings collectively drew approximately 100 people representing non-governmental organizations, academia, industry, and other organizations. At the hearings, 29 people submitted oral comments. Transcripts of the public hearings are in the rulemaking docket (Docket ID Nos. EPA–HQ–OW–2008–0390–0185 and EPA–HQ–OW–2008–0390–0256).

5. Notice of Data Availability and Request for Comment

Based on public comments received on the proposed rule, the Agency identified several topics on which it needed additional public comment. EPA published *Federal Requirements Under the Underground Injection Control (UIC) Program for Carbon Dioxide (CO_2) Geologic Sequestration (GS) Wells; Notice of Data Availability and Request for Comment* (74 FR 44802) on August 31, 2009, to describe additional topics and request comment.

The NODA and Request for Comment presented new data and information from three DOE-sponsored RCSP projects including: (1) The Escatawpa, Mississippi project; (2) the Aneth Field, Paradox Basin project in Southeast Utah; and, (3) the Pump Canyon Site project in New Mexico. Additional information on these projects and responses to comments received on the NODA and Request for Comment are available in the docket for this rulemaking.

The NODA and Request for Comment also provided results of two GS-related modeling studies conducted by the LBNL. The first study (Birkholzer *et al.,* 2008a) focused on the potential for GS to cause changes in ground water quality as a result of potential CO_2 leakage and subsequent mobilization of trace elements such as arsenic, barium, cadmium, mercury, lead, antimony, selenium, zinc, and uranium. Results from this model simulation suggest that if CO_2 were to leak into a shallow aquifer, mobilization of lead and arsenic could occur, causing increases in the concentration of these trace elements in ground water and potential for drinking water standard exceedances.

The second study modeled a theoretical scenario of GS in a sedimentary basin to demonstrate the potential for basin-scale hydrologic impacts of CO_2 storage (Birkholzer *et al.,* 2008b). Model results indicate that basin-wide pressure influences may be large and that predicted pressure changes could move saline water upward into overlying aquifers if localized pathways, such as conductive faults, are present. This example illustrates the importance of basin-scale evaluation of reservoir pressures and far-field pressures resulting from CO_2 injection.

Additional information on LBNL's research and responses to comments received on the NODA and Request for Comment are available in the docket for this rulemaking.

The full publications on the LBNL research are also available on LBNL's Web site at *http://esd.lbl.gov/GCS/projects/CO2/index_CO2.html.*

Lastly, the NODA and Request for Comment presented an alternative to address public comments and concerns about the proposed injection depth requirements for Class VI wells. Section III.D of today's action contains more information on this subject.

Following publication of the NODA and Request for Comment, EPA initiated a 45-day public comment period, which closed on October 15, 2009. EPA received 67 unique submittals from 64 commenters, many of whom commented on the proposed rule. The Agency also held a public hearing in Chicago, IL on September 17, 2009. Six people, representing the oil and gas industry, electric utilities, water associations, and academia attended the hearing. Two attendees submitted oral comments at the hearing. A transcript of the public hearing is in the rulemaking docket (EPA–HQ–OW–2008–0390–391).

F. How will EPA's adaptive rulemaking approach incorporate future information and research?

In the preamble to the proposed rule (73 FR 43492), EPA explained the need for and merits of using an adaptive approach to regulating injection of CO_2 for GS at 40 CFR parts 144 through 146. The Agency indicated that this approach would provide regulatory certainty to owners or operators, promote consistent permitting approaches, and ensure that Class VI permitting Agencies are able to meet current and future demand for Class VI permits. The proposal also clarified that, as the Agency reviewed public comments, it would continue to evaluate ongoing research and demonstration projects and gather other

relevant information as needed to make refinements to the rulemaking process.

Many commenters strongly supported an adaptive, flexible approach and suggested that the Agency initially take a conservative approach in developing the UIC–GS requirements, with a provision for periodic review of the rule to allow EPA to incorporate operational experience as it is gained. These commenters also urged EPA not to wait until the completion of DOE's pilot projects before finalizing the GS rule, expressing a need for early regulatory certainty.

Some commenters expressed concerns about an adaptive approach, stating that it could lead to regulatory uncertainty because modifications could be made after the initial regulations are promulgated. One commenter said that GS will not scale-up rapidly, leaving ample time to study and assess possible regulatory approaches.

EPA agrees with commenters who supported an adaptive approach to the UIC rulemaking for GS. Additionally, the Agency believes that there is a need to have regulations in place during the earliest phases of GS deployment. Finalizing today's requirements will allow early Class VI wells to be permitted in a manner that addresses the unique characteristics of CO_2 injection for GS and allow early projects to demonstrate successful confinement of CO_2 in a manner that is protective of USDWs. EPA also believes that an adaptive approach enables the Agency to make changes to the program as necessary to incorporate new research, data, and information about GS and associated technologies (*e.g.,* modeling and well construction). This new information may increase protectiveness, streamline implementation, reduce costs, or otherwise inform the requirements for GS injection of CO_2. The Agency plans, every six years, to review the rulemaking and data on GS projects to determine whether the appropriate amount and types of information and appropriate documentation are being collected, and to determine if modifications to the Class VI UIC requirements are appropriate or necessary. This time period is consistent with the periodic review of National Primary Drinking Water Standards under Section 1412 of SDWA.

G. How does this action affect UIC program implementation?

Under section 1421(b), the SDWA mandates that EPA develop minimum Federal requirements for State UIC primary enforcement responsibility, or primacy, to ensure protection of USDWs. In order to implement the UIC program, States must apply to EPA for primacy approval. In the primacy application, States must demonstrate: (1) State jurisdiction over underground injection projects; (2) that their State regulations are at least as stringent as those promulgated by EPA (*e.g.,* permitting, inspection, operation, monitoring, and recordkeeping requirements); and (3) that the State has the necessary administrative, civil, and criminal enforcement penalty remedies pursuant to 40 CFR 145.13 authorities.

Once an application for primacy is received, the EPA Administrator must review and approve or disapprove the State's primacy application. EPA may also choose to approve or disapprove part of the application. This determination is based on EPA's mandate under the SDWA as implemented by UIC regulations established in 40 CFR part 144 through 146, and must be made by a rulemaking. Most States were authorized with full or partial primacy for the UIC program in the early 1980s; recently, two Tribes received primacy for the Class II program under section 1425 of the SDWA. EPA directly implements the UIC program in States that have not applied for primacy and States that have primacy for part of the UIC program. A complete list of the primacy agencies in each State is available at *http://www.epa.gov/safewater/uic/primacy.html.*

EPA may approve primacy for States as authorized by sections 1422 and 1425 of the SDWA. There are fundamental differences between how these two statutory provisions are applied. Under section 1422, States must demonstrate that their proposed UIC program meets the statutory requirements under section 1421 and that their program contains requirements that are at least as stringent as the minimum Federal requirements provided for in the UIC regulations to ensure protection of USDWs. Alternatively, States seeking primacy under section 1425 have the option to demonstrate that their Class II program is an "effective" program to prevent underground injection that endangers USDWs. Typically, these States follow the broader elements of a State program submission established by EPA in 40 CFR part 145, subpart C. In today's final rule, and in accordance with the SDWA section 1422, all Class VI State programs must be at least as stringent as the minimum Federal requirements finalized in today's rule.

UIC program implementation: Authority to administer a State UIC program may be granted to one or more State agencies. States may choose to include in their UIC primacy application a program that is administered by multiple agencies. Under 40 CFR 145.23, in order for more than one agency to be responsible for administration of the program, each agency must have Statewide jurisdiction over the class of injection activities for which they are responsible. Some States administer their program for all injection well classes through a single agency, whereas other States elect to divide the program between agencies. For example, in most States, the Class II program is run by an oil and gas agency and other well classes are run by a State environmental agency (*e.g.,* the Oklahoma Corporation Commission oversees Class II wells in the State, and the Oklahoma Department of Environmental Quality oversees other well classes). Additionally, several States allow their oil and gas agencies to administer their UIC program for specific well classes or subclasses provided they meet all minimum Federal requirements (*e.g.,* the Railroad Commission of Texas oversees Class III brine-mining wells and Class V geothermal wells in Texas). EPA believes that retaining this flexibility for States to identify the appropriate agency to oversee Class VI wells will address commenters' concerns that States should be afforded the opportunity to determine which agency should oversee Class VI wells, and recognizes the existing expertise of both State oil and gas agencies and deep well injection programs, generally overseen by State environmental agencies.

Proposed approach for Class VI primacy and public comment: In the proposed rule, EPA emphasized that States, Territories, and Tribes seeking primacy for Class VI wells would be required to demonstrate that their regulations are at least as stringent as the proposed minimum Federal requirements. Recognizing that some States may wish to obtain primacy for only Class VI wells, the Agency requested comment on the merits and possible disadvantages of allowing primacy approval for Class VI wells independent of other well classes.

Commenters representing States, industry, various trade associations, and electric utilities supported the concept of allowing independent primacy for Class VI wells. Commenters asserted that States have the best knowledge of regional geology and areas in need of special protection, along with necessary pre-existing relationships with the regulated community. Commenters also agreed with EPA's statement in the proposal that independent primacy would encourage States to develop a

comprehensive regulatory program for all aspects of CCS (noting that some States have already begun legislative efforts that are wider in scope than the proposed Federal rule) and facilitate the rapid deployment of commercial-scale CCS projects. They also asserted that this approach is acceptable under the UIC program's statutory authority.

Independent primacy for Class VI wells: Historically, EPA has not accepted independent UIC primacy applications from States for individual well classes under section 1422 of SDWA, as a matter of policy. For example, if a State wanted primacy for Class I wells, the State would also need to accept primacy for all other well classes under section 1422 of SDWA (See section II.H for a description of well classifications). This policy has been in place since the initiation of the Federal UIC program and was intended to encourage States to take full primacy for UIC programs, avoid Federal duplication of efforts, and provide for administrative efficiencies.

However, based on comments on the UIC–GS proposed rule and discussions with States and stakeholders, the Agency will allow independent primacy for Class VI wells under § 145.1(i) of today's rule, and will accept applications from States for independent primacy under section 1422 of the SDWA for managing UIC–GS projects under Class VI. EPA believes that States are in the best position to implement UIC–GS programs, and by allowing for independent Class VI primacy, EPA encourages States to take responsibility for implementation of Class VI regulations. The Agency's UIC program believes that this may, in turn, help provide for a more comprehensive approach to managing GS projects by promoting the integration of GS activities under SDWA into a broader framework for States managing issues related to CCS that may lie outside the scope of the UIC program or other EPA programs. This would harness the unique efficiencies States can offer to promote adoption of GS technology that incorporates issues in the broader scope of CCS, while ensuring that USDWs are protected through the UIC regulatory framework. Allowing States to apply only for Class VI primacy will also shorten the primacy approval process.

EPA's willingness to accept independent primacy applications for Class VI wells applies only to Class VI well primacy and does not apply to any other well class under SDWA section 1422 (*i.e.,* I, III, IV, and V). EPA believes that this shift in its longstanding policy of discouraging "partial" or "independent" primacy is warranted to encourage States to seek primacy for Class VI wells and allow States to address the unique challenges that would otherwise be barriers to comprehensive and seamless management of GS projects.

The Agency recognizes that some States are currently addressing off-facility surface access for corrective action and monitoring, pore space ownership and trespass issues, and amalgamation of correlative rights in depleted reservoirs for GS. Additionally, because GS technologies are an important component of CCS, the Agency considers the allowance for independent Class VI primacy important and unique to this well class. This decision is expected to ensure that the Class VI primacy application process does not serve as a barrier to GS and CCS deployment. EPA will not consider applications for independent primacy for any other injection well class under SDWA section 1422 other than Class VI, nor will the Agency accept the return of portions of existing 1422 programs. EPA will continue to process primacy applications for Class II injection wells under the authority of section 1425 of the SDWA.

Today's final rule includes a new subparagraph § 145.1(i) that establishes EPA's intention to allow for independent primacy for Class VI wells. The Agency is developing implementation materials to provide guidance to States applying for Class VI primacy under section 1422 of SDWA and to assist UIC Directors evaluating permit applications.

Effective date of the GS rule and Class VI primacy application and approval timeframe: Today's rule, at § 145.21(h), establishes a Federal Class VI primacy program in States that choose not to seek primacy for the Class VI portion of the UIC program within the approval timeframe established under section 1422(b)(1)(B) of the SDWA. Under § 145.21(h), States will have 270 days following final promulgation of the GS rule September 6, 2011 to submit a complete primacy application that meets the requirements of §§ 145.22 or 145.32. Pursuant to the SDWA, this 270-day timeframe allows States that seek primacy for the new Class VI wells a reasonable amount of time to develop and submit their application to EPA for approval. EPA will assist States in meeting the 270-day deadline by developing implementation materials for States and conducting training on the process of applying for and receiving primacy for Class VI wells under section 1422 of SDWA. EPA will also assist States as they develop GS regulations that are the equivalent of minimum Federal requirements and plans to use an expedited process for approving primacy.

Although the SDWA allows the Administrator to extend the date for submission of an application for up to 270 additional days for good cause, the Agency has determined that it will not provide for an extension for States applying for Class VI primacy. Instead, EPA believes that, in light of national priorities for promoting climate change mitigation strategies and Administration priorities for developing and deploying CCS projects in the next few years, it is important to have enforceable Class VI regulations in place nationwide as soon as possible.

If a State does not submit a complete application during the 270-day period, or EPA has not approved a State's Class VI program submission, then EPA will establish a Federal UIC Class VI program in that State after the 270-day application period closes. This will ensure that tailored State- or Federally-enforceable requirements applicable to GS projects will be in place nationwide as soon as possible after rule finalization. Further, a clear, nationally-consistent deadline will avoid potential confusion that may arise if some States have approved Class VI programs and others do not. EPA will publish a list of the States where the Federal Class VI requirements have become applicable in the **Federal Register** and update 40 CFR part 147. It is important to note that, although the Agency is not accepting extension requests, a State may, at any time in the future, apply for primacy for the new GS requirements following establishment of a Federal Class VI UIC program. If a State receives approval after the 270-day deadline (for a primacy application submitted either before or after the deadline), EPA will publish a subsequent notice of the approval as required by the SDWA; at that point, the State, rather than EPA, will implement the Class VI program.

The Agency clarifies that States may not issue Class VI UIC permits until their Class VI UIC programs are approved. During the first 270-days and prior to EPA approval of a Class VI primacy application, States without existing SDWA section 1422 primacy programs must direct all Class VI GS permit applications to the appropriate EPA Region. EPA Regions will issue permits using existing authorities and well classifications (*e.g.,* Class I or Class V), as appropriate.

States with existing UIC primacy for all non-Class VI well classes under section 1422 that receive Class VI permit applications within the first 270

days after promulgation of the final rule may consider using existing authorities (*e.g.,* Class I or Class V), as appropriate, to issue permits for CO_2 injection for GS while EPA is evaluating their Class VI primacy application. EPA encourages States to issue permits that meet the requirements for Class VI wells to ensure that Class V and Class I wells previously used for GS can be re-permitted as Class VI wells that meet the protective requirements of today's final rule within one year of promulgation of the Class VI regulation, pursuant to requirements at § 146.81(c), with minimal additional effort on the part of the owner or operator or the Director.

After the 270-day deadline, and until a State has an approved Class VI program, EPA will establish and implement a Class VI program. Therefore, all permit applications in States without Class VI programs must be directed to the appropriate EPA Region in order for a Class VI permit to be issued. In States where EPA directly implements the Class VI program, Class I permits for CO_2 injection for GS may no longer be issued and Class V permits may only be issued to projects eligible for such permits (see discussion of the relationship between Class V and Class VI permits in Section II.H).

Streamlining the primacy approval process: In an effort to support States with the Class VI primacy application process and respond to comments received during the rulemaking process, today's rule includes new regulatory language at §§ 145.22 and 145.23 to streamline and clarify the process for submission of Class VI primacy applications and address the unique aspect of Class VI injection operations. For example, EPA is allowing the electronic submission of required primacy application information (*e.g.,* letter from the Governor, program description, Attorney General's statement, or Memorandum of Agreement). The Agency is also allowing the use of existing reporting form(s), *e.g.,* existing UIC program forms or State equivalents, for Class VI wells, as appropriate.

EPA will evaluate the efficiency and effectiveness of electronic submittals as part of the adaptive approach to the GS rulemaking and determine whether electronic submittal may be applicable to other UIC primacy applications submitted to EPA for review and approval under sections 1422 and 1425 of SDWA. Additionally, the Agency is developing a Class VI Program Primacy Application and Implementation Manual that describes, for States, the process of applying for and receiving primacy for Class VI wells under section 1422 of SDWA. The Manual will also provide tools designed to assist States with the development of their primacy application and UIC Directors with evaluating permit application information.

Unique requirements for Class VI permit applications: To address the unique nature of Class VI injection operations, today's rule at § 145.23(f) includes new language describing the requirements for Class VI State program descriptions. Specifically, § 145.23(f)(1) requires States to include a schedule for issuing Class VI permits for wells within the State that require them within two years after receiving program approval from EPA, and § 145.23(f)(2) requires States to include their permitting priorities, as well as the number of permits to be issued during the first two years of program operation. In addition, today's rule at § 145.23(f)(4) requires the Director of Class VI programs approved before December 10, 2011, to provide a description of the process for notifying owners or operators of any Class I wells previously permitted for the purpose of geologic sequestration or Class V experimental technology wells no longer being used for experimental purposes that will continue injection of carbon dioxide for the purpose of GS that they must apply for a Class VI permit pursuant to requirements at § 146.81(c) within one year of December 10, 2011. § 145.23(f)(4) also requires the Director of a Class VI Program approved after December 10, 2011, to provide a description of the process for notifying owners or operators of any Class I wells previously permitted for the purpose of geologic sequestration or Class V experimental technology wells no longer being used for experimental purposes that will continue injection of carbon dioxide for the purpose of GS or Class VI wells permitted by EPA that they must apply to the State program for a Class VI permit pursuant to requirements at § 146.81(c) within one year of Class VI program approval. EPA is committed to working closely with and receiving input from States during all stages of the GS permitting process, irrespective of primacy status. Close coordination during program implementation will minimize effort and burden on States and owners and operators and streamline the administrative process for transferring permits or permit applications when primacy is granted. These requirements are tailored for Class VI wells to ensure that States are prepared to review Class VI permit applications as soon as possible following program approval; and, in light of the national priorities to promote climate change mitigation strategies, such modifications of § 145.23 may help ensure expeditious implementation of Class VI requirements across the country.

Today's rule, at § 145.23(f)(13), requires States to describe in their primacy application procedures for notifying any States, Tribes, and Territories of Class VI permit applications where the AoR is predicted to cross jurisdictional boundaries and for documenting this consultation. This new requirement addresses comments on the proposed rule and NODA and Request for Comment that Class VI operations are likely to have larger AoRs that may cross jurisdictional boundaries and necessitate trans-boundary coordination. At § 145.23(f)(9), the final rule also requires States receiving Class VI program approval to incorporate information related to any EPA approved exemptions expanding the areal extent of an existing Class II EOR/EGR aquifer exemption for Class VI injection. This requirement complements aquifer exemption requirements promulgated under today's rule and ensures that State programs incorporate information regarding the specific location (and any associated supporting data) into their program descriptions.

The Agency plans to review these requirements as part of the adaptive rulemaking approach to ensure that the tailored requirements are appropriate to ensure USDW protection from endangerment.

H. How does this rule affect existing injection wells under the UIC program?

Today's rulemaking establishes a new class of injection well, Class VI, for GS projects because CO_2 injection for long-term storage presents several unique challenges that warrant the designation of a new well type.

When EPA initially promulgated its UIC regulations in 1980, the Agency defined five classes of injection wells at 40 CFR 144.6, based on similarities in the fluids injected, construction, injection depth, design, injection practices, and operating techniques. These five well classes are still in use today and are described below.

- Class I wells inject industrial non-hazardous liquids, municipal wastewaters, or hazardous wastes beneath the lowermost USDW. These wells are among the deepest of the injection wells and are subject to technically sophisticated construction and operation requirements.
- Class II wells inject fluids (*e.g.,* CO_2; brine) in connection with conventional

oil or natural gas production, enhanced oil and gas production, and the storage of hydrocarbons that are liquid at standard temperature and pressure.

- Class III wells inject fluids associated with the extraction of minerals, including the mining of sulfur and solution mining of minerals (*e.g.,* uranium).
- Class IV wells inject hazardous or radioactive wastes into or above USDWs. Few Class IV wells are in use today. These wells are banned unless authorized under a Federal or State-approved ground water remediation project.
- Class V includes all injection wells that are not included in Classes I–IV. In general, Class V wells inject non-hazardous fluids into or above USDWs; however, there are some deep Class V wells that are used to inject below USDWs. This well class includes Class V experimental technology wells including those permitted as GS pilot projects.

The Agency acknowledges that owners or operators of wells regulated under existing well classifications may want to change the purpose of their injection activity. The following sections describe the applicability of today's rule to owners or operators of existing wells and considerations for Directors evaluating existing wells that may be re-permitted as Class VI wells.

Class I wells: Wells previously permitted as Class I wells for GS, including wells permitted prior to rule promulgation and wells permitted during the 270-day period after rule promulgation, must apply for Class VI permits within one year of promulgation by December 10, 2011, pursuant to requirements at § 146.81(c). The Agency anticipates that permit applications (*e.g.,* Class I or Class V) developed for CO_2 GS following publication of today's rule will follow the Class VI requirements and be designed to facilitate efficient re-permitting as Class VI wells. Such forethought will allow new Class VI permits to be issued with minimal additional effort on the part of the owner or operator and the Director. Additional information on Class V experimental technology wells is discussed in this section. For additional information on permitting authorities and UIC program implementation, see section II.G.

Class II CO_2 injection wells designated for enhanced recovery: Enhanced oil recovery (EOR) and enhanced gas recovery (EGR) technologies, collectively referred to as enhanced recovery (ER), are used in oil and gas reservoirs to increase production. Injection of CO_2 is one of several ER techniques that have successfully been used to boost production efficiency of oil and gas by re-pressurizing the reservoir, and in the case of oil, by also increasing mobility. Injection wells used for ER are regulated through the UIC Class II program.

CO_2 currently injected for ER in the U.S. comes from both natural and anthropogenic sources, which provide 79 percent and 21 percent, respectively, of CO_2 supply (DOE NETL, 2008). Natural CO_2 sources consist of geologic domes in Colorado, New Mexico, and Mississippi. Anthropogenic sources of CO_2 supplied for ER today include natural gas processing, ammonia and fertilizer production, and coal gasification facilities.

Historically, CO_2 purchases comprise about 33 to 68 percent of the cost of a CO_2-ER project (EPRI, 1999). For this reason, CO_2 injection volumes are carefully tracked at ER sites. CO_2 recovered from production wells during ER is recycled (*i.e.,* separated and re-injected), and at the conclusion of an ER project as much CO_2 as is feasible is recovered and transported to other ER facilities for re-use. However, a certain amount of CO_2 remains underground. Current Class II ER requirements do not require tracking and monitoring of the injectate; therefore, the migration and fate of the unrecovered CO_2 is not documented.

As of 2008, there were 105 CO_2-EOR projects within the US (Oil and Gas Journal, 2008). The majority (58) of these projects are located in Texas, and the remaining projects are located in Mississippi, Wyoming, Michigan, Oklahoma, New Mexico, Utah, Louisiana, Kansas, and Colorado. CO_2-EOR projects recovered 323,000 barrels of oil per day in 2008, 6.5 percent of total domestic oil production. A total of 6,121 CO_2 injection wells among 105 projects were used to inject 51 million metric tons of CO_2 (Oil and Gas Journal, 2008; EIA, 2009; DOE NETL, 2008). Compared to CO_2-EOR, CO_2-EGR remains largely in the development stage (*e.g.,* Oldenburg *et al.,* 2001).

Future deployment of CCS may fundamentally alter CO_2-ER in the U.S. DOE anticipates that many early GS projects will be sited in depleted or active oil and gas reservoirs because the reservoirs have been previously characterized for hydrocarbon recovery and may have suitable infrastructure (*e.g.,* wells, pipelines, etc.) in place. Additionally, oil and gas fields now considered to be "depleted" may resume operation because of increased availability and decreased cost of anthropogenic CO_2.

EPA believes that if the business model for ER changes to focus on maximizing CO_2 injection volumes and permanent storage, then the risk of endangerment to USDWs is likely to increase. This is because reservoir pressure within the injection zone will increase as CO_2 injection volumes increase. Elevated reservoir pressure is a significant risk driver at GS sites, as it may cause unintended fluid movement and leakage into USDWs that may cause endangerment. Additionally, increasing reservoir pressure within the injection zone as a result of GS will stress the primary confining zone (*i.e.,* geologic caprock) and well plugs to a greater degree than during traditional ER (*e.g.,* Klusman, 2003). Finally, active and abandoned well bores are much more numerous in oil and gas fields than other potential GS sites, and under certain circumstances could serve as potential leakage pathways. For example, in typical productive oil and gas fields, a CO_2 plume with a radius of about 5 km (3.1 miles) may come into contact with several hundred producing or abandoned wells (Celia *et al.,* 2004).

EPA proposed that the Class VI GS requirements would not apply to Class II ER wells as long as any oil or gas production is occurring, but would apply only after the oil and gas reservoir is depleted. Under the proposed approach, Class II wells could be used for the injection of CO_2, as long as oil production is simultaneously occurring from the same formation. The preamble to the proposal sought comment on the merits of this approach.

Some commenters agreed with the proposed approach while others suggested that the approach did not adequately address risks posed to USDWs by injection operations transitioning from production to long-term storage of CO_2. A majority of commenters requested that EPA develop specific criteria for this transition.

Consistent with these comments, EPA determined that owners or operators of wells injecting CO_2 in oil and gas reservoirs for GS where there is an increased risk to USDWs compared to traditional Class II operations using CO_2 should be required to obtain a Class VI permit, with some special consideration for the fact that they are transitioning from a well not originally designed to meet Class VI requirements. Additionally, EPA recognizes that further clarification is needed to sufficiently characterize the factors that lead to increased risks and warrant conversion from Class II to Class VI.

Therefore, today's rule clarifies that Class VI requirements apply to any CO_2 injection project (regardless of formation

type) when there is an increased risk to USDWs as compared to traditional Class II operations using CO_2. Traditional ER projects are not impacted by this rulemaking and will continue operating under Class II permitting requirements. EPA recognizes that there may be some CO_2 trapped in the subsurface at these operations; however, if there is no increased risk to USDWs, then these operations would continue to be permitted under Class II.

EPA has developed specific, risk-based factors to be considered by the Director in making the determination to apply Class VI requirements to transitioning wells. EPA believes this approach provides the necessary, site-specific flexibility while providing appropriate protection of USDWs from endangerment. These risk-based factors for determining whether Class VI requirements apply are finalized in today's rule at § 144.19 and include: (1) Increase in reservoir pressure within the injection zone; (2) increase in CO_2 injection rates; (3) decrease in reservoir production rates; (4) the distance between the injection zone and USDWs; (5) the suitability of the Class II AoR delineation; (6) the quality of abandoned well plugs within the AoR; (7) the owner's or operator's plan for recovery of CO_2 at the cessation of injection; (8) the source and properties of injected CO_2; and (9) any additional site-specific factors as determined by the Director. Any single factor may not necessarily result in a determination that a Class II owner or operator must apply for a Class VI permit; rather, all factors must be evaluated comprehensively to inform a Director's (or owners' or operators') decision. The Agency is also developing guidance to support Directors and owners or operators in evaluating these factors and making the determination on whether to apply Class VI requirements.

Owners and operators of Class II wells that are injecting carbon dioxide for the primary purpose of long-term storage into an oil and gas reservoir must apply for and obtain a Class VI permit where there is an increased risk to USDWs compared to traditional Class II operations using CO_2. EPA expects that, in most cases, the ER owners or operators will use these same factors to evaluate whether there is an increased risk to USDWs. When an increased risk is identified, the owner or operator must notify the Director of their intent to seek a Class VI permit. Today's rule clarifies that the Director has the discretion to make this determination in the absence of an owner or operator notification and, in doing so, require the owner or operator to apply for and obtain a Class VI permit in order to continue injection operations (§ 144.19(a)). In the event that an injection operation makes changes to the ER operation such that the increased risk to USDWs warrants transition to Class VI and does not notify the Director, the owner or operator may be subject to specific enforcement and compliance actions to protect USDWs from endangerment, including corrective action within the AoR, cessation of injection, monitoring, and/or PISC under sections 1423 and 1431 of the SDWA.

The Agency acknowledges that some stakeholders and commenters are concerned about the burden that a transition may impose on existing programs. EPA believes that transition to Class VI is necessary to ensure USDW protection but is allowing the constructed components of Class II ER wells to be grandfathered into the Class VI permitting regime at the discretion of the Director and pursuant to requirements at § 146.81(c), in order to facilitate the transition from Class II to Class VI wells without undue regulatory burden. As outlined in section II.G, today's rule clarifies that State oil and gas agencies that oversee the Class II program in many States may assume regulatory authority for Class VI by either a memorandum of understanding with the Class VI primacy agency, or by obtaining primacy for the entire Class VI program as long as it is identified in the State's program description under § 145.23. In this way, the same agency may oversee the Class II and Class VI programs, streamlining the transition process. State primary enforcement responsibility is discussed further in section II.G.

As part of EPA's adaptive rulemaking approach for Class VI wells, the Agency will collect data on transitioning Class II projects to determine whether the factors at § 144.19 adequately address risks to USDWs and whether additional or amended Federal regulations or other actions are warranted for transitioning wells from ER to long-term storage of CO_2.

Class V Experimental Technology Wells: Prior to finalization of the Class VI regulation, a number of CO_2 injection projects were permitted as Class V experimental technology wells for the purpose of testing GS technology in the U.S. Wells permitted under this classification are designed for the purpose of testing new technology that is of an experimental nature. EPA understands that some of the wells previously permitted as Class V experimental technology wells may no longer be used for this purpose. GS wells that are not being used for experimental purposes must be re-permitted as Class VI wells and will be subject to today's requirements.

In the preamble to the proposed rule, EPA described UIC Program Guidance #83 *(Using the Class V Experimental Technology Well Classification for Pilot GS Projects)* and the use of the Class V experimental technology well classification (see section II.E.1 of today's notice). EPA stated that the guidance will continue to apply to experimental projects (as long as the projects continue to qualify as experimental technology wells under the guidelines described in the guidance) and to future projects that are experimental in nature.

Several commenters on the proposed rule asked EPA to clarify the point at which Class V experimental technology wells should be re-permitted as Class VI wells. Today's rule, at § 146.81(c), requires owners or operators of Class V experimental technology wells no longer being used for experimental purposes (*e.g.,* wells that will continue injection of CO_2 for the purpose of GS) to apply for Class VI permits within one year of rule promulgation and to comply with the requirements of today's rule. However, EPA is allowing the constructed components of Class V experimental technology wells to be grandfathered into the Class VI permitting regime at the discretion of the Director and pursuant to requirements at § 146.81(c).

Following promulgation of today's rule, only GS projects of an experimental nature (*i.e.,* to test GS technologies and collect data) will continue to be classified, permitted, and regulated as Class V experimental technology wells; and Class V wells are prohibited from operating as non-experimental GS operations under § 144.15. Experimental projects are those whose primary purpose is to test new, unproven technologies. EPA does not consider it appropriate to permit CO_2 injection wells that are testing the injectivity or appropriateness of an individual formation (*e.g.,* as a prelude to a commercial-scale operation) as Class V experimental technology wells. Such wells should be permitted as Class VI wells.

Other commenters suggested that owners or operators of wells injecting CO_2 into basalts, coal seams, and salt domes should be able to seek a Class V experimental permit. EPA agrees that the Class V experimental technology well classification may be appropriate for these projects provided they are experimental in nature. EPA expects that, following today's rule, a limited number of experimental injection

projects testing GS technology will continue. EPA anticipates that these projects will be small-scale and involve limited CO_2 volumes. However, if these projects become larger scale and are no longer experimental, they will need to be permitted as Class VI wells. The construction, operation or maintenance of any non-experimental Class V GS wells is prohibited (§ 144.15).

The Agency is preparing additional guidance for owners or operators and Directors regarding the use of the Class V experimental technology well classification for GS following promulgation of today's rule. The guidance will assist owners and operators and Directors in determining what constitutes a Class V experimental technology well for the purposes of testing GS technology.

Grandfathering for Class I, Class II and Class V Experimental Technology Wells: Recognizing that owners or operators of existing Class I, Class II, and Class V experimental technology wells may seek to change the purpose of their injection well, EPA proposed to give the Director discretion to carry over or "grandfather" the construction requirements (*e.g.,* permanent, cemented well components) provided he or she is able to make a determination that these wells would not endanger USDWs. EPA sought comment on this approach and how the proposed grandfathering provisions for existing wells may affect compliance with Class VI construction requirements.

Nearly all industry commenters favored grandfathering of Class I, II, and V well construction requirements for GS, indicating that most wells are built to appropriate specifications and would have sufficient mechanical integrity for GS in order to protect USDWs from endangerment. These commenters cited oil and gas industry experience with CO_2 injection in the UIC Class II program and suggested that this experience demonstrates that construction requirements for Class II injection wells are sufficient to protect USDWs. Other commenters asserted that grandfathering Class II construction will expedite the transition of Class II ER projects to Class VI GS.

Several commenters were concerned that the structural modifications that may be required for some existing Class II wells to comply with the proposed injection well construction requirements at § 146.86 may actually compromise the integrity of those wells. One commenter also mentioned that pre-existing wells, including wells approved for sequestration as Class I and/or Class II wells, have not been constructed to the same standards. These existing wells penetrating the injection zone may, therefore, become potential threats to USDWs.

In response, EPA recognizes that the oil and gas industry has decades of experience injecting CO_2 for ER and that many Class V experimental technology wells, including those used in the RCSP's projects, are specifically designed for injection of CO_2 and are being constructed to Class I non-hazardous waste well specifications. In today's final rule, at § 146.81(c), owners or operators seeking to grandfather existing Class I, II, or V wells for GS must demonstrate to the Director that the grandfathered wells were engineered and constructed to meet the requirements at § 146.86(a) and ensure protection of USDWs from endangerment in lieu of requirements at § 146.86(b) and § 146.87(a). Based on the owner or operator's demonstration, the Director will determine if a well is appropriately constructed for GS. If the Director determines that the construction is appropriate for GS, the well will be re-permitted as a Class VI well and must meet the operational, testing and monitoring, reporting, injection well plugging, and PISC and site closure requirements in subpart H of part 146. If an owner or operator seeking to grandfather an existing Class I, II, or V well to a Class VI well cannot make this demonstration, then grandfathering of the constructed well and re-permitting as a Class VI well is prohibited.

III. What is EPA's final regulatory approach?

Today's rule creates a new class of injection well (Class VI) under the existing UIC program with new minimum Federal requirements that protect USDWs from endangerment during underground injection of CO_2 for the purpose of GS. Today's action includes requirements for the permitting, siting, construction, operation, financial responsibility, testing and monitoring, PISC, and site closure of Class VI injection wells that address the pathways through which USDWs may be endangered. These requirements are tailored from existing UIC program components to ensure that they are appropriate for the unique nature of injecting large volumes of CO_2 for GS into a variety of geological formations to ensure that USDWs are not endangered.

Today's rule retains many of the requirements for Class VI wells that EPA proposed on July 25, 2008. However, based on a review of public comments on the proposed rule and the NODA and Request for Comment, EPA made several changes to the GS rule. These changes are highlighted as follows and are described in today's publication.

- Additional description of the adaptive rulemaking approach. To ensure USDW protection and meet the potentially fast pace of GS deployment, EPA plans to continue its adaptive rulemaking approach for GS to incorporate new research, data, and information about GS and associated technologies. See section II.F.
- Elaboration on the rationale for allowing States to gain Class VI primacy independent of other well classes. To encourage States to take responsibility for implementation of Class VI regulations and foster a more comprehensive approach to managing GS projects within a broader framework for managing CCS issues, § 145.21 of today's rule allows States to gain primacy for Class VI wells independent of other well classes. See section II.G.
- Explanation of the considerations for permitting wells that are transitioning from Class II to Class VI. To clarify the point at which the purpose of CO_2 injection transitions from ER (*i.e.,* a Class II well) to long-term storage (*i.e.,* Class VI) and the risk posed to USDWs increases and is greater than traditional ER projects injecting CO_2, today's rule at § 144.19 contains specific, risk-based factors to be considered by owners or operators and by Directors in making this determination. See section II.H.
- Incorporation of a process to allow Class VI well owners or operators to seek a waiver from the injection depth requirements. To provide flexibility to address concerns about geologic storage capacity limitations, address injection depth on a site-specific basis, and accommodate injection into different formation types. Today's rule, at § 146.95, allows owners or operators to seek a waiver of the Class VI injection depth requirements provided they can demonstrate USDW protection. Today's final rule also limits the use of aquifer exemptions for Class VI well injection activities (§ 144.7(d)). See section III.D.
- Clarification of the requirements for submitting materials to support Class VI permit applications. Today's rule specifies separate requirements for information to be submitted with the permit application (§ 146.82(a)) and information that must be submitted before well operation is authorized (§ 146.82(c)). This modification addresses comments that not all of the information to support the proposed Class VI permit application requirements will be available at the

time the operator develops their initial permit application, See section III.A.

• Addition of requirements for updating project-specific plans. To ensure that management of GS projects reflect up-to-date information, today's rule requires periodic reviews of the AoR and corrective action, testing and monitoring, and emergency and remedial response plans (§ 146.84(e), § 146.90(j), and § 146.94(d)). Any significant changes to the plans require a permit modification (under § 144.39(a)(5)). See Sections III.F and III.K.

• Increasing the frequency of AoR reevaluations. To address concerns about the inherent uncertainties in modeling CO_2 movement, the emerging nature of GS technology, and the importance of targeting monitoring activities where risk to USDWs is greatest, today's rule at § 146.84(e) requires that the AoR for GS projects be reevaluated at a fixed frequency, not to exceed five years as specified in the AoR and corrective action plan, or when monitoring and operational conditions warrant. See section III.B.

• Clarification and expansion of financial responsibility requirements for Class VI well owners or operators. To ensure that financial resources are available to protect USDWs from endangerment, today's rule (at § 146.85) identifies qualifying financial instruments, the time frames over which financial responsibility must be maintained, procedures for estimating the costs of activities covered by the financial instruments, procedures for notifying the Director of adverse financial conditions, and requirements for adjusting cost estimates to reflect changes to the project plans. See section III.I.

• Revisions to the GS site monitoring and plume tracking requirements to ensure that the most appropriate methods are used to identify potential risks to USDWs posed by injection activities, verify predictions of CO_2 plume movement, provide inputs for modeling, identify needed corrective actions, and target other monitoring activities. Today's rule, at § 146.90(g), requires Class VI well owners or operators to use direct methods to monitor for pressure changes in the injection zone and to supplement these direct methods with indirect, geophysical techniques unless the Director determines, based on site-specific geology, that such methods are not appropriate. See section III.F.

EPA believes that these changes will result in a clearer, more protective approach to permitting GS projects across the U.S. while still allowing for consideration of site specific variability.

In addition to protecting USDWs, today's rule provides a regulatory framework to promote consistent approaches to permitting GS projects across the U.S. and supports the development of a key climate change mitigation technology.

Today's final GS rule contains tailored requirements for geologic siting; AoR and corrective action; construction; operation; monitoring and MIT; recordkeeping and reporting; well plugging, PISC, and site closure; financial responsibility; emergency and remedial response; public involvement; and permit duration of Class VI wells.

To develop today's final regulatory approach, EPA considered public comments submitted in response to the proposed rule and the NODA and Request for Comment. Sections III.A through L focus on the aspects of the GS regulation that are tailored to the unique nature of GS and highlight the changes between the proposed and final GS rule. Additional background information is available in the preamble, NODA and Request for Comment, and docket for this rulemaking.

A. Site Characterization

Today's final action requires owners or operators of Class VI wells to perform a detailed assessment of the geologic, hydrogeologic, geochemical, and geomechanical properties of the proposed GS site to ensure that GS wells are sited in appropriate locations and inject into suitable formations. Class VI well owners or operators must also identify additional confining zones, if required by the Director, to increase USDW protection.

Site characterization is a fundamental component of the UIC program. Owners or operators must identify the presence of suitable geologic characteristics at a site to ensure the protection of USDWs from endangerment associated with injection activities. Existing UIC regulations for siting injection wells include requirements to identify geologic formations suitable to receive injected fluids and confine those fluids such that they are isolated in order to ensure protection of USDWs from endangerment. Today's rule similarly requires the owner or operator to perform a detailed assessment to evaluate the presence and adequacy of the various geologic features necessary to receive and confine large volumes of injected CO_2 so that the injection activities will not endanger USDWs. Today's requirements for Class VI wells are based extensively on the long-standing site characterization requirements of the UIC program, and are tailored to address the unique nature of GS. Specifically, § 146.83 of today's rule sets forth the criteria for a GS site that is geologically suitable to receive and confine the injected CO_2, while § 146.82 identifies the specific information an owner or operator must submit to the Director in order to demonstrate that the site meets the minimum siting criteria at § 146.83.

Today's rule at § 146.83 retains the minimum criteria for siting as proposed. Owners or operators of Class VI wells must provide extensive geologic data to demonstrate to the Director that wells will be sited in areas with a suitable geologic system comprised of a sufficient injection zone and a confining zone free of transmissive faults or fractures to ensure USDW protection. In addition, the Agency proposed that owners or operators must, at the Director's discretion, identify and characterize additional (secondary) confinement zones that will impede vertical fluid movement. EPA sought comment on the merits of identifying these additional zones, and received many comments on this topic.

The majority of commenters who commented on the requirement to identify additional zones at the Director's discretion disagreed with the proposed approach, saying that the requirement is unnecessary if the injection zone and confining zones were competent, and believing it would reduce the number of GS storage site opportunities. EPA disagrees with the commenters' assertion that secondary confinement and containment zones should not be required under the final rule and received no data or information to support commenters' assertion that characterizing secondary confining zones is technically infeasible. Therefore, EPA is retaining the requirement that owners or operators must, at the Director's discretion, identify and characterize additional confining zones. In certain geologic settings, these zones may be appropriate to ensure USDW protection, impede vertical fluid movement, allow for pressure dissipation, and provide additional opportunities for monitoring, mitigation and remediation (§ 146.83(b)).

Today's rule at § 146.82 establishes the detailed information that owners or operators must submit to the Director to demonstrate that the site is suitable for GS. As part of the site characterization and permit application process, owners or operators of Class VI wells are required to submit maps and cross sections describing subsurface geologic formations and the general vertical and

lateral limits of all USDWs within the AoR. The Agency anticipates that owners or operators will use existing wells within the AoR or construct stratigraphic test wells for purposes of data collection; such wells may be subsequently converted to monitoring wells. Site characterization identifies potential risks and eliminates unacceptable sites, *e.g.,* sites with potential seismic risk or sites that contain transmissive faults or fractures. Data and information collected during site characterization also inform the development of construction and operating plans, provide inputs for AoR delineation models, and establish baseline information to which geochemical, geophysical, and hydrogeologic site monitoring data collected over the life of the injection project can be compared.

Today's rule also requires owners or operators to submit, with their permit applications, a series of comprehensive site-specific plans: An AoR and corrective action plan, a monitoring and testing plan, an injection well plugging plan, a PISC and site closure plan, and an emergency and remedial response plan. This requirement for a comprehensive series of site-specific plans is new to the UIC program. The Director will evaluate all of the plans in the context of the geologic data, proposed construction information, and proposed operating data submitted as part of the site characterization process, to ensure that planned activities at the facility are appropriate to the site-specific circumstances and address all risks of endangerment to USDWs.

EPA sought comment on the proposed submissions required for permit applications, and received many comments indicating that not all of the information listed in the proposed rule at § 146.82 will be available at the time the operator develops their initial permit application. In response to comments, EPA revised § 146.82 so that the final regulation specifies separate requirements for information to be submitted with the permit application (§ 146.82(a)) and information that must be submitted before well operation is authorized (§ 146.82(c)).

Today's final rule includes requirements at § 146.82(a)(2) that the owner or operator identify all State, Tribal, and Territorial boundaries within the AoR. Based on the information provided to the Director during the initiation of the permit application, the Director, pursuant to requirements at § 146.82(b), must provide written notification to all States, Tribes, and Territories in the AoR to inform them of the permit application and to afford them an opportunity to be involved in any relevant activities (*e.g.,* development of the emergency and remedial response plan (§ 146.94)). These requirements respond to comments received regarding the anticipated large AoRs and injection volumes for GS and the importance of ensuring trans-boundary coordination across the U.S. The Agency encourages transparency in the permitting process and anticipates that State-State/State-Tribal communication on GS permitting will facilitate information sharing and encourage safe, protective projects.

The final GS permitting requirements provided in today's rule in conjunction with the minimum siting requirements at § 146.83 enable flexibility and the discretion of the permitting authority when appropriate, while ensuring USDW protection. This flexibility and permitting authority discretion serves to maximize efficiencies for owners or operators and permitting agencies. The rule enables owners or operators to choose from the variety of technologies and methods appropriate to their site-specific conditions. At the same time, the rule provides the foundation for national consistency in permitting of GS projects. To promote national consistency, the Agency is developing guidance to support comprehensive site characterization required under today's rule.

B. Area of Review (AoR) and Corrective Action

Today's rule at § 146.84 enhances the existing UIC requirements for AoR and corrective action to require computational modeling of the AoR for GS projects that accounts for the physical and chemical properties of the injected CO_2 and is based on available site characterization, monitoring, and operational data. Owners or operators must periodically reevaluate the AoR to incorporate monitoring and operational data and verify that the CO_2 is moving as predicted within the subsurface.

AoR modeling and reevaluation are important components of the overall proposed strategy to track the CO_2 plume and pressure front through an iterative process of site characterization, modeling, and monitoring at GS sites. This approach addresses the unique and complex movement of CO_2 at GS sites.

1. AoR Requirements

Under the UIC program, EPA established an evaluative process to determine that there are no features near an injection well (such as faults, fractures or artificial penetrations) where injected fluid could move into a USDW or displace native fluids into USDWs resulting in endangerment to USDWs. Existing UIC regulations require that the owners or operators define the AoR, within which they must identify artificial penetrations (regardless of property ownership) and determine whether they have been properly completed or plugged. The AoR determination is integral to assessing geologic site suitability because it requires the delineation of the expected extent of the carbon dioxide plume and associated pressure front and identification and evaluation of any penetrations that could result in the endangerment of USDWs. For existing injection well classes (I through V), the AoR is defined either by a fixed radius around the injection well or by a simple radial calculation (40 CFR 146.6).

AoR and corrective action plan: EPA proposed that owners or operators of Class VI wells prepare, maintain, and comply with a plan to delineate the AoR for a proposed GS project, periodically reevaluate the delineation, and perform corrective action that meets the requirements of this section and is acceptable to the Director. Commenters supported the proposed requirement for an AoR and corrective action plan, particularly advocating updates that ensure that facilities are being properly managed to address changing circumstances (*e.g.,* addition of monitoring wells or operational changes). The Agency is developing guidance that describes the content of project plans required in the GS rule, including the AoR and corrective action plan.

Today's final rule retains the requirement for owners or operators to develop and implement an AoR and corrective action plan; the approved plan will be incorporated into the Class VI permit and will be considered permit conditions; failure to follow the plan will result in a permit violation under SDWA section 1423. Owners or operators must also review the AoR and corrective action plan following the most recent AoR reevaluation and submit an amended plan, or demonstrate to the Director that no amendment to the AoR and corrective action plan is needed (§ 146.84(e)(4)). The iterative process by which this and other required plans are reviewed throughout the life of a project will promote an ongoing dialogue between owners or operators and the Director. Tying the plan reviews to the AoR reevaluation frequency is appropriate to ensure that reviews of the plans are conducted on a defined schedule, if there is a change in the AoR, or if other circumstances change, while adding little burden if the AoR reevaluation

confirms that the plan is appropriate as written. The plan review process also supports development and review of effective testing and monitoring programs. Additional information on updates to the AoR and corrective action plan is discussed in subsequent sections.

AoR definition: In the proposed rule, EPA defined the AoR for a GS project as "the region surrounding the GS project that may be impacted by the injection activity," and stated that "the AoR is based on computational modeling that accounts for the physical and chemical properties of all phases of the injected CO_2 stream." Several commenters stated that the proposed AoR definition for Class VI wells was vague and open to broad interpretation, which could lead to overly large or small AoRs. Other commenters believed that specific CO_2 phases and areas of quantitative measures of elevated pressure should be included in the definition.

EPA evaluated all comments on the AoR definition, and determined that a performance-based definition provides sufficient instruction regarding the region that should be included within the AoR. However, to provide additional clarity, EPA modified the Class VI AoR definition for today's final rulemaking. The AoR is defined in the final rule as, "the region surrounding the geologic sequestration project where USDWs may be endangered by the injection activity. The AoR is delineated using computational modeling that accounts for the physical and chemical properties of all phases of the injected CO_2 stream and displaced fluids and is based on available site characterization, monitoring, and operational data as set forth in § 146.84." The Agency is developing guidance on AoR and corrective action to support AoR delineation (*i.e.,* including regions of the CO_2 plume and pressure front).

Use and applicability of computational models: EPA proposed that the AoR for Class VI wells be determined using sophisticated computational modeling that accounts for multiphase flow and the buoyancy of CO_2, and is informed by site characterization data. EPA proposed that any computational model that meets minimum Federal requirements and is acceptable to the Director may be used, including proprietary models. EPA sought comment on the use and applicability of computational modeling and allowing the use of proprietary models for GS AoR delineation.

Many commenters agreed with EPA that computational multiphase modeling is the most accurate method of delineating the AoR of GS sites. Several commenters also provided detailed technical suggestions regarding how modeling should be conducted. Some commenters opposed the use of computational models, stating that they are overly complicated to use and interpret and are not warranted for protection of USDWs.

EPA agrees with commenters who support the use of computational modeling, and retains the requirement in today's rule at § 146.84(a). The Agency is developing guidance on AoR and corrective action to support the use of computational modeling for AoR delineation. Available data from pilot projects and research studies (*e.g.,* Schnaar and Digiulio, 2009) support today's final approach of requiring the use of computational models to delineate the AoR for GS sites.

Comments were submitted both in support of and against allowing the use of proprietary models. Several commenters who supported allowing the use of proprietary models said that allowing the use of these models will save costs and increase efficiency, as many existing CO_2 injection projects currently rely on proprietary models. However, commenters suggested that the Director be given access to the model in order to fully evaluate results and modeling assumptions. Commenters that opposed the use of proprietary models did not believe that such models are sufficiently transparent, and believed that the Director would not be able to replicate the results.

EPA's final approach allows the use of proprietary models at the discretion of the Director. EPA does not agree with commenters who believe that the use of proprietary models will prohibit full evaluation of model results and assumptions. Several available proprietary models meet minimum Federal requirements for use in AoR delineation and their use has been documented in peer-reviewed research studies. Class VI well owners or operators, including those using proprietary AoR delineation models, are required to disclose the code assumptions, relevant equations, and scientific basis to the satisfaction of the Director. To ensure that all predictive models used for AoR delineation are meeting the Agency's intent, EPA will collect and review project data on models used in early GS projects as part of its adaptive rulemaking approach. See section II.F.

AoR reevaluation: EPA proposed that the AoR delineation be reevaluated periodically over the life of the project in order to incorporate CO_2 monitoring data into models to ensure protection of USDWs from endangerment. Under the proposed approach, AoR reevaluation would occur at a minimum of every 10 years during CO_2 injection, or when monitoring data and modeling predictions differ significantly. EPA sought comment on the requirement for reevaluation every 10 years and what conditions would merit reevaluation of the AoR.

The majority of commenters agreed that AoR reevaluations are necessary, citing the large volumes of CO_2 that may be injected, the uncertainty of CO_2 movement in the subsurface, the need to incorporate monitoring data, and the lack of experience in tracking large volumes of CO_2. EPA agrees with commenters who supported the proposed approach for periodic AoR reevaluation. EPA believes that in order to sufficiently protect USDWs from endangerment, the CO_2 plume and pressure front should be tracked over the lifetime of the project using an iterative approach of site characterization, modeling, and monitoring. Periodic AoR reevaluation, as required in today's final action, is an integral component of this approach. EPA believes that the AoR reevaluation is an efficient use of resources and notes that if the CO_2 plume and pressure front are moving as predicted, the burden of the AoR reevaluation requirement will be minimal. In cases where the observed monitoring data agree with model predictions, an AoR reevaluation may simply consist of a demonstration to the Director that monitoring data validate modeled predictions.

Several commenters supported the proposed reevaluation timeframe of a minimum of 10 years or when monitoring and modeling data differ. However, many commenters believed that 10 years was too infrequent and suggested more frequent reevaluations or basing the reevaluation timeframe on a performance standard, given the potential risks posed by these projects to USDWs and the general uncertainty related to CO_2 movement at GS projects. Based on consideration of public comments, EPA agrees that reevaluations of the AoR every 10 years may not be sufficient, and today's final approach requires an AoR reevaluation at a minimum of once every five years, or when monitoring data and modeling predictions differ significantly. EPA believes that this revised frequency addresses commenters' concerns about the inherent uncertainties in modeling CO_2 movement, the emerging nature of GS technology, and the importance of targeting monitoring activities where

risk of endangerment to USDWs is greatest.

2. Corrective Action Requirements

EPA proposed that owners or operators of Class VI wells identify and evaluate all artificial penetrations within the AoR. Based on this review, owners or operators, in consultation with the Director, would identify the wells that need corrective action to prevent the movement of CO_2 or other fluids into or between USDWs. Owners or operators would perform corrective action to address deficiencies in any wells (regardless of ownership) that are identified as potential conduits for fluid movement into USDWs. This inventory and review process is similar to what is required of Class I and Class II injection well owners or operators. The proposal did not prescribe any specific methods or cements that should be used for corrective action, but stated that the methods used must be appropriate for CO_2 injection and compatible with all fluids.

Phased corrective action: Due to the anticipated large size of the AoR for Class VI wells, EPA proposed allowing owners or operators to conduct corrective action on a phased basis during the lifetime of the project, at the discretion of the Director. In these cases, corrective action would not need to be conducted throughout the entire AoR prior to injection. Corrective action would only be necessary in areas near the injection well with a high certainty of CO_2 exposure during the first years of injection as informed by site-characterization data and model predictions. Artificial penetrations in areas farther from the injection well would be addressed after injection has commenced, but prior to CO_2 plume and pressure front movement into that area. The proposal sought comment on allowing for phased corrective action at the discretion of the Director.

The majority of commenters agreed with EPA's proposed approach of allowing phased corrective action at the Director's discretion. Most commenters believed that phased corrective action is a practical and cost effective approach. However, some commenters argued that phased corrective action should be allowed at all sites and not left to Director's discretion. Others argued that specific timeframes (*e.g.,* two to five years) for corrective action should be mandated to ensure that wells are addressed prior to plume movement into that area. Several State commenters disagreed with EPA's proposal to allow phased corrective action and believed that all corrective action should be completed prior to injection.

EPA agrees with commenters who supported allowing for phased corrective action at the discretion of the Director, and retains this provision in today's final regulation at § 146.84(d). Phased corrective action may provide many benefits to a project including spreading corrective action costs throughout the life of a GS project, avoiding delays in project start-up, allowing for use of future, improved corrective action techniques, and addressing unanticipated changes in the movement of the CO_2 plume or pressure front. Given the wide range of conditions and site-specific considerations unique to GS sites, Director's discretion is appropriate as Directors are in the best position to make decisions about the appropriateness of phased corrective action.

EPA agrees with commenters that corrective action on wells should be completed in advance of the anticipated arrival of the CO_2 plume or pressure front. However, it is not appropriate to set a specific timeframe for completing corrective action because CO_2 plume movement will be site-specific and may change over the life of a GS project. Instead, decisions regarding the timing of corrective action will be incorporated into the approved AoR and corrective action plan for each project based on project-specific information. The Agency is developing guidance on AoR and corrective action for GS sites, which addresses the types of issues these commenters raise.

C. Injection Well Construction

Today's rule finalizes requirements (at § 146.86) for the design and construction of Class VI wells using materials that can withstand contact with CO_2 over the life of the GS project in order to prevent movement of fluids into USDWs.

Proper construction of injection wells provides multiple layers of protection to ensure the prevention of fluid movement into USDWs. Today's final approach is based on existing construction requirements for surface casing, long-string casing, and tubing and packer for Class I hazardous waste injection wells, with modifications to address the unique physical characteristics of CO_2, including its buoyancy relative to other fluids in the subsurface and the potential presence of impurities in captured CO_2. In addition to protecting USDWs, today's comprehensive construction requirements respond to concerns about GS project safety and potential impacts on USDWs.

Surface and long-string casing requirements: EPA proposed that surface casing for a Class VI well be set through the base of the lowermost USDW and cemented to the surface; and, that the long-string casing be cemented in place along its entire length from the injection zone to the surface. This is consistent with existing requirements for Class I hazardous waste injection wells.

EPA proposed the enhanced casing requirements for Class VI wells to maintain additional barriers to CO_2 leakage outside of the injection zone, and solicited comment on the proposed construction requirements related to the depth of the surface casing. Commenters objecting to the proposed requirements argued that the surface casing and long-string casing requirements may preclude GS in areas with very deep USDWs. They commented that, under certain circumstances, it would be too burdensome or technologically infeasible to construct the casings to the required depth. Commenters also argued that these requirements would adversely impact acceptance of GS and would slow down large-scale deployment of this climate change mitigation technology. These commenters recommended that the rule allow more flexibility regarding surface and long-string casing depths to accommodate varied conditions where Class VI wells may be constructed throughout the U.S. Other commenters agreed with the Agency's proposed long-string casing requirements for Class VI wells, stating that the requirements prevent undesirable migration of fluids behind the casing and provide maximum zonal isolation.

The Agency disagrees that the surface and long-string casing requirements are not flexible enough to address the varied geological formations and aquifer characteristics across the United States. EPA adds that cementing of deep wells has been performed successfully by owners or operators of Class I wells at depths up to 12,000 feet (USEPA, 2001). Protection of USDWs from endangerment, regardless of their depth or stratigraphic location, is the primary mission of the UIC program and the purpose of all requirements for injection wells.

However, in order to address concerns about lack of flexibility while ensuring USDW protection, EPA modified the surface casing requirements at § 146.86(b) to provide owners or operators flexibility regarding how to complete the surface casing in situations where the cement cannot be re-circulated to the surface. The regulation does not specify how the cementing

must be accomplished (*e.g.,* single or staged circulation); instead, it allows flexibility for owners or operators to propose alternative cementing methods that provide a sufficient cement seal and prevent fluid movement through any channels adjacent to the well bore under all circumstances in order to protect USDWs from endangerment. The Agency is retaining the requirements as proposed for long-string casing construction for Class VI wells. To further address comments on deep injection wells, today's final rule includes requirements at § 146.95 for owners or operators that seek a waiver of the injection depth requirements. Owners or operators of wells operating under injection depth waivers must comply with additional construction requirements to ensure that wells used to inject above or between USDWs are protective and will not endanger USDWs. See section III.D for a detailed discussion of the waiver approach.

Cement and well materials requirements: EPA proposed that all materials used in the construction of Class VI wells must be compatible with fluids with which the materials may be expected to come into contact, and that cement and cement additives must be compatible with the CO_2 stream and formation fluids and of sufficient quality and quantity to maintain integrity over the design life of the project. The Agency requested comment on cementing of the long-string casing, including the use of degradation-resistant well construction materials, such as acid-resistant cements and corrosion-resistant casing for Class VI wells.

Commenters who disagreed with EPA's proposed requirements for well materials and cement argued that the specific use of acid-resistant/corrosion-resistant cement is excessive. They expressed concerns that the proposed rule did not reflect actual field experience or recent laboratory research and they encouraged the Agency to defer imposing these additional requirements until further field experience and research are conducted. These commenters suggested that the Agency allow Director's discretion in determining the standards for casing and cementing on a case-by-case basis.

Commenters who supported the use of acid-resistant/degradation-resistant cement and materials asserted that their use is essential to reduce the risk of leaks associated with compromised mechanical integrity and to protect USDWs from endangerment, at a modest cost relative to the long-term benefit of well integrity.

Some commenters supported the use of Class II well construction standards for Class VI wells. These commenters indicated that the oil and gas industry has several decades of CO_2 injection experience, which, they believe demonstrates that Class II construction standards are sufficient to protect human health and the environment. EPA recognizes that the oil and gas industry has experience injecting CO_2 and that many of the wells used for ER may be suitable for GS. However, GS is sufficiently different from Class II ER operations to warrant today's tailored construction requirements for Class VI wells at § 146.86. For example, the volume of CO_2 anticipated to be injected in Class VI wells is significantly greater than for Class II wells. Additionally, formation pressures are expected to be higher as a result of Class VI injection when compared to formation pressures associated with Class II ER projects. Today's final rule does provide for grandfathering of construction for wells transitioning to GS provided the owner or operator can demonstrate to the Director (during the re-permitting process) that wells were constructed and cemented with materials compatible with GS activities; see section II.H.

EPA agrees with commenters that cement additives and degradation resistant materials are crucial to proper construction of Class VI wells. Because of the numerous approaches developed for cement design and due to continually evolving well materials and construction technology (as evidenced by oil and gas industry experience demonstrating the effectiveness of existing cementing materials and procedures), EPA believes it would not be prudent or feasible to specify design standards for cement or cementing procedures, such as wellbore conditioning. Instead, the final rule specifies a performance standard at § 146.86(b)(1) that all casing and cementing or other materials used in the construction of each well have sufficient structural strength, be designed for the life of the GS project, be compatible with the injected fluids, and prevent fluid movement into or between USDWs.

Tubing and packer requirements: EPA proposed that all Class VI wells be constructed with tubing and a packer that is set opposite a cemented interval at a location approved by the Director, and sought comment on this approach. Several commenters agreed with the proposed approach for tubing and packer of Class VI wells, saying that tubing and packer in Class VI wells facilitate continuous monitoring of pressure in the annulus between the tubing and casing and effectively provide two barriers from USDWs. Additionally, tubing can be replaced relatively easily in the event that damage to the tubing is identified or a tubing diameter change is necessary. EPA agrees with commenters that the use of tubing and packer in accordance with specified requirements at § 146.86(c) offers the best multiple-barrier protection of USDWs from endangerment and today's final rule retains this requirement.

Horizontal wells: In the proposed rule, EPA solicited comment on the merits of horizontal well drilling techniques for Class VI wells and the applicability of proposed well construction requirements to horizontal injection well design. Commenters strongly supported the use of horizontal well drilling techniques for Class VI wells. Many commenters cited the oil and gas industry's extensive technical experience with horizontal injection well construction and the practical experience gained at GS pilot projects including the In Salah project in Algeria. Commenters also emphasized that horizontal well drilling helps to reduce surface impact by reducing the number of injection well heads required to achieve a given injection rate, which limits the number of potential leakage pathways into USDWs. Commenters stated that allowing the use of horizontal wells for GS would maximize CO_2 injection volumes into a particular reservoir and increase the total effective GS CO_2 storage capacity in the U.S.

EPA agrees with commenters that horizontal well drilling techniques represent a potential and promising method for increasing efficiency of GS projects while simultaneously reducing impact and potential leakage pathways into USDWs. EPA agrees that using existing experience with horizontal well construction and use in conjunction with the Class VI requirements may help improve efficiency in GS operations while ensuring protection of USDWs from endangerment. Therefore, the Agency will allow the use of horizontal wells for Class VI GS as long as the wells are constructed and implemented to meet the requirements under subpart H of part 146.

D. Class VI Injection Depth Waivers and Use of Aquifer Exemptions for GS

Today's final rule includes requirements at § 146.95 that allow owners or operators to seek a waiver from the Class VI injection depth requirements for GS to allow injection into non-USDW formations while ensuring that USDWs above and below

the injection zone are protected from endangerment. The Agency anticipates that any issuance of waivers will be limited to circumstances where there are deep USDWs (74 FR 44802, August 31, 2009) and/or where the lack of a waiver of injection depth requirements would result in impractical or technically infeasible well construction, and where USDW protection is demonstrated and maintained through the life of the GS project. These requirements are designed to ensure that the owner or operator and the Director consider, on a site-specific basis, the implications, benefits, and challenges associated with GS, water availability, and USDW protection. Today's final rule also establishes limited circumstances under which aquifer exemption expansions may be granted for owners or operators of Class II EOR/EGR wells transitioning to Class VI injection wells for GS.

1. Proposed Rule

Injection depth requirements for GS: In the proposed rule, EPA defined Class VI injection wells as "wells used for GS (injection) of CO_2 beneath the lowermost formation containing a USDW." The proposed injection depth requirements (*i.e.,* that injection is below the lowermost USDW) for Class VI wells are consistent with the siting and operational requirements for deep, technically sophisticated wells and are an important component of the UIC program. The basis for these requirements is the principle that placing distance between the injection formation and USDWs will decrease risks to USDWs. In deep-well injection scenarios, the added depth and distance between the injection zone and overlying formations serve both as a buffer allowing for pressure dissipation and as a zone for monitoring that may detect any excursions (of the injectate) out of the injection zone. Additional depth and distance also allow CO_2 trapping mechanisms, including physical trapping, dissolution of CO_2 in native fluids and mineralization, to occur over time—thereby reducing risks that CO_2 may migrate from the injection zone and endanger USDWs. Added depth also allows the potential for the presence of additional confining layers (between the injection zone and overlying formations/USDWs).

The Agency acknowledged that the proposed injection depth requirements would preclude injection of CO_2 into zones in between and above USDWs and may restrict the use of GS in areas of the country with deep USDWs, where well construction would be impractical or technically infeasible. As proposed, the definition would also have effectively precluded injection of CO_2 into shallow formations such as coal seams and basalts. The Agency requested comment on alternative approaches that would allow injection between USDWs and/or above the lowermost USDW and thus potentially allow for more areas to be available for GS while continuing to prevent endangerment of USDWs.

The Agency received comments in support of, and opposition to, the proposed injection depth requirements for Class VI wells. Commenters who supported the proposed requirements cited the importance of USDW protection, the integrity and importance of the long-standing deep well UIC requirements, and concerns about water availability and the future use of deep USDWs. Commenters also indicated that in the early years of GS deployment, injection depth limitations would be prudent.

Those opposed to the proposed requirements supported allowing injection above and between USDWs. These commenters indicated that injection depth flexibility for GS is important to ensure that no parts of the country are excluded from GS activities and that CCS deployment is not restricted. Other commenters encouraged injection depth flexibility because, they asserted, some Class II, Class III, and Class V operations already inject above the lowermost USDW without any potential for threats to underlying (or overlying) USDWs.

Use of aquifer exemptions for GS: The UIC requirements at §§ 146.4 and 144.7 establish criteria for and afford the Director discretion to issue aquifer exemptions which, when approved, removes an aquifer from protection as a USDW, in accordance with the requirements of § 144.7(b)(1). Generally, aquifer exemptions are granted for mineral or hydrocarbon exploitation by Class III solution mining wells, or by Class II oil and gas-related wells, respectively, and when there is no reasonable expectation that the exempted aquifer will be used as a drinking water supply (see specific aquifer exemption criteria at § 146.4). There are also limited numbers of aquifer exemptions for Class I industrial injection. Aquifer exemptions associated with Class II and Class III operations are generally limited in area (*e.g.,* a quarter of a mile around the injection well-bore for Class II wells). EPA attempts to limit aquifer exemptions for injection operations to the circumstances where the necessary criteria at § 146.4 are met and not, in general, for the purpose of creating additional capacity for the subsurface emplacement of fluids.

The proposed rule acknowledged that there may be situations where owners or operators may seek aquifer exemptions for GS and sought comment on whether aquifer exemptions should be allowed for the purpose of Class VI injection. EPA also requested comment on the conditions under which aquifer exemptions for GS should be approved.

Some commenters encouraged the Agency to allow the use of aquifer exemptions for Class VI injection and indicated that the existing criteria at 40 CFR 146.4 and 40 CFR 144.7 are appropriate for GS. However, a number of commenters requested that the Agency modify the aquifer exemption criteria to provide regulatory certainty and ensure that the criteria specifically apply to CO_2 injection for GS. Other commenters requested that the Agency modify the definition of a USDW to reduce the need for aquifer exemptions (*e.g.,* lowering the upper TDS limit from 10,000 mg/l TDS). Additionally, commenters acknowledged that there was a particular interest in aquifer exemptions for Class II fields that may be used for GS in the future.

Other commenters suggested that the Agency limit or prohibit aquifer exemptions for Class VI injection, citing the need to ensure protection of current and future drinking water resources. Furthermore, several commenters opposed to the use of aquifer exemptions suggested modifications to the definition of a USDW to enhance protection for formations in excess of 10,000 mg/l TDS.

Injection formations for GS: In the preamble to the proposed rule, EPA discussed and sought comment on the range of target geologic formations used or under investigation for GS of CO_2 (*e.g.,* deep saline formations, depleted oil and gas reservoirs, unmineable coal seams, basalts, and other formations). The proposed rule also sought comment on whether the final rule should prohibit injection into any specific formation types that are located above the lowermost USDW.

Most commenters encouraged EPA not to automatically exclude any potential injection formations for GS at this stage of deployment. Commenters suggested, in particular, that there is a sufficient technical basis and scientific evidence to allow GS in depleted oil and gas reservoirs and in saline formations, noting that there is consensus on how to inject into these formation types.

Some commenters, including water associations, cautioned the Agency regarding injection into saline

formations, citing concerns about the potential future need for these formations as drinking water sources. Other commenters suggested that basalts, salt domes, shales, coal seams, limestone formations, and fractured karst are not ready for commercial sequestration and suggested that additional research is needed into GS in these formation types.

More detailed information on the comments is available in the NODA and Request for Comment and in the docket for this rulemaking.

2. Notice of Data Availability and Request for Comment

In response to comments received on the proposed injection depth requirements, the Agency published a NODA and Request for Comment to present additional information on an alternative for addressing injection depth in limited circumstances where there are deep USDWs and injection above and between USDWs would not endanger USDWs. Under the approach, the proposed Class VI injection depth requirements would remain unchanged but would allow an owner or operator seeking to inject into non-USDWs above or between USDWs to apply for a waiver from the injection depth requirements. The waiver process, presented in the NODA and Request for Comment, would be informed by site-specific information and would be reviewed by both the UIC and Public Water System Supervision (PWSS) Directors to ensure appropriate siting of a GS project as well as consideration of water resource availability and demands.

The NODA and Request for Comment sought comment on the merits of the injection depth waiver approach and whether the waiver process should apply only to saline formations and oil/gas reservoirs or to all formation types. Additionally, the Agency requested information on (1) locations in the U.S. where injection depth is an issue; (2) data and information on the safety of injecting through/above/between USDWs; and, (3) strategies being considered by States, Tribes, and Regions to address competing resource issues. The Agency requested this information to enable a more comprehensive decision regarding the impacts of the proposed injection depth requirements and the need for waivers.

Comments on the waiver alternative presented in the NODA and Request for Comment: The Agency received comments both in support of and opposition to the injection depth waiver alternative discussed in the NODA and Request for Comment.

Commenters supporting the waiver alternative presented in the NODA and Request for Comment acknowledged that the waiver approach is flexible, strikes the right balance between USDW protection and maximizing GS capacity, and would ensure a thorough and scientifically based, site-specific assessment of the appropriateness of a waiver during the siting process. A number of commenters supportive of the waiver cited hydrocarbon storage, other injection operations, and production activities as evidence that GS into shallower geologic environments can be performed safely and successfully while ensuring USDW protection.

There was limited opposition to the waiver alternative presented in the NODA and Request for Comment. Commenters who opposed the waiver approach maintained that all injection of CO_2 for GS should be below the lowermost USDW and any new requirements should maximize protection of USDWs. However, some commenters who opposed the waiver process acknowledged the utility of the waiver, and urged the Agency to consider additional requirements for any wells that operate under injection depth waivers. The Agency did not receive any analytical or quantitative data in response to publication of the NODA and Request for Comment.

The Agency also received comments on the waiver application and review process. Commenters questioned how the process would work and how waivers would apply to existing Class I, II, or V wells that may be re-permitted as Class VI wells in the future. Some commenters suggested that the waiver request should be part of the permit application process, while others felt that it should be a discrete submittal. Other commenters expressed concern about the nexus between the waiver process and aquifer exemptions. Some commenters who supported the waiver concept suggested that adoption of an injection depth waiver process should not be at the discretion of the individual UIC program Directors and that EPA should require all States to include a waiver process.

A number of commenters supporting the concept of the waiver of injection depth requirements indicated that they did not support the joint review of waiver information by both the UIC and PWSS Directors. These commenters believed that the joint review process as discussed in the NODA and Request for Comment was inefficient and duplicative, and could introduce confusion and lack of clarity about the role of each Director. However, a number of commenters did support the principle of affording the PWSS Director a consultative role for increased transparency and to ensure consideration of public water supply needs in a potential GS project area when siting a Class VI well.

Noting the unique nature of the waiver process and the belief that injection above USDWs may present additional questions relative to movement of CO_2 in the subsurface, many commenters supported the Agency's assertion that additional requirements should apply to waivered wells. These commenters suggested that additional regional, hydrologic studies be required when an injection depth waiver is considered. Other commenters encouraged EPA to enhance the site characterization requirements when a waiver is granted to (1) ensure the identification of appropriate upper and lower confining units, (2) include requirements for more comprehensive, site-specific monitoring (above and below the injection zone), and (3) ensure appropriate public notification prior to issuance of a waiver. A number of commenters also suggested that the Agency develop guidance to support the waiver application process, waiver evaluation, and decision making.

Comments on the use of aquifer exemptions for GS: Comments submitted in response to the NODA were similar to and built upon those received on the proposal. Some commenters indicated that, in addition to allowing injection above and between USDWs (through the waiver process), aquifer exemptions should also be allowed for Class VI injection. A number of these commenters requested that the Agency modify (1) the aquifer exemption criteria to ensure that the criteria specifically apply to CO_2 injection for GS and (2) the USDW definition to limit protection for formations currently afforded protection under the SDWA (*i.e.,* by reducing the 10,000 mg/l TDS threshold). These commenters added that Class II EOR/EGR operations injecting into exempted aquifers would need a mechanism to continue the aquifer exemptions if the well were to be re-permitted as a GS operation.

However, a number of commenters encouraged the Agency to limit or prohibit aquifer exemptions for Class VI injection, citing the need to ensure protection of current and future drinking water resources. Furthermore, several of these commenters suggested modifications to the definition of a USDW to enhance protection for formations in excess of 10,000 mg/l TDS.

Comments on injection formations for GS: Commenters submitted comments similar to those received on the proposal. Some commenters encouraged the Agency to limit GS injection to only deep saline formations and depleted reservoirs. These commenters cited a lack of information about the viability of basalts, salt domes, shales, and coal seams for GS. Other commenters suggested that the Agency allow injection into all formation types for GS. Commenters that supported flexibility in injection formation types indicated that proper site-characterization is critical, regardless of the injection formation type. They indicated that a decision to allow injection for GS should be made on a site-by-site basis and a prohibition based on formation types is not appropriate.

3. Final Approach

In response to comments on the proposed injection depth requirements, the use of aquifer exemptions for GS, the range of potential injection formations for GS, the waiver process discussed in the NODA and Request for Comment, and concerns about USDW protection and national capacity for GS, today's rule finalizes requirements at § 146.95 that allow owners or operators to seek a waiver of the Class VI injection depth requirements for injection into non-USDW formations above and/or between USDWs. It establishes: (1) Requirements specifying information that owners or operators must submit, and Directors must consider, in consultation with PWSS Directors; (2) procedures for public notice of a waiver application and for Director-Regional Administrator communication; (3) the waiver issuance process; and (4) additional requirements that apply to owners or operators of Class VI wells granted a waiver of the injection depth requirements to ensure USDW protection above and below the injection zone. Today's final rule also establishes limited circumstances under which expansions of aquifer exemptions may be granted for owners or operators of Class II EOR/EGR wells transitioning to Class VI injection for GS. Additionally, today's rule does not categorically preclude or prohibit injection into any type of formation.

The Agency is finalizing these requirements to ensure USDW protection while providing flexibility to UIC program Directors and owners or operators who will undertake CO_2 injection for GS. The Agency believes this approach: (1) Responds to concerns about local and regional geologic storage capacity limitations imposed by the proposed injection depth requirements; (2) allows for a more site-specific assessment of injection depth for GS projects; (3) accommodates injection into different formation types; (4) allows for injection of CO_2 for GS into non-USDWs above and/or between USDWs when appropriate and where it can be demonstrated that USDWs will be protected from endangerment; and (5) responds to concerns about the use of aquifer exemptions for GS. Finally, EPA's approach to addressing injection depth variability through a waiver process responds to concerns about future drinking water resource availability and the need to ensure that high quality water remains available in sufficient quantities to supply drinking water needs.

The final injection depth waiver requirements at § 146.95 apply to all non-USDWs including: (1) Formations that have salinities greater than 10,000 mg/l TDS and (2) all eligible previously exempted aquifers situated above and/or between USDWs. EPA anticipates that previously exempted aquifers will, in many cases, not be appropriate receiving formations for GS due to their location, size, lithologic properties, and previous injection operations; and, therefore, the Agency expects that few owners or operators will seek Class VI permits for GS injection into previously exempted aquifers.

Injection depth waivers for GS: Today's final rule requires an owner or operator seeking a Class VI waiver of the injection depth requirements to submit additional information to the Director to inform a comprehensive assessment of site-suitability for a Class VI well to inject into a non-USDW above or between USDWs. The Agency believes that it is appropriate and reasonable that the owner or operator and the Director consider additional, specific information prior to waiver issuance in addition to the required Class VI permit information and the site characterization information collected (pursuant to requirements at § 146.82(a) for the site-specific characterization of geologic, hydrogeologic, geochemical, and geomechanical properties and § 146.83 to determine the suitability of the proposed GS site).

In addition to submitting a Class VI permit application, the owner or operator must also submit a supplemental report (the GS Class VI injection depth waiver application report) referenced at § 146.82(d) and outlined at § 146.95(a) with additional, specific information including: Information about the injection zone; identification of confining units above and below the injection zone; tailored AoR modeling above and below the injection zone; a demonstration that well design is appropriate and protective of USDWs, in lieu of specific well construction requirements at § 146.86; a description of how monitoring will be tailored for injection above/between USDWs; and information about public water supplies in the AoR. The purpose of the report is to ensure that the owner or operator collects appropriate information and demonstrates to the Director that the injection zone is suitable for GS and is confined by confining units above and below the injection zone; that well construction, operation, and monitoring are tailored for the site; and, that USDWs are not and will not be endangered. This report, suggested by commenters on the NODA and Request for Comment, ensures that waiver information is discrete from the permit application as indicated at § 146.82(d) and must be made available to the UIC Director, PWSS Directors, the Regional Administrator, and the public when the waiver is publicly noticed with the draft, Class VI permit application.

EPA believes that, to be effective, a waiver of injection depth requirements should be granted only after the UIC program Director, the PWSS Director(s), and the public have evaluated information specific to the site and anticipated injection activity. In addition, the decision to waive injection depth requirements must be made using a clear and transparent public notification process. The requirements at § 146.95(b) establish considerations that the UIC Director must assess when evaluating a waiver application in conjunction with the permit application for a Class VI GS project. These are designed to ensure that USDW protection, site-specific drinking water resource issues, and the use and impact of GS technologies are considered and documented. The requirements at § 146.95(b)(2) also establish the manner in which the UIC Director will consult with the PWSS Director(s) of States, Territories, and Tribes having jurisdiction over lands within the AoR of a well for which a waiver is sought to ensure that water system concerns are considered when evaluating a waiver application. The communication with the PWSS Director is consultative and does not constitute a final Agency decision.

Under § 146.95(c) and pursuant to requirements at § 124.10, the public notification process for a waiver of injection depth requirements for a Class VI well must occur concurrently with the Class VI permit notification in order to ensure that all necessary information is disclosed to the public for notice and

comment and that the public understands that the site, if permitted, would be operating under a waiver from the injection depth requirements. In addition, the rule at § 146.95(c) requires the Director to provide the public with appropriate, site-specific and waiver-specific information to inform public comment. If the permitting authority receives comments on the injection depth waiver during the public comment period for both the waiver and the permit application, the Director must evaluate comments prior to approving the waiver and issuing the Class VI permit. These requirements balance USDW protection and disclosure of PWSS information with the GS permit application process requirements.

Today's final regulations, at § 146.95(d), require the Director to provide the Regional Administrator with the information collected during the waiver application and the public notice processes. Based on this information and pursuant to requirements at § 146.95(d), the Regional Administrator will provide written concurrence or non-concurrence regarding waiver issuance. The requirements at § 146.95(d)(1) afford the Regional Administrator discretion to request limited, additional information to support the waiver decision. The Regional Administrator also has the discretion to require re-initiation of the public notice and comment period if necessary. Today's rule at § 146.95(d)(2) clarifies that Directors of State-approved programs shall not issue waivers without the written concurrence of the Regional Administrator. EPA believes Agency input is necessary in making injection depth waiver decisions and agrees with commenters who expressed interest in ensuring that multi-State boundary and water resource issues are addressed. EPA also believes that Agency involvement in the waiver decision process will contribute to national consistency in waiver issuance.

The requirements at § 146.95(e) identify the information that EPA will maintain on its Web site to provide transparency and inform the public regarding GS injection depth waiver issuance throughout the U.S.

Today's rule finalizes additional requirements at § 146.95(f) to address comments and provide clarity to owners or operators who receive and operate with a waiver of the Class VI injection depth requirements. These requirements are a supplement to all other applicable requirements finalized today (see § 146.95(f)(1)). The additional requirements are designed to complement existing requirements by:

- Building upon the site characterization and AoR delineation conducted during the waiver application process (at § 146.95(a)),
- Supplementing specific requirements that are not applicable due to the fact that certain Class VI requirements (*e.g.,* at § 146.86) reference the "lowermost USDW,"
- Expanding the monitoring requirements during operation and PISC to address protection of USDWs underlying and overlying the injection zone, and,
- Ensuring protection of USDWs above and below an injection zone when a Class VI well is issued a waiver of the injection depth requirements.

The Agency believes that collection and assessment of site- and project-specific information is integral to the waiver process. The Agency is developing guidance to support owners or operators in assessing a GS project site and applying for a waiver of the Class VI injection depth requirements and to assist Directors in evaluating waiver applications.

Today's final approach for injection depth waivers represents minimum Federal requirements. Adoption of the waiver process will remain at the discretion of individual UIC programs, since States may choose to develop requirements that are more stringent than the minimum Federal requirements provided in today's rule. Furthermore, States, Territories and Tribes may be prohibited by state law from allowing such a waiver process. Therefore, States, Territories, and Tribes seeking primacy for Class VI wells are not required to provide for injection depth waivers in their UIC regulations and may choose not to make this process available to owners or operators of Class VI wells under their jurisdiction. Although some commenters asked EPA to require that waivers be applied nationally, the Agency believes that the decision about whether a waiver program is appropriate in a specific State, Tribe, or Territory should be made by each program. This approach allows flexibility for individual program Directors to determine the appropriateness of allowing for waivers based on regional or State-specific conditions, such as the predominant geologic settings anticipated to be used for GS or other land uses in the State while ensuring maximum protection of USDWs from endangerment. UIC program Directors may adopt GS requirements that do not allow injection above or between USDWs if they determine this to be appropriate or if State law prohibits the injection depth waiver process.

No waivers can be issued prior to the establishment of a Class VI UIC program in a State, pursuant to the requirements at § 145.21(see section II.E.2). This is designed to ensure that States determine whether a waiver process will be allowed as a part of their GS program.

Use of aquifer exemptions for GS: Today's rule allows for the expansion to the areal extent of existing aquifer exemptions for Class II EOR/EGR wells transitioning to Class VI injection for GS pursuant to requirements at §§ 146.4 and 144.7(d). Today's final rule also precludes the issuance of new aquifer exemptions for Class VI wells. Aquifer exemptions will only be granted for projects that are transitioning from Class II EOR/EGR wells to Class VI, and are referred to as aquifer exemption expansions below. However, Class VI owners or operators granted expansions of existing Class II EOR/EGR aquifer exemptions for GS projects must meet all of the tailored requirements for Class VI wells in today's rule, except where there are specific provisions for grandfathering of constructed wells pursuant to requirements at § 146.81(c).

If an owner or operator applies for a Class VI permit to inject CO_2 into a previously exempted aquifer (non-USDW) that is located above and/or between USDWs, the permit applicant must also apply for a waiver of the injection depth requirements pursuant to § 146.95 to ensure that if a waiver is granted, USDWs above and below the injection zone are protected from endangerment.

While the Agency developed the waiver process to address comments and concerns about: (1) Current and future drinking water resources and (2) the use of climate mitigation technology at appropriate sites, the Agency acknowledges that there are limited circumstances where aquifer exemptions for GS may be warranted. The aquifer exemption requirements in today's final rule afford owners or operators an opportunity to assess and select a suitable GS site while also preserving USDWs (*i.e.,* formations/aquifers afforded SDWA protection). EPA agrees with commenters who expressed concerns about USDW preservation and protection and believes that, in most cases, the injection depth waiver is a more appropriate option than aquifer exemptions for Class VI injection, and believes that aquifer exemption expansions for GS should be granted in limited circumstances.

The aquifer exemption requirements and the injection depth waiver requirements serve different purposes. An aquifer exemption removes the

injection formation from SDWA protection as a USDW and allows injection (*i.e.,* permitted or rule authorized) into an exempted formation, while an injection depth waiver allows (Class VI) CO_2 injection for GS above or between USDWs and ensures protection of USDWs above and below the injection zone (which may be an exempted aquifer).

The Agency recognizes that a limited number of Class II EOR/EGR well owners or operators currently inject into exempted aquifers or exempted portions of aquifers and these owners or operators may transition to Class VI GS in the future (see section II.H). In response to commenters who believed that there is a need for aquifer exemptions in specific circumstances and in an effort to maintain USDW protection while providing flexibility to transitioning projects, today's rule allows owners or operators of Class II EOR/EGR operations injecting into exempted aquifers (or exempted portions of aquifers) to reapply for an aquifer exemption expansion for the re-permitted Class VI injection.

For all Class II EOR/EGR aquifer exemption expansions for Class VI injection, public notice and opportunity for a public hearing is required under § 144.7(b)(3). In addition, today's rule requires that all such aquifer exemption expansion requests be treated as substantial program revisions under § 145.32 and will require revision of part 147. Furthermore, if EPA directly implements the UIC program in a State, an aquifer exemption expansion requires a revision to the UIC program of the applicable State under part 147.

The Agency acknowledges that the expansion of an existing aquifer exemption for a GS project will remove additional USDWs (or portions of USDWs) from SDWA protection, and that owners or operators of other classes of injection wells could apply for a permit to inject into these exempted aquifers. However, EPA clarifies that aquifer exemption expansions granted under today's rule will only be granted for the purpose of GS (and the injection will be subject to today's tailored requirements for Class VI wells). Any other uses of an exempted aquifer (*e.g.,* for Class I through V injection) require a separate permit, are subject to existing UIC requirements, and must be approved by the UIC Director. The Agency anticipates that a UIC Director will (and encourages the UIC Director to) consider the following types of risks when evaluating additional injection activities into the AoR of a GS project: The number of artificial penetrations in the AoR, potential adverse geochemical interactions between previously injected CO_2 and other injection fluids, and an increase in reservoir pressure as a result of multiple injectors and subsurface plume interaction. EPA believes that these factors would reduce the likelihood that exempted aquifers associated with GS injection will be used for other activities.

Additionally, the Agency recognizes that an owner or operator could, in theory, request multiple expansions to the areal extent of a previously exempted aquifer used for Class II EOR/EGR injection. However, due to the nature of Class VI operations including the permit application process, the AoR evaluation, and the development of site-specific plans, the Agency anticipates that an owner or operator will not be able to continually expand an aquifer exemption for a Class VI operation. Instead, the applicant should identify, up front, the predicted extent of the injected CO_2 plume and any mobilized fluids that may result in degradation of water quality over the lifetime of the GS project to develop an appropriate aquifer exemption request. Identification of the areal extent of the expanded aquifer exemption must be informed by computational modeling of the site developed for delineation of the AoR, and be of sufficient size to cover any possible changes to the computational model that may arise during future reevaluation of the AoR over the life of the project.

Pursuant to requirements at § 144.7(d)(2), the Director will comprehensively evaluate the permit application information in concert with the areal extent of the aquifer exemption expansion request. The purpose of these requirements is to ensure USDW protection while developing an exemption expansion that is commensurate with the Class VI injection project, for the life of the project, to reduce the potential need for additional expansions of a specific aquifer exemption for Class VI injection in the future.

Furthermore, in the event that a Class VI owner or operator obtains evidence based on monitoring data collected at the GS site, as required by § 146.90(g), that non-exempted, USDW portions of the aquifer (*i.e.,* on the periphery of the exempted aquifer) may be endangered by the injection activity, the owner or operator must immediately cease injection and implement the Emergency and Remedial Response Plan approved by the Director pursuant to requirements at § 146.94. Additionally, the Agency clarifies that such USDW endangerment is a violation of the UIC requirements and associated Class VI permit conditions (*e.g.,* § 144.12; § 146.86, etc.).

Today's final approach is designed to ensure that the differences between traditional Class II EOR/EGR operations and Class VI operations are considered during the aquifer exemption application process and the Class VI permitting process. These differences include the anticipated large CO_2 injection volumes associated with GS, the buoyant and mobile nature of the injectate, and its corrosivity in the presence of water. The Agency believes that this process will encourage owners or operators and Directors to consider the use of alternative formations for GS, including non-USDW formations through the waiver process, prior to applying for or approving aquifer exemption expansions for Class II EOR/EGR wells transitioning to Class VI GS operations. See the discussion on injection depth waivers for GS for information on scenarios that will require the use of both aquifer exemptions and waivers in this section.

Injection formations for GS: In response to comments received on the proposal and the NODA and Request for Comment, today's rule does not categorically preclude or prohibit injection into any type of formation. Instead, the requirements are designed to ensure protection of USDWs from endangerment through proper siting, well construction, operation, monitoring, and PISC at all sites selected for GS.

EPA recognizes that some types of formations, such as coal seams and basalts, are typically shallow and above the lowermost USDW. EPA expects that injection wells conducting GS in these shallow formations will be permitted as Class VI wells and such wells will be issued waivers, provided that their owners or operators can meet all of the requirements for an injection depth waiver at § 146.95 and demonstrate that such injection can be performed in a manner that protects USDWs. EPA adds that wells used to inject into these formation types or other formation types (*e.g.,* salt domes and shales) for experimental purposes would be permitted as Class V experimental technology wells. See section II.H for additional information on the use of the Class V experimental technology well classification following finalization of today's rulemaking.

To facilitate experimental injection for GS and to increase understanding of injection into basalts, shales, and other formation types, EPA is preparing additional guidance for owners or operators and Directors regarding the use of Class V experimental technology

wells for GS following promulgation of today's rule.

Adaptive approach: In the early stages of GS deployment, EPA will collect and review project data on GS projects, including information on any Class VI wells granted a waiver of the injection depth requirements and any aquifer exemption expansions issued for Class II EOR/EGR wells transitioning to Class VI GS. Given the unique nature of the waiver of injection depth requirements, the Agency will further assess if the requirements provided in § 146.95 are appropriately designed to evaluate waiver applications, issue waivers, and ensure protection of USDWs. The adaptive approach will also afford the Agency an opportunity to assess the manner in which waivers and expansions of existing Class II EOR/EGR aquifer exemptions for GS are issued across the U.S. and evaluate the applicability of injection into all formation types.

E. Injection Well Operation

Today's final rule contains tailored requirements at § 146.88 for the operation of Class VI wells, including injection pressure limitations, use of down-hole shut-off systems, and annulus pressure requirements to ensure that injection of CO_2 does not endanger USDWs.

The requirements for operation of Class VI injection wells are based on the existing requirements for Class I wells, with enhancements to account for the unique conditions that will occur during GS including buoyancy, corrosivity, and higher sustained pressures over a longer period of operation.

Injection pressure limitations: EPA proposed that owners or operators limit injection pressure such that pressure in the injection zone does not exceed 90 percent of the fracture pressure of the injection zone, and that injection may not initiate new fractures or propagate existing fractures. Most commenters opposed an arbitrary pressure limit, and advocated setting pressure limitations on a site-specific basis. Today's final rule retains the requirement that pressure in the injection zone must not exceed 90 percent of the fracture pressure of the injection zone (§ 146.88(a)). The calculated fracture pressure—and therefore, the injection pressure limit—are based on site-specific geologic and geomechanical data collected during the site characterization process as advocated by commenters.

Annulus pressure: EPA proposed that owners or operators fill the annulus with an approved non-corrosive fluid and maintain pressure on the annulus that exceeds the operating injection pressure. Many commenters disagreed with the requirement to maintain an annulus pressure greater than the injection pressure because they indicated that this could increase the potential for damage to the well.

EPA acknowledges that, in some circumstances, maintaining an annulus pressure greater than the injection pressure could result in a greater chance for damage to the well or the formation. As a result, the final rule provides the Director discretion to adjust this requirement if maintaining an annulus pressure higher than the injection pressure may cause damage to the well or the formation. EPA changed the requirements in § 146.88(c) to: "The owner or operator must maintain on the annulus a pressure that exceeds the operating injection pressure, unless the Director determines that such requirement might harm the integrity of the well or endanger USDWs."

Automatic down-hole shut-off devices: EPA proposed that owners or operators install and use alarms and automatic down-hole shut-off systems, in addition to the use of surface shut-off devices, to alert the owner or operator and shut-in the well in the event of a loss of mechanical integrity. Automatic down-hole shut-off devices are valves located in the well tubing (at a depth established based on the location of USDWs) that are set to close if triggered by changes in flow rate or other monitored parameters. Automatic surface shut-off valves are commonly used in the oil and gas industry to prevent further well complications in the case of a triggered event such as inadvertent well backflow during a workover. The Agency sought comment on the merits of requiring such devices.

Commenters, including representatives of water associations, supported the requirement to construct Class VI wells with automatic down-hole shut-off devices. These commenters suggested that automatic down-hole shut-off devices provide an additional barrier against upward migration of CO_2 and serve as an additional level of protection when used in concert with surface shut-off devices.

Many industry commenters disagreed with the requirement to construct Class VI wells with automatic down-hole shut-off devices. These commenters indicated that down-hole shut-off devices are redundant of surface devices and unnecessary and would not provide additional protection to USDWs. Commenters suggested that these devices are more appropriate for offshore wells and that the likelihood of damage to surface wellheads is small. Other commenters stated that installation of automatic down-hole shut-off devices in new and pre-existing deep injection wells is complex and servicing of the devices necessitates removal of the tubing. Commenters also indicated that the use of such devices can complicate routine testing and well workovers, and that failure of such devices could damage the well. Several commenters suggested alternatives to automatic down-hole shut-off devices including: Use of wireline retrievable plugs with landing nipples; and use of well materials designed to withstand the proposed injection pressures.

EPA evaluated the range of comments on this topic and maintains that down-hole shut-off devices are an important barrier against endangerment of USDWs from the escape of CO_2. While stakeholders commented that automatic down-hole shut-off devices are primarily used in offshore oil and gas production applications, they are currently used in other situations where loss of well integrity could result in damage to the well or harm to humans (*e.g.,* near high-density population areas, or in onshore acid gas injection; IEA, 2003). While commenters indicated that down-hole monitoring is more difficult, or impractical with an automatic down-hole shut-off device in place, EPA has identified examples of documented logging techniques, including ultrasonic and temperature logs, that can be performed with an automatic down-hole device emplaced (Julian *et al.,* 2007; Somaschini *et al.,* 2009). They are also used in high pressure, high temperature onshore wells and in permafrost areas.

EPA recognizes that, in limited circumstances, the sudden closing of an automatic shut-off valve could cause damage to a well, and that some of these devices may make well maintenance and operation more challenging. Additionally, EPA recognizes that well complications may increase as the frequency of routine or unexpected down-hole device maintenance workovers increases. However, the buoyant nature of CO_2 and the elevated injection pressures associated with GS increase the likelihood of an uncontrolled flow of CO_2 out of the well. If CO_2 does begin to flow back up an injection well, it will rapidly cool and expand as it moves toward the surface and can result in a stream of solid CO_2 which can cause damage to the wellhead and other well instrumentation; such damage has been documented in CO_2 ER wells (Skinner, 2003; Duncan *et al.,* 2009). Automatic

shut-off devices can help prevent such occurrences.

After evaluating the risks and benefits of down-hole shut-off systems and considering additional research, EPA will not require automatic down-hole shut-off devices for onshore Class VI wells. Instead, the final rule, at § 146.88(e)(2), requires that owners or operators of onshore Class VI wells install automatic surface shut-off devices, and affords Director's discretion to mandate automatic down-hole shut-off devices in onshore situations that may warrant their use. EPA believes that requiring automatic surface shut-off devices instead of down-hole devices provides more flexibility to owners or operators when performing required mechanical integrity tests. Additionally, this requirement addresses concerns about risks associated with routine well workovers that may be complicated by the presence of down-hole devices while still maintaining USDW protection.

Today's rule, at § 146.88(e)(3), requires the installation of down-hole shut-off devices for Class VI wells located in the offshore submerged lands within the jurisdiction of a State UIC program. The Agency believes that the unique construction and operational conditions for offshore Class VI wells, including isolation from shorelines and the need to construct wells through the water column and the subsurface, may delay response time in the event of well difficulties. These conditions merit requiring automatic down-hole shut-off devices for offshore wells in the submerged lands of a State.

In the event of onshore or offshore well complications, an automatic surface or down-hole shut-off device will immediately shut-in the well to cease injection (limiting CO_2 volume associated with the event), isolate the injectate, and minimizes the risk of subsurface fluid movement and associated problems that may endanger USDWs. EPA believes that requiring the installation of automatic surface shut-off devices for onshore wells (and affording Director's discretion to require down-hole devices where necessary) and automatic down-hole shut-off devices for offshore wells in submerged lands within the jurisdiction of a State ensures that proper precautions are taken to prevent subsurface fluid movement and ensure protection of USDWs, human health, and the environment.

Well stimulation: In the proposed rule, EPA sought comment on whether well stimulation or fracturing to enhance formation injectivity is appropriate and should be allowed for Class VI wells. EPA also requested submittal of information from commenters to better qualify the use of hydraulic fracturing for well stimulation in specific geologic settings and various lithologies. Well owners or operators often use stimulation techniques, including intentionally creating new or propagating existing fractures in the injection zone on wells that have experienced decreased oil and gas production. Additionally, increasing the number and size of fractures surrounding the injection zone can enhance or increase the injectivity of the formation. However, if fractures extend to the confining layer, USDWs can be endangered.

Some commenters stated that while stimulation using a range of techniques including hydraulic fracturing is not appropriate in all geologic settings it should be allowed for Class VI wells. Commenters supported the requirement that hydraulic fracturing only be allowed during well stimulation, noting that ER operations have successfully employed hydraulic fracturing to increase well injectivity without damaging the confining layer. These commenters thought that enhancing injectivity through stimulation would allow injection to occur with fewer injection wells and therefore fewer penetrations of the confining layer.

Many commenters indicated that the Director should be able to determine, based on site-specific information, whether stimulation techniques would pose a risk to the confining layer. Some commenters proposed considerations for determining whether stimulation, including hydraulic fracturing, is appropriate in a given situation and acknowledged that tools exist for owners or operators and Directors to manage the safe use of well stimulation practices. These tools include use of monitoring programs or computer simulations in conjunction with stimulation activities to determine if stimulation is negatively impacting confining layers. Others suggested that open-hole injection zones and multiple injection points can also aid in increasing well injectivity.

A water association commented that activities such as hydraulic fracturing should not be allowed under any circumstances in order to prevent fracturing of the confining layer and the opening of pathways for fluid migration into a USDW.

EPA agrees with commenters that well stimulation may be appropriate in situations where it is determined that it will increase well injectivity and provide better performance for some projects. However, EPA believes that protection of USDWs from endangerment is critical and the primary purpose of UIC regulations pursuant to SDWA. In order to allow appropriate well stimulation while protecting confining layers and USDWs, EPA intends to allow stimulation only at the discretion of the Director. The Director is in the best position to determine if well stimulation techniques, including but not limited to hydraulic fracturing, are appropriate in a given situation. EPA has added a requirement at § 146.91(d)(2) that the owner or operator must notify the Director before any stimulation activities are undertaken. Such notice will provide the Director an additional opportunity to review stimulation plans, assess the description of stimulation fluids to be used, determine that stimulation will not interfere with containment, assess plan appropriateness, and potentially witness the stimulation activity. Although the plan will already have been approved by the Director as part of the permit application process and incorporated into the permit, this notification requirement gives the Director an opportunity to reassess the proposed stimulation activities in light of any new information. In order to preserve the integrity of the confining layer, EPA is retaining the prohibition against fracturing the confining layer at any time and adds that fracturing should not be allowed except during well stimulation. EPA clarifies that under no circumstances may stimulation endanger USDWs.

Tracers: In the proposed rule, EPA sought comment on the use of tracers in GS operations. Tracers are inert compounds added to or naturally occurring in the injection fluid, which can be easily detected through monitoring wells or through surface monitoring techniques. Detection of the tracer would indicate a leak of the injection fluid from the injection zone. Many types of tracers are available, including perfluorocarbons, SF_6, noble gases, and stable isotopes such ^{18}O and ^{14}C.

Some commenters supported the use of tracers in Class VI injection wells, maintaining that tracers are a useful method for detecting CO_2 leaks. Many commenters suggested that tracers should not be required, but should be allowed at the discretion of the Director. Other commenters thought that owners or operators should be allowed to decide whether to use tracers.

Most commenters asserted that tracers were unnecessary and that better methods for tracking CO_2 movement were available. These commenters cited

a variety of reasons, including that tracers were expensive, burdensome, and untested; that detection of a tracer at the surface would do nothing to protect USDWs from endangerment; and that some tracers may have health risks or can contribute to climate change. EPA received comments on specific tracers, such as perfluorocarbons (which have been proven in other applications), radioactive tracers (which have been used successfully in the oil and gas industry, but only with a limited radius), and the use of CO_2 itself (which can act as a tracer).

EPA agrees that tracers can be a useful tool in some circumstances, but recognizes that some factors (*e.g.,* the potential to contribute GHGs to the atmosphere, cost, and difficulties associated with monitoring for tracers) may make other methods of tracking CO_2 movement more practical. Therefore, today's rule does not require use of tracers for Class VI wells. However, EPA does believe that tracers may be valuable in some cases, and will retain Director's discretion to require the use of tracers and to determine the type of tracer to be used if the Director determines that their use will increase USDW protection from endangerment.

F. Testing and Monitoring

Today's final rule at § 146.90 requires owners or operators of Class VI wells to develop and implement a comprehensive testing and monitoring plan for their projects that includes injectate monitoring, corrosion monitoring of the well's tubular, mechanical, and cement components, pressure fall-off testing, ground water quality monitoring, CO_2 plume and pressure front tracking, and, at the Director's discretion, surface air and soil gas monitoring (SDWA section 1421 *et al.*). The rule also requires MIT to verify proper well construction, operation, and maintenance.

Monitoring associated with injection projects is an important component of the UIC program and is required to ensure that USDWs are not endangered. Monitoring data can be used to verify that the injectate is safely confined in the target formation, minimize costs, maintain the efficiency of the storage operation, confirm that injection zone pressure changes follow predictions, and serve as inputs for AoR modeling. Monitoring results will provide information about site performance when compared against baseline information (collected during the site characterization phase) or when compared to previous monitoring results. In conjunction with careful site selection and AoR delineation, monitoring is critical to the successful operation, PISC, and site closure of a GS project.

Today's monitoring requirements are based on existing UIC regulations, tailored to address the needs and challenges posed by GS projects. For example, supercritical CO_2 is different from many Class I injectates in physical properties and chemical composition. Also, many GS projects are anticipated to be "large-scale," with large volumes of CO_2 injected over long project life-spans. In the proposed rule, EPA sought comment on the testing and monitoring plan, MIT, the use of pressure fall-off testing, the types and amounts of ground water quality monitoring, pressure front tracking, geophysical methods, and surface air and soil gas monitoring.

The testing and monitoring requirements for Class VI wells at § 146.90 incorporate elements of pre-existing UIC requirements for monitoring and testing, tailored and augmented as appropriate for GS projects. EPA recognizes that much will be learned about monitoring and testing technologies and their application in various geologic settings in the early phases of GS deployment. Therefore, the Agency will evaluate monitoring data from early GS projects as part of the Agency's adaptive rulemaking approach (See section II.F). The Agency is developing guidance to support testing and monitoring at GS sites.

1. Testing and Monitoring Plan

EPA proposed that owners or operators of Class VI wells submit monitoring plans with their permit applications. These plans would be tailored to the GS project and be implemented upon Director approval, and, at a minimum, include procedures and frequencies for analysis of the chemical and physical characteristics of the CO_2 stream; MIT (internal and external); corrosion monitoring; determination of the position of the CO_2 plume and area of elevated pressure; monitoring of geochemical changes in the subsurface; and, at the discretion of the Director, surface air and soil gas monitoring for CO_2 fluctuations, and any additional tests necessary to ensure USDW protection from endangerment.

EPA sought comment on the testing and monitoring plan. Commenters recommended that the plan be reevaluated concurrently with AoR reevaluations. Commenters agreed that the plan should be site-specific and flexible to allow the use of varied monitoring and testing technologies. The Agency acknowledges the importance of flexibility and today's rule maintains a testing and monitoring plan requirement that will allow for site specificity and selection of the most appropriate monitoring technologies. The Agency also acknowledges the importance of agreement between site-characterization data, AoR information, and monitoring and testing information.

The final rule retains the requirement to develop and implement a testing and monitoring plan and requires that the approved plan be incorporated into the Class VI permit. Owners or operators must also periodically review the testing and monitoring plan to incorporate operational and monitoring data and the most recent AoR reevaluation (§ 146.90(j)). This review must take place within one year of an AoR reevaluation, following significant changes to the facility, or when required by the Director. The iterative process by which this and other required plans are reviewed throughout the life of a project will promote an ongoing dialogue between the owner or operator and the Director. Tying the plan reviews to the AoR reevaluation frequency is appropriate to ensure that reviews of the plans are conducted on a defined schedule to address situations where there is a change in the AoR or other circumstances change, while adding little burden if the AoR reevaluation confirms that the plan is appropriate as written. The Agency is developing guidance that describes the contents of the project plans required in the GS rule, including the testing and monitoring plan.

2. CO_2 Stream Analysis

Injectate analysis provides information on the chemical composition and physical characteristics of the injectate. Analysis of the CO_2 stream for GS projects will provide information about any impurities that may be present and whether such impurities might alter the corrosivity of the injectate down-hole. Such information is necessary to inform well construction and the project-specific testing and monitoring plan, and enable the owner or operator to optimize well operating parameters while ensuring compliance with the Class VI permit. The proposed rule required that analysis of the CO_2 stream be conducted prior to commencing injection and throughout injection operations at an appropriate frequency based on the CO_2 source and the likelihood of variability in the injectate composition. Commenters supported the need for analysis of the CO_2 stream. The final rule retains the requirement that owners or operators need to characterize their CO_2 stream as part of

their UIC permit application (§ 146.82(a)(7)), and throughout the operational life of the injection facility (§ 146.90(a)). The details of the sampling process and frequency must be described in the Director-approved, site/project-specific testing and monitoring plan.

Resource Conservation and Recovery Act (RCRA) Applicability to CO_2 Streams: EPA received public comment asserting that the proposed UIC Class VI requirements were unclear as to whether the CO_2 stream would be a RCRA hazardous waste, and left uncertain the type of permit needed. Many commenters stated that a CO_2 stream should not be treated as a RCRA hazardous waste on the grounds that it is neither a listed hazardous waste nor does it exhibit a hazardous characteristic. Other commenters asserted that CO_2 in the presence of water could exhibit the RCRA corrosivity characteristic. Additionally, commenters indicated that analytic procedures used under RCRA (in particular, the toxicity characteristic leaching procedure (TCLP)) cannot be applied to supercritical CO_2 streams and that the Class VI regulations would better ensure the proper management of a CO_2 injectate. EPA did not receive any new data on CO_2 stream characterization in the public comments.

In general, subtitle C of RCRA establishes a "cradle to grave" regulatory scheme over certain "solid wastes" which are also "hazardous wastes." RCRA defines solid waste as, among other things, discarded material, including solid, liquid, semisolid, or contained gaseous material. EPA has further defined the term solid waste for purposes of its hazardous waste regulations. To be considered a hazardous waste, a material must first be classified as a solid waste under the regulations (40 CFR 261.2). Under EPA's regulations at 40 CFR 262.11, generators of solid waste are required to determine whether their wastes are hazardous wastes. A solid waste is a hazardous waste if it exhibits any of four characteristics of a hazardous waste (*i.e.,* ignitability, corrosivity, reactivity, or toxicity) under 40 CFR 261.20–.24, or is a listed waste under 40 CFR 261.30–.33 (these include various used chemical products, by-products from specific industries, or unused commercial products).

A CO_2 stream is not itself a listed RCRA hazardous waste. EPA has reviewed estimates of CO_2 injectate quality, which were based upon information such as the quality of flue gas from the burning of fossil fuels, existing flue gas emission controls (*e.g.,* electrostatic precipitators and scrubbers), and data from applied CO_2 capture technology. These estimates indicate that captured CO_2 could contain some impurities. These estimates also indicate that the types of impurities and their concentrations would likely vary by facility, coal composition, plant operating conditions, and pollutant removal and carbon capture technologies.

Under this final rule, owners or operators will need to determine whether the CO_2 stream is hazardous under EPA's RCRA regulations, and if so, any injection of the CO_2 stream may only occur in a Class I hazardous waste injection well. Conversely, Class VI wells cannot be used for the co-injection of RCRA hazardous wastes (*i.e.,* hazardous wastes that are injected along with the CO_2 stream).

EPA supports the use of CO_2 capture technologies that minimize impurities in the CO_2 stream. As a result of the public comments received on the proposed Class VI rule related to various RCRA applicability issues, EPA initiated a rulemaking separate from today's final UIC Class VI rule. The RCRA proposed rule will examine the issue of RCRA applicability to CO_2 streams being geologically sequestered, including the possible option of a conditional exemption from the RCRA requirements for CO_2 GS in Class VI wells (see RIN 2050–AG60, EPA Semiannual Regulatory Agenda, Spring 2010, EPA–230–Z–10–001). EPA will consider comments received on the Class VI rule during the development of the RCRA proposal. The Agency clarifies that commenters who wish to submit comments on the RCRA proposal must do so during the comment period for that rule. Today's rule does not itself change applicable RCRA regulations.

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Applicability to CO_2 Streams: EPA received a range of comments regarding CERCLA liability and GS. Some commenters suggested that the Agency allow for a GS exemption under CERCLA, while others requested that the rule specify that injectate intrusion into a USDW is not considered a CERCLA release and that the SDWA provides enough civil and criminal enforcement authority to address any environmental contamination that might result from GS. Other commenters supported maximizing protection under CERCLA by writing Class VI GS permits as broadly as possible so that "unauthorized releases" are avoided.

CERCLA, more commonly known as Superfund, is the law that provides broad Federal authority to clean up releases or threatened releases of hazardous substances that may endanger human health or the environment. CERCLA references four other environmental laws to designate more than 800 substances as hazardous and to identify many more as potentially hazardous due to their characteristics pursuant to RCRA. CERCLA authorizes EPA to clean up sites contaminated with hazardous substances and seek compensation from responsible parties or compel responsible parties to perform cleanups themselves.

CO_2 itself is not listed as a hazardous substance under CERCLA. However, the CO_2 stream may contain a listed hazardous substance (such as mercury) or may mobilize substances in the subsurface that could react with ground water to produce listed hazardous substances (such as sulfuric acid). Whether such substances may result in CERCLA liability from a GS facility depends entirely on the composition of the specific CO_2 stream and the environmental media in which it is stored (*e.g.,* soil or ground water). CERCLA exempts from liability under CERCLA section 107, 42 U.S.C. 9607, certain "Federally permitted releases" (FPR) as defined in CERCLA, 42 U.S.C. 9601(10), which would include the permitted injectate stream as long as it is injected and behaves in accordance with the permit requirements. Class VI permits will need to be carefully structured to ensure that they prevent potential releases from the well, which are outside the scope of the Class VI permit and thus not considered federally permitted releases.

The UIC program Director has authority under the SDWA to address potential compliance issues (*e.g.,* potential releases that may endanger USDWs) resulting from injection violations in the unlikely event that an emergency or remedial response (at § 146.94) is necessary. Although EPA anticipates that the need for emergency or remedial actions at GS sites will be rare, today's rule requires that emergency and remedial response plans be developed and updated to address such events (in accordance with the remedial response requirements at § 146.94) and that owners or operators demonstrate that financial resources are set aside to implement the plans if necessary (pursuant to the financial responsibility requirements at § 146.85).

3. Mechanical Integrity Testing (MIT)

Injection well MIT is a critical component of the UIC program's requirements designed to ensure USDW protection from endangerment. Testing and monitoring the integrity of an injection well at an appropriate frequency throughout the injection operation, in conjunction with corrosion monitoring of well materials, can verify that the injection system is operating as intended or provide notice that there may be a loss of containment that may lead to endangerment of USDWs. Routine MITs enable owners or operators to ensure that well integrity is maintained from construction throughout the life of the injection project. UIC regulations for other deep-well classes require injection well owners or operators to demonstrate both internal and external mechanical integrity.

Internal MIT: Internal mechanical integrity (MI) is an absence of significant leakage in the injection tubing, casing, or packer. Loss of internal MI is usually due to corrosion or mechanical failure of the injection well's tubular and mechanical components. Typically, internal MI is demonstrated with an annual pressure test of the annular space between the injection tubing and long-string casing.

For Class VI wells, EPA proposed that owners or operators perform an initial annulus pressure test and then continuously monitor injection pressure, injection rate, injected volume, pressure on the annulus between the tubing and long-stem casing, and annulus fluid during injection. EPA sought comment on the appropriate frequency of internal MIT and the practicality of continuous testing to measure internal MI. Commenters' suggestions on the appropriate frequency varied and some believed that the proposed requirement for continuous monitoring seemed excessive and/or impractical.

Today's rule at § 146.89 retains the requirements for continuous monitoring to demonstrate internal MI presented in the proposed rule. This is driven by concerns that the potential corrosivity of CO_2 in the presence of water and the anticipated high pressures and volumes of injectate could compromise the integrity of the well. Continuous monitoring to demonstrate internal MI for Class VI wells is essential because it allows for the immediate identification of corrosion-related mechanical integrity problems or problems due to temperature and pressure effects associated with injection of supercritical CO_2. Furthermore, the technologies used for continuous monitoring are currently available and widely used.

External MIT: External well MI is demonstrated by establishing the absence of significant fluid movement along the outside of the casing, generally between the cement and the well structure, and between the cement and the well-bore. Failure of an external MIT can indicate improper cementing or degradation of the cement that was emplaced to fill and seal the annular space between the outside of the casing and the well-bore. This type of failure can lead to movement of injected fluids out of intended injection zones and toward USDWs.

EPA proposed annual external MIT using a tracer survey, a temperature or noise log, a casing inspection log, or any other test the Director requires. EPA sought comment on the appropriate frequency and types of MITs for Class VI wells. In general, commenters requested flexibility in methods and timing of testing, with some suggesting a five-year frequency for external MIT.

Because GS is a new technology and there are a number of unknowns associated with the long-term effects of injecting large volumes of CO_2, today's rule requires owners or operators of CO_2 injection wells to demonstrate external MI at least once annually during injection operations using a tracer survey or a temperature or noise log (§ 146.89(c)). This increase in required testing frequency relative to other injection well classes ensures the protection of USDWs from endangerment given the potential corrosive effects of CO_2 (in the presence of water) on well components (steel casing and cement) and the buoyant nature of supercritical CO_2 relative to formation brines, which could enable it to migrate up a compromised wellbore. The Director may also authorize an alternate test of external mechanical integrity with the approval of EPA (§ 146.89(e)).

In addition, the final rule is modified from the proposal to allow the Director discretion to require use of casing inspection logs to determine the presence or absence of any casing corrosion at § 146.89(d). To ensure the appropriate application of this test and to afford flexibility to owners or operators and Directors, the final rule requires that the frequency of this test be established based on site-specific and well-specific conditions and incorporated into the testing and monitoring plan if the Director requires such testing. This modification is made to clarify that such logs, while not used to directly assess mechanical integrity, may be used to measure for corrosion of the long-string casing and thus may serve as a useful predictor of potential mechanical integrity problems in the future.

4. Corrosion Monitoring

Existing UIC Class I deep well operating requirements allow the Director discretion to require corrosion monitoring and control where corrosive fluids are injected. Corrosion monitoring can provide early warning of well material corrosion that could compromise the well's MI. Given the potential for corrosion of well components if they are in contact with water saturated with CO_2 or CO_2 in the presence of water, corrosion monitoring is included as a routine part of Class VI well testing. EPA proposed quarterly monitoring using coupons, routing the CO_2 injectate through a loop of well material, or an alternative method proposed by the Director.

Some commenters believed that such testing was unnecessary given that well materials will need to be constructed with materials compatible with the injectate. EPA notes, however, that the long-term effects of CO_2 on cement and other well components are not yet completely understood. Given the anticipated long life-span of a Class VI well and the difficulties that would be associated with a corrosion-related well failure, EPA believes that quarterly corrosion monitoring is justified and retains the requirement in the final rule (at § 146.90(c)).

5. Ground Water/Geochemical Monitoring

Ground water and geochemical monitoring are important monitoring techniques that ensure protection of USDWs from endangerment, preserve water quality, and allow for timely detection of any leakage of CO_2 or displaced formation fluids out of the target formation and/or through the confining layer. Periodically analyzing ground water quality (*e.g.,* salinity, pH, and aqueous and pure-phase CO_2) above the confining layer can reveal geochemical changes that result from leaching or mobilization of heavy metals and organic compounds, or fluid displacement.

EPA proposed periodic monitoring of the ground water quality and geochemical changes above the confining zone and sought comment on the types and frequencies of monitoring to be performed. The Agency agrees with commenters who support a flexible monitoring regime, and believes that the amounts and types of monitoring should be site specific.

Some commenters expressed concern that monitoring wells penetrating the confining layer could become conduits for fluid movement. EPA clarifies that direct geochemical monitoring is not required in the target formation itself, although sampling via wells in the target formation may be desirable in some circumstances, *e.g.,* to perform geochemical monitoring in wells used for direct pressure monitoring to meet requirements of § 146.90(g). Furthermore, EPA believes that the benefits of direct monitoring using wells outweigh the risks of unintended fluid migration. Monitoring wells provide important information that confirms injectate confinement. Careful siting and appropriate construction of monitoring wells are critical to effective monitoring and can minimize the potential that monitoring wells serve as conduits for fluid movement.

The final rule, at § 146.90(d), retains the requirement for direct ground water quality monitoring as specified in the site-specific monitoring plan. Such monitoring is required above the confining zone (and below the lower confining zone for waivered wells pursuant to requirements at § 146.95(f)). The number, placement, and depth of monitoring wells will be site-specific and will be based on information collected during baseline site characterization. Ground water and geochemical monitoring results, when compared to baseline site characterization data, previous monitoring results, and operational parameters will enable owners or operators and Directors to assess project performance, confirm that the injectate, formation fluids, and the injection operation are not impacting overlying (and underlying, for wells operating under injection depth waivers) formations, identify formation fluid changes, inform modifications to the monitoring plan, and ensure USDW protection from endangerment.

6. Pressure Fall-Off Testing

Pressure fall-off tests are designed to determine if reservoir pressures are tracking predicted pressures and modeling inputs. The results of pressure fall-off tests will confirm site characterization information, inform AoR reevaluations, and verify that projects are operating properly and the injection zone is responding as predicted.

EPA proposed that owners or operators perform pressure fall-off testing at least once every five years and requested comment on the use and frequency of these tests. Some commenters expressed support for the tests, and suggested frequencies of annually to every five years. Some commenters expressed opposition to the tests stating that they are not necessary and the information they provide is not unique and may be obtained from other tests.

The Agency believes that pressure fall-off testing provides valuable information and that a five-year frequency is appropriate. The final rule, at § 146.90(f), retains the requirement for testing at least once every five years. EPA believes that this frequency will allow for pressure tracking in the injection formation. It will also help to verify that the operation is responding as modeled/predicted and allow the owner or operator to take appropriate action (*e.g.,* recalibration of the AoR model) in the event that the monitoring results do not match expectations.

7. CO_2 Plume and Pressure Front Monitoring/Tracking

Monitoring the movement of the CO_2 and the pressure front are necessary to identify potential risks to USDWs posed by injection activities, verify predictions of plume movement, provide inputs for modeling, identify needed corrective actions, and target other monitoring activities. The proposed rule required tracking of the plume and pressure front by direct pressure monitoring via monitoring wells in the first formation overlying the confining zone or by using indirect geophysical techniques such as seismic profiling, electrical, gravity, and electromagnetic surveys.

EPA sought comment on the requirement to track the CO_2 plume and pressure front and the appropriate technologies and geophysical methods that can be used for such monitoring. Commenters focused on appropriate testing frequency and technologies, expressing concerns about cost and the belief that the requirements were too stringent and might negatively affect public opinion. With respect to direct monitoring of pressure, some commenters supported the proposed approach, while others believed the use of monitoring wells would be costly and difficult. Some commenters supported indirect (*i.e.,* geophysical) monitoring of the plume, while others expressed concerns that seismic methods may not be effective in all settings.

In consideration of all public comments, today's final rule at § 146.90 requires Class VI well owners or operators to perform monitoring to track the extent of the CO_2 plume and pressure front. The owner or operator must use direct methods to monitor for pressure changes in the injection zone. Indirect methods (*e.g.,* seismic, electrical, gravity, or electromagnetic surveys and/or down-hole CO_2 detection tools) are required unless the Director determines, based on site-specific geology that such methods are not appropriate (§ 146.90(g)).

The purpose of monitoring in the injection zone (§ 146.90(g)(1)) is to track the development and movement of the pressure front and CO_2 plume. This will support an understanding of site performance and verify predictive modeling. Pressure monitoring within the injection zone is necessary because any such monitoring above the confining zone would not detect movement of the pressure front unless a breach of the confining zone occurs. EPA believes that monitoring using wells in the injection zone (*i.e.,* that penetrate the confining zone) can be safely performed if the wells are constructed to prevent flow between the injection zone and USDWs or other layers above the confining zone. Such construction technologies exist and have been used in the oil and gas industry for years. EPA believes that the benefits of monitoring in the injection formation outweigh the manageable risk of those monitoring wells serving as conduits for fluid movement. EPA adds that owners or operators may consider performing additional pressure monitoring in wells that are above the confining zone (*e.g.,* in the same wells used to perform ground water quality monitoring required at § 146.90(d)) to provide additional verification that no pressure changes are occurring above the confining zone due to CO_2 leakage or displacement of native fluids. An appropriate monitoring regimen will enhance public confidence in GS. EPA disagrees that the use of monitoring wells to track the plume and pressure front will be too costly and believes that the benefits outweigh the costs.

Additionally, § 146.90(g)(2) requires owners or operators to track the position of the CO_2 plume using indirect methods (*e.g.,* seismic, electrical, gravity, or electromagnetic surveys and/or down-hole CO_2 detection tools), unless the Director determines based on site-specific geology, that such methods are not appropriate. EPA is affording Director's discretion regarding the use of geophysical techniques at some sites because the Agency recognizes that geophysical methods are not appropriate in all geologic settings. For example, geophysical methods are difficult to execute in areas that are structurally and topographically complex or where lithologies have limited contrast in density, porosity, permeability, and other physical properties. EPA clarifies that this

determination will be made by the Director based on the site-specific geologic information submitted by the owner or operator with their permit application. However, because the use of geophysical methods can yield valuable information about the extent of the CO_2 plume and pressure front, EPA is requiring their use unless they are determined not to be appropriate.

EPA believes that this approach—requiring direct pressure monitoring at all sites and the use of indirect geophysical or down-hole techniques except where the Director determines that such methods are not appropriate based on site-specific information—provides owners or operators the flexibility to develop a site-specific monitoring plan, ensures that direct monitoring is available to track the movement of the CO_2 and validate models, and recognizes that indirect techniques may not be appropriate in all situations.

8. Surface Air/Soil Gas Monitoring

EPA proposed that Directors have discretion to require surface air and/or soil gas monitoring at GS sites. Surface air and soil gas monitoring can be used to monitor the flux of CO_2 out of the subsurface, with elevation of CO_2 levels above background levels indicating potential leakage and USDW endangerment. While deep subsurface well monitoring forms the primary basis for detecting threats to USDWs, knowledge of leaks to shallow USDWs is of critical importance because these USDWs are more likely to serve public water supplies than deeper formations. If leakage to a USDW should occur, near-surface and surface monitoring may assist owners or operators in identifying the general location of the leak and what USDWs may have been impacted by the leak, and initiating targeted emergency and remedial response actions.

EPA sought comment on the use of surface air and soil gas monitoring technologies to ensure USDW protection. Commenters that supported the use of surface air and soil gas monitoring technologies stressed the importance of USDW protection and noted that this monitoring can provide a potential indication that a leak into a USDW has occurred and may need to be remediated. These commenters suggested that such monitoring should be site-specific and that any data collected must be compared against baseline data (collected prior to commencing an injection project). Those who opposed the proposed surface air and soil gas monitoring requirements questioned the applicability of surface air and soil gas technologies to USDW protection, and expressed concerns about the potential for false positives, uncertainty and variability in measurements, and the negative impact that this requirement may have on public perception of GS. Some commenters also believed that requiring such monitoring would be outside the scope of SDWA authority.

The Agency agrees that surface air and soil gas monitoring, when coupled with subsurface monitoring, may be appropriate at some GS projects to ensure USDW protection and agrees that baseline information is needed for this type of monitoring. EPA also acknowledges that surface air and soil gas measurements are subject to variability and may not be suitable for all settings as a method to ensure USDW protection. However, EPA does not believe that this should entirely preclude their use. The decision to use surface monitoring and the selection of monitoring methods will be site-specific (*e.g.,* may be influenced by geology; injection depth; and operational conditions) and must be based on potential risks to USDWs within the AoR. EPA also believes that appropriately selected surface monitoring technologies will not negatively influence public opinion, but could help to assure the public that GS projects are being appropriately operated and monitored. Used in conjunction with deep subsurface monitoring, as required at § 146.90, and as part of a multi-barrier approach to protecting USDWs from endangerment, surface air and soil gas monitoring are within the scope of SDWA's general authority (SDWA sections 1421 *et al.*). Furthermore, where deployed, such monitoring will increase USDW protection, enable immediate notification of the UIC Director in the case of potential USDW endangerment, and facilitate remedial action.

The final rule at § 146.90(h) retains the allowance for surface air and soil gas monitoring at the discretion of the Director as a means of identifying leaks that may pose a risk to USDWs and informing emergency notification of a Class VI owner or operator and UIC Director in the event of a USDW endangerment, pursuant to requirements at § 146.91(c).

Since proposal of the Class VI UIC requirements (73 FR 43492, July 25, 2008), EPA proposed, and is finalizing concurrently with this rulemaking, GS reporting requirements under the GHG Reporting Program (subpart RR). Subpart RR is being promulgated under authority of the CAA and builds on UIC requirements with the additional goals of verifying the amount of CO_2 sequestered and collecting data on any CO_2 surface emissions. If a Director requires surface air/soil gas monitoring pursuant to requirements at § 146.90(h) and an owner or operator demonstrates that monitoring employed under §§ 98.440 to 98.449 of subpart RR meets the requirements at § 146.90(h)(3), the Director must approve the use of monitoring employed under subpart RR.

The Agency recognizes that there may be unique circumstances wherein the UIC Director requires the use of surface air/soil gas monitoring other than monitoring deployed under subpart RR due to site-specific considerations. For example, a UIC Director may identify a sensitive USDW such as a sole source aquifer, as defined at 40 CFR part 149, in the AoR of a GS project. He or she may determine that the most appropriate method of enhancing protection of such resources is to require the owner or operator to deploy an array of soil gas probes, pursuant to § 146.90(h), around the sole source aquifer at specified depths and lateral spacing, with specified sampling and reporting frequencies, to ensure USDW protection. Such monitoring might not be necessary under subpart RR, where the primary purpose of surface air and soil gas monitoring is to verify the amount of CO_2 sequestered and collect data on any CO_2 surface emissions.

EPA believes that the requirements of these two rules complement one another by concurrently ensuring USDW protection, as appropriate, and requiring reporting of CO_2 surface emissions under subpart RR. Subpart RR is discussed further in section II.C.

9. Additional Requirements

EPA recognizes that monitoring and testing technologies used at GS sites will vary and be project-specific, influenced by both geologic conditions and project characteristics. At certain sites additional monitoring may be needed. Furthermore, EPA acknowledges that the science and technology behind subsurface monitoring and testing will continue to develop, and new methods may emerge to provide additional monitoring options. Therefore, the final rule (at § 146.90(i)) allows the Director discretion to require additional monitoring where appropriate. For example, a Director may require a Class VI owner or operator to conduct ground water quality monitoring in additional formations or zones or require the use of multiple indirect geophysical methods for plume and pressure front tracking if he or she determines it is

necessary based on review of project-specific information submitted.

The final rule, at § 146.90(k), requires owners or operators to submit a quality assurance and surveillance plan (QASP) for all testing and monitoring requirements. A QASP ensures that all aspects of monitoring and testing are verifiable, including the technologies, methodologies, frequencies, and procedures involved. Each QASP will be unique to a given GS project, informed by site-specific details, monitoring technologies selected, and will be updated as the project evolves in concert with the testing and monitoring plan.

G. Recordkeeping and Reporting

Pursuant to § 1445(a)(1) of the SDWA, today's final rule at § 146.91 requires owners or operators of Class VI wells to submit the results of required periodic testing and monitoring associated with the GS project. Furthermore, today's rule at § 146.91(e) also requires that all required reports, submittals, and notifications under subpart H be submitted to EPA in an electronic format. This requirement applies to owners or operators in Class VI primacy States and those in States where EPA implements the Class VI program, pursuant to § 147.1. All Directors will have access to the data through the EPA electronic data system.

EPA expects that the Class VI permit application process will be an iterative process, during which the owner or operator must submit information to the Director to inform permitting decisions and permit issuance. During this process, the Director is responsible for reviewing and approving the required information. The Agency is requiring that owners or operators submit information in an electronic format to facilitate accessibility and transferability; however, if an owner or operator cannot submit the required data using EPA's electronic reporting system, EPA expects the Director to seek EPA's approval regarding an alternate reporting format. Following EPA's approval of a non-electronic submittal format, an alternate reporting procedure may be allowed.

The electronic reporting requirement is designed to facilitate programmatic activities by providing Directors with information needed to ensure compliance with UIC Class VI permits, while also ensuring that GS projects are operating properly, are in compliance with their permit conditions, and are sufficiently protective of USDWs. The information compiled under § 146.91 may be used as evidence of a permit violation.

Use of EPA's electronic reporting system will also allow EPA to access data related to Class VI program implementation and facilitate coordination between EPA and co-regulators. EPA plans to use the data and information submitted by owners or operators to periodically evaluate the effectiveness of the GS program, enabling the Agency to make changes to the Class VI program as necessary to incorporate new research, data, and information about GS and associated technologies.

1. What information must be provided by the owner or operator?

Today's rule identifies the technical information and reports that Class VI owners or operators must submit to the Director to obtain a Class VI permit to construct, operate, monitor, and close a Class VI well. The information submitted as a demonstration, to the Director, must be in the appropriate format and level of detail necessary to support permitting and project-specific decisions by the Director to ensure USDW protection. The final decision regarding the appropriateness and acceptability of all owner or operator submissions rests with the Director.

Class VI Permit Application Information: Today's rule requires owners or operators to submit, pursuant to the requirements at § 146.91(e), information to the Director to support Class VI permit applications (this information is enumerated at § 146.82). This information includes site characterization information on the stratigraphy, geologic structure, and hydrogeologic properties of the site; a demonstration that the applicant has met financial responsibility requirements; proposed construction, operating, and testing procedures; and AoR/corrective action, testing and monitoring, well plugging, PISC and site closure, and emergency and remedial response plans. The specific requirements for the content of this information are discussed in other sections of this preamble.

Operational and Monitoring Reports: Today's rule, at § 146.91, requires owners or operators to submit project monitoring and operational data at varying intervals, including semi-annually and prior to or following specific events (*e.g.,* 30-day notifications and 24-hour emergency notifications).

EPA proposed that operating data be reported semi-annually. EPA also proposed that monitoring data be submitted semi-annually in certain circumstances. Several commenters asked that the Director have discretion to authorize reporting less frequently than semi-annually, while other commenters suggested monthly or quarterly reporting. EPA is retaining the semi-annual reporting requirement for operating data and some monitoring data in the final rule (§ 146.91(a)). However, permitting authorities may choose to require more frequent reporting.

The final rule also requires owners or operators to report the results of mechanical integrity tests, any other injection well testing required by the Director, and any well workovers within 30 days (§ 146.91(b)), as proposed.

Today's final rule consolidates notification requirements and clarifies the manner in which the data must be reported. Owners or operators must notify the Director in writing 30 days prior to any planned well workover, stimulation, or test of the injection well (§ 146.91(d)). This notification affords the Director an opportunity to evaluate the planned activity in the context of new information received since permit approval and correspond with the owner or operator, if necessary, regarding any suggested modifications to the planned activity or to place additional conditions on the planned activity if necessary. EPA clarifies that a response by the Director following 30-day notification is not required if the Director has no further concerns regarding the activity. The final rule also requires owners or operators to notify the Director within 24 hours of obtaining any evidence that the injected CO_2 stream and associated pressure front may cause an endangerment to a USDW, any noncompliance with a permit condition, or of an event (such as malfunction of the injection system or triggering of a down-hole automatic shut-off system) that may endanger USDWs, or any release of carbon dioxide to the atmosphere or biosphere detected through any required soil/air monitoring (§ 146.91(c)).

Area of review reevaluations and plan amendments: Today's final rule requires owners or operators to electronically submit AoR reevaluation information and all plan amendments, pursuant to § 146.84, at a minimum of every five years.

Annual report: In addition to the recordkeeping and reporting requirements, EPA sought comment on requiring submittal of an annual report throughout the duration of a GS project. Most commenters did not support annual reports.

Today's final rule does not include a requirement for an annual report. EPA recognizes the concerns expressed by commenters about the burden associated with an annual report, and

believes that the reporting required at § 146.91(a) in conjunction with the AoR reevaluations and associated plan updates, which are required no less frequently than every five years, will facilitate a continuous dialogue between owners or operators and the permitting authority, provide evidence of compliance with the Class VI permit, and ensure protection to USDWs.

2. How must information be submitted?

Electronic Reporting: Recognizing that much of the data generated during Class VI site characterization, operation, testing and monitoring, mechanical integrity testing, and during the post-injection site care period will be generated in electronic format, EPA proposed that owners or operators report data in an electronic format acceptable to the Director (§ 146.91). EPA also proposed that the Director have discretion to accept data in other formats, if appropriate. EPA sought comment on electronic data submissions and the concept of providing Directors discretion to accept other data formats. See section II.C for additional information on mandatory reporting of greenhouse gases under the Clean Air Act.

Most commenters supported the concept of requiring data to be submitted electronically. Commenters also recognized that there may be a need to accept data in other formats. Several commenters expressed concern about whether States would have the capabilities to accept electronic data submissions from owners or operators.

In light of the prevalent use of electronic data, the expectation that Class VI wells will be used into the future, that the capability to send and receive electronic data will improve over time, and that today, information generated during GS site characterization, operation, monitoring, and testing is generated in electronic formats, the final rule requires that owners or operators submit data in an electronic format.

Acknowledging that some States may have to develop electronic data systems to receive electronic information from the owner or operator, and that many States which already have electronic data systems will have to make changes to accommodate a new class of UIC well (Class VI), EPA believes that it is prudent to provide assistance by developing a central framework for the electronic system that will be used by States to gather and track owner or operator data. This will enable owners or operators to submit data without having to wait for a State to develop a system. It will also provide for standardized submissions across the country and enable States to focus State resources on reviewing and approving permit applications rather than building or upgrading separate, independent databases for GS information.

EPA recognizes that there may be some circumstances where it may be necessary to collect data in other formats, *e.g.,* for historical data, etc. Therefore, the Agency is providing for the Director to allow submission of data in alternative formats on a case-by-case basis. EPA expects that decisions to allow submission of data in formats other than electronic will be based on the inability or inefficiency of converting data to electronic formats, rather than the ability of the State to accept electronic data.

3. What are the recordkeeping requirements under this rule?

Today's final rule requires that owners or operators retain most operational monitoring data as required under § 146.91 for 10 years after the data are collected. In addition, the rule requires that owners or operators retain certain data until 10 years after site closure. This recordkeeping timeframe, which is longer than requirements for other injection well classes, is appropriate and tailored to the longer life-spans of GS projects.

The proposed rule did not include any requirements for operational data recordkeeping. However, existing UIC requirements at 40 CFR 144.51(j), which apply to all permitted injection wells require retention of certain operational data and permit application data for three years and retention of injectate quality data throughout the life of the project and for three years after injection well plugging. Commenters requested clarity on the recordkeeping requirements for Class VI well owners or operators, particularly related to well plugging and site closure reports.

Today's final rule clarifies the recordkeeping requirements for Class VI well owners or operators. These include the requirements at 40 CFR 144.51(j) and the Class VI-specific recordkeeping requirements in today's rule at § 146.91(f). Class VI well owners or operators must retain data collected to support permit applications and data on the CO_2 stream until 10 years after site closure. Owners or operators must retain monitoring data collected under the testing and monitoring requirements at § 146.90(b–i) for 10 years after it is collected. Today's rule allows the Director authority to require the owner or operator to retain specific operational monitoring data for a longer duration of time (§ 146.91(f)(5)). Well plugging reports, PISC data, and site closure reports must be kept for 10 years after site closure (§§ 146.92(d), 146.93(f), and 146.93(h)).

EPA believes that longer record retention timeframes are appropriate for Class VI wells to ensure that all necessary data are available to support AoR reevaluations, updates to the various plans which will occur at least every five years, and non-endangerment demonstrations during PISC. In addition, extended retention periods will ensure that data are available should any project-specific questions or concerns arise following site closure. These data will also support EPA's review of project data as part of the adaptive rulemaking approach.

Class VI compliance: Today's final Class VI rule includes requirements for permitting, siting, construction, operation, financial responsibility, testing and monitoring, PISC, and site closure of Class VI injection wells to ensure that USDWs are not endangered. Site-specific information collected during the site characterization process and periodically updated throughout the life of the project is incorporated into the GS project plans and used to establish permit conditions. This information establishes the manner in which an owner or operator must construct, operate, monitor, report on, and close a Class VI GS project—the conditions the owner or operator must meet to ensure compliance. Pursuant to requirements at 40 CFR 144.8, an owner or operator's failure to comply with the site-specific permit conditions, failure to complete construction elements, failure to complete or provide compliance schedules or monitoring reports, failure to submit complete reports, and any action that causes USDW endangerment during the life of the GS project are considered instances of noncompliance and will result in a violation of the permit under SDWA section 1423. Additionally, EPA may use this information as evidence of an imminent and substantial endangerment of a USDW, which may require remedial action under SDWA section 1431.

Data and information gathered through information requests, semi-annual and 30-day reporting, and other project records will provide information to demonstrate and confirm that a Class VI project is in compliance. Information reported within 24 hours as required under § 146.91(c), including, but not limited to: Evidence that the injected CO_2 stream or associated pressure front may cause an endangerment to a USDW; triggering of a shut-off system; or failure to maintain mechanical integrity is used to inform the Director of any evidence

indicating that an owner or operator of a Class VI well has violated a permit condition or caused endangerment to USDWs.

H. Well Plugging, Post-Injection Site Care (PISC), and Site Closure

Today's final action, at § 146.92 requires owners or operators of Class VI wells to plug injection and monitoring wells in a manner that protects USDWs. The final rule, at § 146.93, also contains tailored requirements for extended, comprehensive post-injection monitoring and site care of GS projects following cessation of injection until it can be demonstrated that movement of the CO_2 plume and pressure front no longer pose a risk of endangerment to USDWs.

Proper plugging of injection and monitoring wells is a long-standing requirement in the UIC program designed to ensure that injection wells do not serve as conduits for fluid movement following cessation of injection and site closure in order to ensure protection of USDWs. PISC, which is unique to GS, is necessary to ensure that site monitoring continues until the injectate and any mobilized fluids do not pose a risk to USDWs.

1. Injection Well Plugging

EPA proposed that, after injection ceases at a GS project, the injection well must be plugged in order to ensure that the well itself does not become a conduit for fluid movement into USDWs. Well plugging activities include flushing the well with a buffer fluid, testing the external mechanical integrity of the well, and emplacing cement into the well in a manner that will prevent fluid movement that may endanger USDWs. In the proposed rule, EPA did not specify the types of materials or tests that must be used during well plugging, acknowledging that there are a variety of methods that are appropriate and new materials and tests may become available in the future. However, all plugging materials must be compatible with the injectate (*i.e.,* such that plugging materials would not degrade over time). EPA sought comment on the injection well plugging activities identified in the proposed rule.

Most commenters supported EPA's proposed approach regarding well plugging. Because the injection well plugging requirements provide appropriate protection of USDWs while allowing owners or operators flexibility in meeting the well plugging requirements by allowing them to choose from available materials and tests to carry out the requirements, EPA retains the requirements as proposed in today's rule at § 146.92. The owners or operators must prepare and comply with a Director-approved injection well plugging plan submitted with their permit application (§ 146.92(b)). The approved injection well plugging plan will be incorporated into the Class VI permit. The Agency is developing guidance that describes the contents of the project plans required in the GS rule, including the injection well plugging plan.

Owners or operators must submit a notice of intent to plug at least 60 days prior to plugging the well. At this time, if any changes have been made to the original well plugging plan (*e.g.,* based on operational and monitoring data or data collected during AoR reevaluations), the owner or operator must submit a revised injection well plugging plan (§ 146.92(c)). Any amendments to the injection well plugging plan must be incorporated into the permit following public notice and comment and approval by the Director. EPA envisions that owners or operators will take into account similar considerations that guide updates to other project plans, *e.g.,* the testing and monitoring plan, as they update the injection well plugging plan. However, EPA is not requiring formal periodic review and updates to the injection well plugging plan throughout the injection phase because it is not expected that changes to this plan will be implemented until the point at which the injection well is to be plugged. EPA also encourages an ongoing dialogue between owners or operators and Directors regarding planned well plugging activities. Finally, owners or operators must submit, to the Director, a plugging report within 60 days after plugging. The Agency is developing guidance on injection well plugging, PISC, and site closure that addresses performing well plugging activities.

2. Post-Injection Site Care (PISC)

Today's final rule at § 146.93 incorporates a PISC period, specific to Class VI wells. PISC is the period after CO_2 injection ceases—but prior to site closure—during which the owner or operator must continue monitoring to ensure USDW protection from endangerment.

PISC and site closure plan submittal and updates: EPA proposed that owners or operators would prepare, update, and comply with a Director-approved PISC and site closure plan that would describe the anticipated PISC monitoring activities and frequency.

EPA sought comment on the PISC and site closure plan requirements. Most commenters supported the requirement for PISC monitoring and the proposed approach regarding submittal, revision, and implementation of a PISC and site closure plan. Many commenters agreed that a PISC monitoring plan is a necessary and important part of the permitting process. These commenters supported the option to amend the plan. However, they contended that, upon cessation of injection, if evaluation of monitoring and modeling results indicates that the project is performing as expected, an owner or operator should not have to submit amendments to the plan.

Today's final regulation retains the PISC and site closure plan requirements (§ 146.93) with an additional requirement at § 146.93(a)(2)(v) that the owner or operator include the duration of the PISC timeframe, and the demonstration of any alternative PISC timeframe pursuant to requirements at § 146.93(c) as part of the plan. The requirement to maintain and implement the approved PISC and site closure plan is directly enforceable regardless of whether the requirement is a condition of the Class VI permit. The PISC and site closure plan will serve to clarify PISC requirements and procedures prior to commencement of a project.

Upon cessation of injection, today's rule requires that owners or operators of Class VI wells either submit an amended PISC and site closure plan or demonstrate to the Director through monitoring data and modeling results that no amendment to the plan is needed (§ 146.93(a)(3)). Any amendments to the PISC and site closure plan would be incorporated into the permit once they are approved by the Director. EPA envisions that owners or operators would take into account similar considerations that guide updates to other project plans, *e.g.,* the testing and monitoring plan, as they update the PISC and site closure plan. EPA also encourages an ongoing dialogue between owners or operators and Directors regarding planned PISC and site closure activities. The Agency is developing guidance that describes the content of the project plans required in the GS rule, including the PISC and site closure plan.

PISC timeframe: EPA proposed that during PISC, owners or operators of Class VI wells would be required to periodically monitor the site and track the position of the CO_2 plume and pressure front to ensure USDWs are not endangered. The proposed rule identified a default PISC timeframe of 50 years following the cessation of injection. This timeframe was based on a review of research studies, industry

reports, and existing environmental programs. In order to support site-specific flexibility, the proposed rule stipulated that the PISC timeframe could be shortened by the Director after cessation of injection if the owner or operator could demonstrate that USDWs would not be endangered prior to 50 years. Similarly, if after 50 years the Director determined that USDWs may still become endangered by the CO_2 plume and/or pressure front, he or she could lengthen the PISC timeframe. EPA sought comment on the proposed PISC timeframe and whether the timeframe should be adjusted.

Most industry commenters supported reducing the default PISC timeframe, stating that the 50-year default timeframe in the proposal would make GS prohibitively expensive, and is not warranted based on the probable timeframes of CO_2 trapping. Commenters suggested that the PISC timeframe should be specific to the characteristics of a project, including the predicted extent of the CO_2 plume and the area of elevated pressure, geologic factors, modeled predictions of CO_2 trapping, and subsurface geochemical reactions and that the PISC period be established on a case-by-case basis as a part of the permitting process. Other commenters supported the proposed 50-year PISC period and indicated that the risks of GS to USDWs are still unclear, and thus a conservative PISC monitoring time period should be implemented. Other commenters asserted that a combination of a fixed timeframe and a performance standard would strike a good balance and is preferable to relying on only one approach.

EPA evaluated comments advocating for a shorter timeframe, including suggestions of 10 and 30 years. However, EPA has not obtained any data from commenters or identified other research that contradict EPA's initial analysis and supports a default timeframe shorter than 50 years. EPA acknowledges the merits of a performance-based approach for the PISC timeframe, recognizing the variety of site conditions that will affect the appropriate PISC timeframe. EPA believes that the Director will be in the best position to make a site-specific determination allowing for the PISC timeframe to be modified while ensuring USDWs are not endangered.

Therefore, in response to comments, EPA retains the proposed default 50-year PISC timeframe. However, today's final rule affords flexibility regarding the duration of the PISC timeframe by: (1) Allowing the Director discretion to shorten or lengthen the PISC timeframe during the PISC period based on site-specific data, pursuant to requirements at § 146.93(b); and, (2) affording the Director discretion to approve a Class VI well owner or operator to demonstrate, based on substantial data during the permitting process, that an alternative PISC timeframe is appropriate if it ensures non-endangerment of USDWs pursuant to requirements at § 146.93(c).

EPA clarifies that owners or operators of all GS sites (*i.e.,* those commencing injection using the 50-year default PISC or those demonstrating an alternative PISC timeframe pursuant to requirements at § 146.93(c)) must continue monitoring until they submit, for Director review and approval, a demonstration based on monitoring and other site-specific data that no additional monitoring is needed to ensure that the GS project does not pose an endangerment to USDWs. If a demonstration cannot be made that the GS project no longer poses a risk of endangerment to USDWs, or the Director does not approve the demonstration, the owner or operator must submit a plan to the Director to continue post-injection site care until such a demonstration can be made and approved by the Director.

Today's final rule at § 146.93(c), affords the Director discretion to approve a demonstration during the permitting process (per requirements at § 146.82(a)(18)) that an alternative post-injection site care timeframe, other than the 50-year default, is appropriate. The demonstration must be based on substantial evidence and site-specific data and information compiled and analyzed during the permitting process and must satisfy the Director, in consultation with EPA that USDWs will be protected from endangerment from GS activities.

Today's final rule at § 146.93(c)(1) specifies what the Director, in consultation with EPA, must consider and what the demonstration of an alternative PISC timeframe must be based on: The results of site-specific computational modeling of the AoR (performed pursuant to § 146.84) and information that supports the PISC and site closure plan development required at § 146.93(a), including the predicted timeframe for pressure decline within the injection zone and any other zones; the predicted rate of CO_2 plume migration and timeframe for the cessation of migration; site-specific chemical processes that will result in CO_2 trapping (*e.g.,* by capillary trapping, dissolution, and mineralization); the predicted rate of CO_2 trapping; and laboratory analyses, research studies, and/or field or site-specific studies to verify the information on trapping. The demonstration must also be based on consideration and documentation of a characterization of the confining zone(s), *e.g.,* thickness, integrity, and the absence of transmissive faults, fractures, and micro-fractures (based on information collected per § 146.82(a)(3)); the presence of potential conduits for fluid movement near the injection well (per § 146.84(c)(2)); the quality of wells and well plugs in wells within the AoR (per § 146.84(c)(3)); the distance between the injection zone and the nearest USDWs above and/or below the injection zone (based on data collected per § 146.82(a)(5)); and any additional site-specific factors required by the Director.

The demonstration of an alternative PISC timeframe must meet criteria set forth at § 146.93(c)(2) to ensure that the data and models on which the demonstration is based are accurate, appropriate to site-specific circumstances, based on the best available information, calibrated where sufficient data are available, and reproducible. This demonstration must be submitted as part of the permit application pursuant to § 146.82(a)(18); the duration of the alternative PISC timeframe and the associated demonstration must be included in the PISC and site closure plan pursuant to § 146.93(a)(2)(iv); and, must be incorporated in the permit as part of the PISC and site closure plan as required at § 146.82(c)(9).

Over the lifetime of the project, owners or operators must periodically reevaluate the AoR regardless of the PISC timeframe approved by the Director. This may also result in periodic reevaluations and updates as needed to the PISC and site closure plan (per § 146.93(a)(4)). These reevaluations provide opportunities for the owner or operator and the Director to review and validate the data on which the alternative demonstration is based, along with operational and monitoring data, to determine whether modifications to the alternative PISC timeframe are needed, and to make changes to the PISC plan as appropriate. Regardless of whether the PISC and site closure plan is modified during the injection period or not, the rule requires at § 146.93(a)(3) that upon cessation of injection, owners or operators must either submit an amended plan or demonstration to the Director through monitoring data and modeling results that no amendment to the plan is needed.

Today's final rule also retains the proposed approach affording the Director discretion, during the PISC

period, to shorten the PISC timeframe if the owners or operators can demonstrate that there is substantial evidence that the GS project no longer poses a risk of endangerment to USDWs (§ 146.93(b)). Likewise, the Director may lengthen the PISC timeframe if, after 50 years, USDWs still may become endangered.

EPA believes that a default post-injection site care timeframe of 50 years, with flexibility to adjust the timeframe during the permitting process where substantial data exists to demonstrate that an alternative timeframe would be protective of USDWs, or based on data collected during the PISC period, is appropriate to address the range of sites where GS is anticipated to occur, to accommodate site-specific circumstances and various geologic conditions, and addresses commenters' concerns, while ensuring USDW protection. The Agency is developing guidance on injection well plugging, PISC, and site closure.

3. Site Closure

EPA proposed that, following a determination under § 146.93 that the site no longer poses a risk of endangerment to USDWs, the Director would approve site closure and the owner or operator would be required to properly close site operations. EPA proposed site closure activities similar to those for other well classes. These include plugging all monitoring wells; submitting a site closure report; and recording a notation on the deed to the facility property or other documents that the land has been used to sequester CO_2. Site closure would proceed according to the approved PISC and site closure plan. Today's final regulation retains these closure requirements (at § 146.93(d) through (h)).

The site closure report will provide documentation of injection and monitoring well plugging; copies of notifications to State and local authorities that may have authority over future drilling activities in the region; and records reflecting the nature, composition, and volume of the injected CO_2 stream. The purpose of this report will be to provide information to potential, future users and authorities of the land surface and subsurface pore space regarding the operation. Well plugging reports, PISC data, including, if appropriate, data and information used to develop the alternative PISC timeframe, and site closure reports must be kept for 10 years after site closure (or longer at the Director's discretion), pursuant to the requirements at §§ 146.91(f),146.93(f), and 146.93(h). See section III.G for more about the recordkeeping requirements in today's rule.

I. Financial Responsibility

Today's rule finalizes regulations at § 146.85 to require that owners or operators demonstrate and maintain financial responsibility as approved by the Director for performing corrective action on wells in the AoR, injection well plugging, PISC and site closure, and emergency and remedial response.

The purpose of these financial responsibility requirements is to ensure that owners or operators have the resources to carry out activities related to closing and remediating GS sites if needed during injection or after wells are plugged but before site closure is approved so that they do not endanger USDWs. The end result is ensuring that all the GS injection sites are cared for and maintained appropriately and that there is no gap in coverage throughout injection and post-injection site care and site closure.

EPA's Proposed Approach: Financial assurance for wells under the UIC program is typically demonstrated through two broad categories of financial instruments: (1) Third party instruments, including surety bond, financial guarantee bond or performance bond, letters of credit (the above third party instruments must also establish a standby trust fund), and an irrevocable trust fund; and (2) self-insurance instruments, including the corporate financial test and the corporate guarantee. In the preamble to the proposed rule, EPA described these instruments and sought comment on the need to adjust financial responsibility instruments for GS projects and the need for additional financial responsibility instruments. The Agency also sought comment on allowing separate financial demonstrations for injection well plugging and PISC (*i.e.,* a demonstration submitted prior to well plugging and the beginning of the post-injection site care period rather than with the permit application).

Summary of Public Comments and Other Input: Commenters identified strengths and weaknesses of the various financial responsibility instruments and expressed concerns about the risk of bank failures and corporate insolvency, which could leave financial obligations unfunded. Some commenters supported the use of self insurance (*i.e.,* a financial test and a corporate guarantee) as a mechanism to demonstrate financial responsibility for GS projects, but expressed concerns that companies that have passed financial tests can fail, and also that the current tangible net worth requirement of $10 million is not adequate for GS projects. Generally, commenters supported allowing separate financial demonstrations for injection well plugging and PISC. Many commenters expressed concern about the potential high cost and long time frames involved with GS projects. They believed that financial assurance would be difficult to obtain, particularly throughout the duration of the PISC period and that it may discourage investment in GS.

Commenters also expressed a need for regulatory certainty to help inform financial responsibility requirements for well owners or operators. They suggested that EPA specify the acceptability of various financial responsibility instruments and that States needed guidance including information on what instruments they should approve in order to avoid approving financial assurance that did not meet the Federal requirements or that was financially inadvisable. Other commenters suggested that the proposed rule left too much discretion to the Director, possibly causing operators to run a higher risk of having their instrument rejected. Other commenters suggested that the rule provide flexibility to owners or operators in the choice of financial instruments, while allowing the Director discretion to assess instruments in the context of operational and site-specific factors, including the level of risk over time, when approving financial responsibility for each project.

Many commenters addressed the use of a pay-in period for trust funds. Some commenters expressed concern that an initial three-year pay-in period would increase upfront costs, while others suggested that an initial pay-in period could help lower financial risk. A commenter suggested that the duration of the pay-in period could coincide with the estimated project risk.

In addition to evaluating public comments, EPA worked with members of the public, academia, industry, regulatory agencies, and financial experts to address the unique financial responsibility issues associated with GS projects. In April and May of 2009, EPA held webinars for the public and industry stakeholders to gather information to inform the financial responsibility requirements and guidance. The webinars facilitated information sharing among stakeholders on financial instruments that could be used to meet the financial responsibility requirements for GS projects. Approximately 100 webinar participants, representing a range of organizations with interest in and unique perspectives on financial

responsibility, attended the workshop series which focused on the strengths and weaknesses of various financial instruments and their applicability for various injection activities. The material presented during the webinars and summaries of participant discussions can be found in the docket for today's rulemaking.

EPA is also aware of recent published literature on the topic of financial responsibility for GS. In particular, the World Resources Institute (WRI) and CCS Regulatory Project (affiliated with Carnegie Mellon University, Department of Engineering and Public Policy) have published research on climate change technologies and policy issues. These and other resources are informing EPA's financial responsibility guidance. These reports can be found in the docket for today's rulemaking.

To supplement publicly available literature and public comments, EPA reevaluated the current minimum Tangible Net Worth (TNW) requirement of $10 million used in the Class I regulations and will recommend a TNW threshold for Class VI wells in guidance. EPA guidance on TNW for GS will help ensure that the risk borne by the public from a self-insured owner or operator is no greater than the riskiest scenario where independent third-party instruments are used. The financial responsibility guidance will also include a recommended cost estimation methodology to assist owners or operators of Class VI wells. The guidance will provide examples of cost considerations and activities that may need to be performed to satisfy the requirements of today's rule. A draft of this guidance will be posted on EPA's Web site at *http://water.epa.gov/type/groundwater/uic/wells_sequestration.cfm* for a 30-day public comment period concurrent with or shortly after publication of today's final rule.

EPA solicited input from the Environmental Financial Advisory Board (EFAB) to develop recommendations on financial responsibility for Class VI wells absent any constraints under the SDWA. EFAB made several recommendations that support the financial responsibility requirements in today's final rule. EFAB agreed that both self insurance and third-party insurance should be made available to responsible parties. They also supported the requirement that third-party providers, such as insurers, pass financial strength requirements, the use of credit ratings to demonstrate financial strength, and that the owner or operator notify the Director in the event of bankruptcy. EFAB also agreed that financial responsibility requirements be linked to cost estimates, with regular updates to both cost estimates and financial responsibility demonstrations. Additionally, EFAB specifically recommended:

- The use of standardized language for financial instruments. Although EFAB did not recommend the use of standardized policy language for insurance, they did suggest that procedures be adopted so that the Director can specifically agree to limitations contained in the insurance policy or specifically reject such limitations during the review process;
- That the owner or operator be required to notify the Director by certified mail of any proceeding under Title 11 (Bankruptcy), U.S. Code, within 10 business days after the commencement of the proceeding; that owners or operators be deemed to not possess the required financial responsibility in the event of bankruptcy, insolvency, or a suspension or revocation of the license or charter of the third party when using letters of credit, surety bonds, or insurance policies or loss of authority of the third party to act as a trustee when using a trust fund;
- That because the RCRA financial mechanisms, which are largely used in the SDWA Class I program, were developed based on hazardous waste facility owner's or operator's considerations, there may be differences in the owner or operator profiles for proposed GS facilities that warrant additional assurance mechanisms. Thus, the Agency should consider adding a new category of financial assurance to the Class VI program that provides the Agency with the flexibility to approve the "functional equivalent" to the established RCRA financial assurance tests; and
- That EPA consider the use of rate-based financing, a new category of instrument that would provide the Director with the flexibility to approve instruments that are functionally equivalent to existing qualifying instruments.

Today's Final Approach: Today's final regulation retains the substantive requirements that owners or operators of Class VI wells demonstrate and maintain financial responsibility to cover the cost of corrective action, injection well plugging, PISC and site closure, and emergency and remedial response. In response to public comments EPA requested in the proposed rule and other input, this final regulation at § 146.85, modifies the proposed requirements to provide clarity on acceptable instruments to enhance enforceability of the requirements, and to set reporting timeframes to provide consistency with other EPA regulations. Specifically, EPA has clarified the financial responsibility requirements by:

(1) Describing "qualifying instruments" to cover the cost of corrective action, injection well plugging, PISC and site closure, and emergency and remedial response in a manner that prevents endangerment of USDWs.

(2) Adding language clarifying that the financial responsibility instrument is directly enforceable regardless of whether the requirement is a condition of the permit.

(3) Requiring submission of annual inflationary updates and specifying a 60-day timeframe after notification by the Director for the submission of written updates of adjustments to the cost estimate.

(4) Requiring owners or operators to notify the Director no later than 10 days after filing for bankruptcy.

(5) Requiring an owner or operator or its guarantor using self insurance to demonstrate financial responsibility for GS to meet a Tangible Net Worth of an amount approved by the Director; have both a net working capital and a tangible net worth of at least six times the sum of the current well plugging, post-injection site care and site closure cost; have assets located in the U.S. amounting to at least 90 percent of total assets or at least six times the sum of the current well plugging, post-injection site care and site closure cost; submit annual report of bond rating and financial information; and either: (1) Pass a bond rating test issued by one or both of the nationally recognized bond rating agencies, Standard & Poor's and Moody's for which the bond's rating must be one of the four highest categories (*i.e.,* AAA, AA, A, or BBB for Standard & Poor's or Aaa, Aa, A, or Baa for Moody's); or, (2) Meet all of the following five financial ratio thresholds:

- A ratio of total liabilities to net worth less than 2.0;
- A ratio of current assets to current liabilities greater than 1.5;
- A ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities greater than 0.1;
- A ratio of current assets minus current liabilities to total assets greater than −0.1; and
- A net profit (revenues minus expenses) greater than 0.

These financial responsibility requirements are not made to duplicate existing financial responsibility regulations, but are tailored to the

unique characteristics and requirements of GS. Considering the potential high costs associated with large-scale deployment of GS projects, EPA would like to ensure that adequate and continuous financial responsibility mechanisms are in place throughout the life of each GS project and that the cost associated with operation of GS projects is not passed along to the public. EPA also believes that having stringent self-insurance requirements in addition to an annual evaluation of the financial instrument minimizes the potential for a financial institution (that has passed the test) to be likely to undergo financial difficulties that can hinder the financial responsibility demonstration for a GS project.

EPA's final approach for financial responsibility for Class VI wells: EPA does not have authority under SDWA to be the direct or indirect beneficiary of a trust fund under this statute for the purpose of establishing financial responsibility for GS projects. EPA must comply with the Miscellaneous Receipts Act, 31 U.S.C. 3302. Standby trust funds are not stand-alone financial instruments that can be used by an owner or operator to demonstrate financial responsibility. Standby trusts must be used with certain types of financial responsibility instruments to enable EPA to be party to the financial responsibility agreement without EPA being the beneficiary of any funds. Use of standby trust funds must be accompanied by other financial responsibility instruments (*e.g.,* surety bonds, letters of credit, or escrow accounts) to provide a location to place funds if needed. The final rule, at § 146.85(a)(1), identifies the following qualifying financial instruments for Class VI wells, all of which must be sufficient to address endangerment of USDWs. Standby trusts are not needed for options 1, 4, and 5.

(1) Trust Funds: If using a trust fund, owners or operators are required to set aside funds with a third party trustee sufficient to cover estimated costs. During the financial responsibility demonstration, the owner or operator may be required to deposit the required amount of money into the trust prior to the start of injection or during the "pay-in period" if authorized by the Director.

(2) Surety Bond: Owners or operators may use a payment surety bond or a performance surety bond to guarantee that financial responsibility will be fulfilled. In case of operator default, a payment surety bond funds a standby trust fund in the amount equal to the face value of the bond and sufficient to cover estimated costs, and a performance surety bond guarantees performance of the specific activity or payment of an amount equivalent to the estimated costs into a standby trust fund.

(3) Letter of Credit: A letter of credit is a credit document, issued by a financial institution, guaranteeing that a specific amount of money will be available to a designated party under certain conditions. In case of operator default, letters of credit fund standby trust funds in an amount sufficient to cover estimated costs.

(4) Insurance: The owner or operator may obtain an insurance policy to cover the estimated costs of GS activities requiring financial responsibility. This insurance policy must be obtained from a third party to decrease the possibility of failure (*i.e.,* non-captive insurer).

(5) Self Insurance (*i.e.,* Financial Test and Corporate Guarantee): Owners or operators may self insure through a financial test provided certain conditions are met. The owner or operator needs to pass a financial test to demonstrate profitability, with a margin sufficient to cover contingencies and unknown obligations, and stability. If the owner or operator meets corporate financial test criteria, this is an indication that the owner or operator can guarantee its ability to satisfy financial obligations based solely on the strength of the company's financial condition. An owner or operator who is not able to meet corporate financial test criteria may arrange a corporate guarantee by demonstrating that its corporate parent meets the financial test requirements on its behalf. The parent's demonstration that it meets the financial test requirement is insufficient if it has not also guaranteed to fulfill the obligations for the owner or operator.

(6) Escrow Account: Owners or operators may deposit money to an escrow account to cover financial responsibility requirements. This account must segregate funds sufficient to cover estimated costs for GS financial responsibility from other accounts and uses.

(7) Other instrument(s) satisfactory to the Director: In addition to these instruments, EPA anticipates that new instruments that may be tailored to meet GS needs may emerge, and may be determined appropriate for use by the Director for the purpose of financial responsibility demonstrations.

The final rule specifies that the qualifying financial responsibility instrument must include protective conditions of coverage, including, but not limited to: Cancellation, renewal, and continuation provisions; specifications on when the provider becomes liable in case of cancellation if there is a failure to renew with a new qualifying financial instrument; and requirements for the provider to meet a minimum credit rating, minimum capitalization, and ability to pass the bond rating when applicable. This clarification was made in direct response to issues raised by commenters for numerous instruments, and also to make sure that there is no gap in coverage if a financial instrument fails.

Today's rule, at § 146.85(c), requires the owner or operator to have a detailed written estimate, in current dollars, of the cost of: Performing corrective action on wells in the AoR, plugging the injection well(s), PISC and site closure, and emergency and remedial response. A cost estimate must be prepared separately for each of these activities and be based on the costs to the owner or operator of hiring a third party (who is neither a parent nor a subsidiary of the owner or operator) to perform the activities. EPA recommends that owners or operators take the following into account when determining the cost estimate for GS projects:

(1) Performing corrective action on wells in the AoR. This includes conducting corrective action on deficient wells in the AoR during the initial AoR, under a phased corrective action approach; and for newly-identified deficient wells in subsequent AoR re-evaluations. See section III.B for more details on the AoR and corrective action plan requirements.

(2) Plugging the injection well(s). This includes performing a final external MIT and plugging the wells in a manner that considers the well depth, the number of plugs and the amount of cement needed, the composition of the captured CO_2, and the types of subsurface formations. See section III.H for more details on plugging requirements.

(3) Post-injection site care and closure. This includes all needed monitoring and site care until it can be demonstrated that the site no longer poses an endangerment to USDWs. See section III.H for more details on post-injection site care and site closure requirements.

(4) Emergency and remedial response. This includes the cost to perform any necessary responses or remediation to address potential USDW endangerment. See section III.J for more details on the emergency and remedial response requirements.

Owners or operators have the flexibility to choose from a variety of financial instruments to meet their financial responsibility obligations. Owners or operators may use one or multiple financial responsibility

instruments for well plugging and PISC (§ 146.85(a)(6)). However, EPA will not allow for a separate financial responsibility demonstration for well plugging and PISC (*i.e.,* a demonstration submitted prior to well plugging and the beginning of the PISC period rather than with the permit application). A demonstration of financial responsibility for all phases of the GS project will be required prior to the issuance of a Class VI permit (§ 146.85(a)(5)(i)).

EPA adds that under today's final rulemaking at § 146.85(a), the Director will only approve instruments determined to be sufficient to address endangerment of USDWs, and has the discretion to disapprove of instruments that he/she determines may not be sufficient based on the following:

(1) The financial instrument is not determined to be a qualifying instrument;

(2) The financial instrument is not sufficient to cover the cost to properly plug and abandon, remediate, and manage wells;

(3) The financial instrument is not sufficient to address endangerment of USDWs; or

(4) The financial instrument does not include required conditions of coverage to facilitate enforceability and prevent gaps in coverage for the life of the GS project.

EPA has added language, at § 146.85(b), that a financial responsibility instrument is directly enforceable regardless of whether the requirement is a condition of the permit. EPA also specifies circumstances under which an owner or operator may be released from a financial instrument, including that the owner or operator has completed the GS project activity for which the financial instrument was required and has fulfilled all financial obligations as determined by the Director, or has submitted a replacement financial instrument and received written approval from the Director accepting the new financial instrument and releasing the owner or operator from the previous financial instrument. The Director's determination of completion of a GS project activity may be sustained by a professional engineer's report on completion. The Director must notify the owner or operator in writing that the owner or operator is no longer required to maintain financial responsibility for the project or activity. This clarification was added to address unforeseen situations where EPA may need to directly enforce the financial responsibility provisions should the permit inadequately provide protection of USDWs from endangerment.

This rule, at § 146.85(c), also requires that the owner or operator adjust the cost estimates to address amendments to the AoR and corrective action plan (§ 146.84), the injection well plugging plan (§ 146.92), the PISC and site closure plan (§ 146.93), and the emergency and remedial response plan (§ 146.94). Within 60 days after the Director has approved any modifications to the plan(s), the owner or operator must review and update the cost estimate for well plugging, PISC and site closure, and emergency and remedial response to account for any amendments if the change in the plan increases the cost. The revised cost estimate must also be adjusted for inflation as specified at § 146.85(c)(2). Any changes to the approved cost estimate must be approved by the Director.

Today's rule does not allow a separate demonstration for financial responsibility requirements (*i.e.,* a demonstration submitted prior to well plugging and the beginning of the post-injection site care period rather than with the permit application). Although the owner or operator may use a financial instrument or a combination of financial instruments for the purpose of financial responsibility for specific phases of the GS project, the demonstration of financial responsibility must be done for the overall GS project at the time of permit application. However, today's rule, at § 146.85(a)(6) provides that, prior to obtaining a Class VI permit, an owner or operator may demonstrate financial responsibility by using one or multiple qualifying financial instruments for specific GS activities, thereby realizing greater flexibility and cost savings from this regulation. In the event that the owner or operator combines more than one instrument for a specific GS activity (*e.g.,* well plugging), such combination must be limited to instruments that are not based on financial strength or performance (*i.e.,* self insurance or performance bond), for example trust funds, surety bonds guaranteeing payment into a trust fund, letters of credit, escrow account, and insurance. In this case, it is the combination of instruments, rather than the single instrument, which must provide financial responsibility for an amount at least equal to the current cost estimate. EPA also notes that today's rule requires the Director to approve the use and length of pay-in-periods for trust funds or escrow accounts. EPA understands that in some cases a short pay-in period (*e.g.,* three-years or less) will provide some financial flexibility for owners or operators while balancing financial risk.

EPA has further clarified financial responsibility requirements by requiring owners or operators or a guarantor to notify the Director no later than 10 days after filing for bankruptcy, at § 146.85(d). This requirement is added in direct response to commenters who addressed the necessity of adequate financial responsibility requirements, even in the event of operator bankruptcy. EPA is adding this requirement in order to avoid a gap in coverage in the event that an instrument fails. This timeframe is consistent with the current U.S. bankruptcy code. In the event that the third party files for bankruptcy, today's rule requires that the owner or operator establish alternative financial assurance within sixty (60) days.

Today's rule, at § 146.85(e), also requires the owner or operator to adjust cost estimates if the Director has reason to believe that the most recent demonstration is no longer adequate to cover the cost of the identified activities. This clarification is made in direct response to commenters who stressed the importance of accurate cost estimates. The Agency is developing guidance, which will provide direction to the Director for when a demonstration may no longer be adequate to cover the GS activities.

As a Federal agency, EPA is working to create a nationally consistent financial responsibility program for GS activities while providing permitting authorities an appropriate level of flexibility. EPA is developing guidance on financial responsibility for owners or operators of Class VI wells to assist owners or operators in evaluating the financial responsibility requirements for Class VI wells and to assist Directors in evaluating financial responsibility demonstrations. The guidance will describe financial responsibility options, demonstrations, types of financial instruments for Class VI wells as well as how to estimate the costs to support accurate financial responsibility demonstrations specific to the needs of a GS project.

Long-term liability and stewardship for GS projects under the SDWA: EPA received a range of comments from stakeholders regarding liability following site closure. Many commenters suggested that, after a GS site is closed, liability should be transferred to the State or Federal government or to a publicly- or industry-funded entity based on a series of rationales (*e.g.,* the need for certainty; the potential for high cost; insurance and legal concerns). EPA also received

comments from those who disagreed with the assertion that a public entity should bear liability following site closure based on the belief that, if owners or operators face potential liability following site closure, they would use precaution in their operations to avoid risks and potential environmental damage. Additionally, many commenters encouraged EPA to consider other State or Federal laws under which liability transfers may be accomplished as models for GS liability transfer.

Under SDWA authority, owners or operators of injection wells must ensure protection of USDWs from endangerment and are subject to liability for enforcement under the Act. The final rule requires that an owner or operator must conduct monitoring as specified in the Director-approved PISC and site closure plan following the cessation of injection until the owner or operator can demonstrate to the Director that the geologic sequestration project no longer poses an endangerment to USDWs. For additional information about the PISC and site closure requirements, see section III.H of this action.

Once an owner or operator has met all regulatory requirements under part 146 for Class VI wells and the Director has approved site closure pursuant to requirements at § 146.93, the owner or operator will generally no longer be subject to enforcement under section 1423 of SDWA for noncompliance with UIC regulatory requirements. However, an owner or operator may be held liable for regulatory noncompliance under certain circumstances even after site closure is approved under § 146.93, under section 1423 of the SDWA for violating § 144.12, such as where the owner or operator provided erroneous data to support approval of site closure.

Additionally, an owner or operator may always be subject to an order the Administrator deems necessary to protect the health of persons under section 1431 of the SDWA after site closure if there is fluid migration that causes or threatens imminent and substantial endangerment to a USDW. For example, the Administrator may issue a SDWA section 1431 order if a well may present an imminent and substantial endangerment to the health of persons, and the State and local authorities have not acted to protect the health of such persons. The order may include commencing a civil action for appropriate relief. If the owner or operator fails to comply with the order, they may be subject to a civil penalty for each day in which such violation occur or failure to comply continues.

Furthermore, after site closure, an owner or operator may, depending on the fact scenario, remain liable under tort and other remedies, or under other Statutes including, but not limited to, Clean Air Act, 42 U.S.C. §§ 7401–7671; CERCLA, 42 U.S.C. § 9601–9675; and RCRA, 42 U.S.C. 6901–6992.

EPA acknowledges stakeholder interest in liability and long-term stewardship in the context of development and deployment of GS technology, however, under current SDWA provisions EPA does not have authority to transfer liability from one entity (*i.e.,* owner or operator) to another.

J. Emergency and Remedial Response

Today's rule at § 146.94 requires Class VI well owners or operators to develop and maintain an emergency and remedial response plan that describes actions to be taken to address events that may cause endangerment to a USDW during the construction, operation, and PISC periods of a GS project. Owners or operators must also periodically update the emergency and remedial response plan to incorporate changes to the AoR or other significant changes to the project. Today's requirements will support expeditious and appropriate response to protect USDWs from endangerment in the unlikely event of an emergency.

Developing emergency and remedial response plans: EPA proposed that owners or operators submit an emergency and remedial response plan to the Director as part of the Class VI permit application. The plan would describe measures that would be taken in the event of adverse conditions at the well, such as a loss of mechanical integrity, the opening of faults or fractures within the AoR, or if movement of injection or formation fluids caused an endangerment to a USDW. Commenters were supportive of including an emergency and remedial response plan as part of the Class VI permit, and some commenters suggested that the plan should be risk based. EPA agrees that advanced planning for emergency and remedial response is an important part of ensuring protection of USDWs at GS sites from endangerment, and today's rule retains the requirement for an emergency and remedial response plan (§ 146.94(a)), and also requires that the approved emergency and remedial response plan be incorporated into the Class VI permit. The purpose of the emergency and remedial response plan is to ensure that owners or operators comprehensively plan, in advance, what actions would be necessary in the unlikely event of an emergency. The plan will also ensure that operators know what entities and individuals must be notified and what actions might need to be taken to expeditiously mitigate any emergency situations and protect USDWs from endangerment. The Agency is developing guidance that describes the contents of the project plans required in the GS rule, including the emergency and remedial response plan. The docket for today's rulemaking includes brief research papers that discuss remedial technologies available to address potential impacts of CO_2 on water resources (USEPA, 2010b) and remedial technologies that may be used to seal faults and fractures at GS sites (USEPA, 2010c).

EPA agrees with commenters that the emergency and remedial response plan should be site-specific and "risk-based." EPA expects that each emergency and remedial response plan will be tailored to the site, and today's rule provides flexibility to the owner or operator to design a site-specific plan that meets the requirements of § 146.94(a). Rather than requiring specific information in the emergency and remedial response plan that may not be relevant to all GS projects, the plan allows such information to be determined on a site-specific basis. The details of an emergency and remedial response plan may be influenced by a variety of factors including: Geology, USDW depth, and injection depth; the presence, depth, and age of artificial penetrations; proposed operating conditions and properties of the CO_2; and activities in the AoR (*e.g.,* the presence of population centers, land uses, and public water supplies). The Director will evaluate the proposed emergency and remedial response plan for a GS project in the context of all information submitted with the permit application (*e.g.,* site characterization information, AoR evaluation data, and well construction, monitoring, and operational information) to ensure that the plan is appropriately comprehensive to address potential emergencies.

Implementing the emergency and remedial response plan: EPA also proposed several steps that the owner or operator would need to follow if he or she obtained evidence that the injectate and associated pressure front may endanger a USDW. Most comments requesting clarity on this requirement recommended that EPA establish triggers during the initial permitting phase and identify appropriate mitigation options.

EPA disagrees with commenters that it is appropriate or useful to identify specific triggers or response actions in the rule that would apply to all sites.

EPA believes that decisions about responses should be made through consultation between owners or operators and Directors because each response action will be site- and event-specific. The purpose of the emergency and remedial response requirements in today's rule is to ensure that a plan is in place for the owner or operator to take appropriate action (*e.g.,* cease injection) in the unlikely event of an emergency or USDW endangerment. The plan also facilitates a dialogue between the owner or operator and the Director to expedite the necessary and appropriate response based on steps identified in advance.

Today's rule at § 146.94(b) requires that, if an owner or operator obtains evidence of endangerment to a USDW, he or she must: (1) Immediately cease injection; (2) take all steps reasonably necessary to identify and characterize any release; (3) notify the Director within 24 hours; and, (4) implement the approved emergency and remedial response plan.

Emergency and remedial response plan updates: Two water associations recommended that the emergency and remedial response plan be reviewed and updated throughout the course of a GS project. EPA agrees with these commenters and today's rule includes a requirement that owners or operators must periodically review the emergency and remedial response plan to incorporate operational and monitoring data and the most recent AoR reevaluation at § 146.94(d). This review must take place within one year of an AoR reevaluation, following significant changes to the facility, or when required by the Director. The iterative process by which this and other required plans are reviewed throughout the life of a project will promote an ongoing dialogue between owners or operators and Directors and ensure that owners or operators are complying with the conditions of their Class VI permits. Tying emergency and remedial response plan reviews to the AoR reevaluation frequency is appropriate to ensure that reviews of the plans are conducted on a defined schedule that ensures there will be appropriate revisions to the plan if there is a change in the AoR or other relevant circumstances change, while adding little burden if the AoR reevaluation confirms that the plan is appropriate as written.

K. Involving the Public in Permitting Decisions

Public input and participation in GS projects has a number of benefits, including: (1) Providing citizens with access to decision-making processes that may affect them; (2) educating the community about a GS project; (3) ensuring that the public receives adequate information about the proposed GS project; and (4) allowing the permitting authority and owners or operators to become aware of public viewpoints, preferences and environmental justice concerns and ensuring these concerns are considered by decision-making officials.

GS of CO_2 is a new technology that is unfamiliar to most people and maximizing the public's understanding of the technology can result in more meaningful public input and constructive participation as new GS projects are proposed and developed. Early and frequent public involvement through education and information exchange is critical to the success of GS and can provide early insight into how the local community and surrounding communities perceive potential environmental, economic, or health effects associated with a specific GS project. Owners or operators can increase the likelihood of success by integrating social, economic, and cultural concerns of the community into the permit decision-making process.

In the proposed rule, EPA sought comment on: (1) The appropriateness of adopting existing public participation requirements at 40 CFR parts 25 and 124 for GS; (2) the need for additional public participation requirements to reflect availability of new information technology to disseminate and gather information; and (3) ways to enhance the public participation process.

Nearly all commenters agreed that early and frequent public education and participation would enhance public acceptance of GS projects. Several commenters supported adopting the existing public participation requirements used for other injection well classes. Many commenters favored requiring the use of new information technology to improve public notification and involvement on GS projects and permitting.

Today's final approach adopts the existing UIC public participation requirements at 40 CFR part 25 and the permitting decision procedures at 40 CFR part 124. EPA encourages owners or operators and permitting agencies to involve the public by providing them information about the Class VI permit (and any requests for a waiver of the injection depth requirements or an expansion of the areal extent of an aquifer exemption) as early in the process as possible. Under 40 CFR parts 25 and 124, permitting authorities must provide public notice of pending actions via newspaper advertisements, postings, mailings, or e-mails to interested parties; hold public hearings if requested; solicit and respond to public comment; and involve a broad range of stakeholders.

EPA expects that there will be higher levels of public interest in GS projects than for other injection activities. The Agency believes that encouraging public participation will help permitting authorities understand public concerns about GS projects and will afford the public an opportunity to gain a clearer understanding of the nature and safety of GS projects and technologies. To address comments about stakeholder participation, EPA is amending the requirements for public notice of permit actions and public comment period at § 124.10 to clarify that public notice of Class VI permitting activities must be given to State and local oil and gas regulatory agencies, State agencies regulating mineral exploration and recovery, the Director of the PWSS program in the State, and all agencies that have jurisdiction to oversee wells in the State in addition to the general public.

EPA agrees with commenters that the use of new forms of information technology can improve public participation and understanding of GS projects. EPA recognizes the importance of social media as a public outreach tool. Social media, which are primarily Internet and mobile based technologies for disseminating and discussing information, can help provide accessibility and transparency to a wide audience. EPA encourages permit applicants and permitting authorities to use the Internet and other forms of social media to explain potential GS projects; describe GS technologies; and post information on the latest developments related to a GS project including schedules for hearings, briefings and other opportunities for involvement.

L. Duration of a Class VI Permit

Today's rule establishes that Class VI permits are issued for the life of the GS project, including the PISC period (§ 144.36). In lieu of the periodic permit reissuance required for most other deep-well classes, owners or operators of Class VI wells must periodically reevaluate the AoR and prepare and implement a series of plans for AoR and corrective action, testing and monitoring, injection well plugging, PISC and site closure, and emergency and remedial response. These plans must be reevaluated by the owner or operator throughout the life of the project to foster a continuing dialogue between the owner or operator and the

Director, and afford opportunities for public input as needed and ensure compliance with the Class VI permit.

EPA proposed that Class VI injection well permits be issued for up to the operating life of the facility, including the PISC period. In the preamble to the proposed rule, EPA explained that, in lieu of permit renewals for Class VI wells, owners or operators must periodically re-evaluate the AoR, at least every 10 years. In existing UIC program regulations, permit duration varies by injection well class: permits for Class I and Class V wells are effective for up to 10 years; while Class II and III permits may be issued for the operating life of the facility, but are subject to a review by the permitting authority at least once every five years.

EPA sought comment on the proposed permit duration for Class VI wells, the appropriateness of GS project plans, and the merits of updating the AoR and corrective action plan in place of permit reissuance. Many commenters supported EPA's proposal to issue permits for the life of a GS project, stating that the requirements for periodic reevaluation of the AoR and corrective action plan would make a five-or ten-year permit review process unnecessary and that a lifetime permit would provide operational continuity. Some commenters suggested that other plans (*e.g.,* the testing and monitoring plan) should also be periodically reviewed throughout the life of the project. Other commenters disagreed with EPA's proposed permit duration for Class VI wells, believing that the proposed level and frequency of interaction (*i.e.,* every 10 years) between the primacy agency and owner or operator would not be sufficient to justify a permit for the operating life of the project. Comments both in favor of and opposition to lifetime permits stressed the importance of incorporating new information, the value of permit review and modification, and the need for a transparent process.

EPA agrees with commenters regarding the need for continuous interaction between permitting authorities and owners or operators of GS projects. Today's rule retains the requirement that Class VI permits are issued for the lifetime of the project (§ 144.36). It also requires owners or operators to review and update the AoR and corrective action plan, the testing and monitoring plan, and the emergency and remedial response plan throughout the life of the project (§ 146.84(e), § 146.90(j), and § 146.94(d)).

Today's rule requires owners or operators to review each plan as required by part 146 and either identify necessary amendments to the plan or demonstrate to the satisfaction of the Director that no amendment is needed. These reviews must be performed within one year of an AoR reevaluation, following any significant changes to the facility (*e.g.,* the addition of monitoring or injection wells), or when required by the Director. In no case can reviews occur less often than once every five years. This review frequency is necessary to ensure that reviews of the plans are conducted on a defined schedule or when there is a change in the AoR or other significant change, while adding little burden if an AoR reevaluation confirms that the plans are appropriate as written. (EPA also revised the AoR reevaluation frequency from 10 years to five years; see section III.B.)

EPA is not requiring formal periodic review and updates to the injection well plugging plan and PISC and site closure plan throughout the injection phase because it is not expected that changes to these plans would be implemented until injection operations cease. However, today's rule at §§ 146.92 and 146.93 does require that owners or operators identify any needed changes to these plans at the cessation of injection operations.

Because the approved plans required by today's rule will be incorporated into the Class VI permit, today's rule establishes permit modification requirements tailored for Class VI permits (*e.g.,* associated with plan updates and other project changes). These requirements state that any changes to the plans will trigger a permit modification pursuant to § 144.39(a)(5).

These modifications invoke part 124 public participation requirements. The Director, through consultation with the owner or operator, may choose to provide public notice of permit modifications as they occur or concurrent with the five year permit review schedule at § 144.36 (*e.g.,* the Director may notice multiple modifications at once, every five years). Minor changes to the plans (*e.g.,* correction of typographical errors) that may result in a permit modification pursuant to requirements at § 144.41 for minor modifications of permits will not require public notification. If any of the plans are changed because of significant changes they will be considered by the Director to be major modifications under § 144.39.

Periodic review and revision of required plans and the ongoing dialogue between owners or operators and Directors will address many of the comments in support of periodic permit renewal, without the associated time and expense of rewriting the entire permit. Instead, today's final approach requires a close level of interaction between owners or operators and Directors. It requires permits to be informed with continually updated information, focuses resources on key issues, and provides for public transparency and involvement when needed. Periodic reevaluation of the AoR, along with reviews and updates to the plans, will provide an equivalent level of review and attention to address potential risks, while focusing time and resources on the most important components of GS operations.

The iterative reviews and revisions of the various rule-required plans and the underlying computational models will also provide numerous opportunities for technical reassessments of the project. These reviews will ensure that the owner or operator and the Director have current knowledge of how the CO_2 plume and pressure front are behaving and afford them time to assess the information and react appropriately to ensure protection of USDWs.

Transfer of permits: Today's final rule does not allow for automatic transfer of a Class VI permit to a new owner or operator (§ 144.38(b)). Given the unique nature of GS and the importance of interaction between GS project owners or operators and permitting authorities, the Agency believes that the Director should have an opportunity to review the permit and determine whether any changes are necessary at the time of the permit transfer, pursuant to requirements at § 144.38(a). If information about the GS project and existing permit conditions are determined to be adequate, the permit review and transfer may entail a minimal amount of new information and administrative effort.

Area permits: Today's rule does not allow area permits for Class VI wells (§ 144.33(a)(5)). Individual well permits are essential to ensure that every Class VI well is constructed, operated, monitored, plugged, and abandoned in a manner that protects USDWs from endangerment. Individual permitting of wells maximizes opportunities for the public to provide input on each well as it is brought into service. This also ensures that existing wells that are converted or re-permitted from other well classes (*e.g.,* Class II EOR/EGR wells converted to Class VI) are engineered and constructed to meet the requirements at § 146.86(a) and ensure protection of USDWs from endangerment in lieu of requirements at § 146.86(b) and § 146.87(a).

While area permits allow for some administrative efficiency, this efficiency can also be achieved through appropriately executed plans for Class VI wells. For example, an owner or operator under § 146.84(c)(1) must delineate the projected lateral and vertical movement of the CO_2 plume and formation fluids from the commencement of injection activities until injection ceases. This delineation should account for any future wells that the owner or operator plans to construct in the AoR to ensure that the Director can consider all anticipated injection and resultant pressure changes when evaluating the plan and setting permit conditions. Similarly, testing and monitoring plans should account for future injection wells to ensure that ground water monitoring and CO_2 plume and pressure front tracking are planned appropriately. Through this iterative planning and submission process, owners or operators and Directors can accomplish multiple efficiencies: permits to construct Class VI wells can be submitted and reviewed either separately or simultaneously, and common, static components of the project can be identified and incorporated into future permit applications, which would facilitate submittal of data by the owner or operator and review and approval by the Director of future wells in the same field.

Owners or operators and permitting authorities may also achieve economies of scale by conducting the public process (*e.g.,* noticing wells; holding hearings) for several Class VI permits simultaneously. This may improve efficiency and public understanding of how multiple wells may interact in a given GS site. EPA also believes that requiring separate permit applications for each well will ensure that the public has an opportunity to provide input on each well in the field as it is constructed or brought online.

As part of the EPA's adaptive rulemaking approach, the Agency will collect information on early GS projects and may consider the use of area permits in the future.

IV. Cost Analysis

Today's rulemaking finalizes regulations for the protection of USDWs, but it does not require entities to sequester CO_2. The costs and benefits associated with protection of USDWs from endangerment are the focus of this rule; however, those associated with the mitigation of climate change are not directly attributable to this rulemaking.

To calculate the costs and benefits of compliance for the final GS Rule, EPA selected the existing UIC program Class I industrial waste disposal well category as the baseline for costs and benefits. EPA used this baseline to determine the incremental costs of today's rule, based on the fact that permits issued to early pilot projects included requirements similar to those for Class I industrial wells.

The incremental costs of the rule include elements such as geologic site characterization, well construction and operation, monitoring equipment and procedures, well plugging, and post-injection site care (monitoring). The benefits of this rulemaking include the decreased risk of endangerment to USDWs and potentially a corresponding decrease in health-related risks associated with contaminated USDWs.

The scope of the GS Rule Cost Analysis includes the full range of activities associated with an injection project, from the end of the CO_2 pipeline at the GS site to the underground injection and monitoring, as it occurs during the timeframe of the analysis. The scope of the cost analysis does not include capturing or purifying the CO_2, nor does it include transporting the CO_2 to the GS site. Some costs as highlighted in this section have changed from the proposed rule based on cost updates or public comments received.

The timeframe of the cost analysis was extended from 25 years in the proposed rule to 50 years for the final rule. Although twice as long as the timeframes commonly used in drinking water-related cost analyses, EPA believes that 50 years reflects the fact that the full lifecycle of GS projects is expected to be well beyond 25 years while avoiding the extreme amount of uncertainty involved in projecting an analysis across multiple generations. Costs attributed to this rule are inclusive of GS projects begun during the 50 years of the analysis, and all cost elements that occur during the 50-year timeframe are discounted to present year values. The number of GS projects projected to be implemented over the timeframe of the cost analysis (29) includes pilot projects and other projects associated with regulations that are in place today.[3] EPA consulted directly with DOE and Regional Partnerships and searched publicly available data to inform the estimated number of projects. Again, EPA emphasizes that the rule does not require anyone to undertake GS.

EPA recognizes that basing the analysis on 29 projects (consisting of pilot projects and other projects) expected on the basis of regulations in place today omits the incremental costs of applying these requirements to additional projects that may result from future changes in climate policy and that a much larger number of affected projects (and thus higher costs) could result from such policy changes. EPA has thus conducted several sensitivity analyses to provide perspective on the incremental costs of the rule under possible future climate policy scenarios. These are summarized in Section IV.A.2.b of this preamble and discussed in greater detail in Cost Analysis for this rule (see EPA, 2010d).

This section of the Preamble summarizes the results of the cost analysis conducted for this rule. For details, see the *Cost Analysis for the Final GS Rule,* which is included in the rule docket.

A. National Benefits and Costs of the Rule[4]

1. National Benefits Summary

This section summarizes the risk (and benefit) tradeoffs between compliance with existing requirements and with the regulatory alternative (RA) selected for the final rule. The Cost Analysis includes a more comprehensive evaluation of risk and benefit tradeoffs for all of the RAs considered for the final rule (see Chapter 2 of the Cost Analysis for a description of each of the RAs). These evaluations in the Cost Analysis include a nonquantitative analysis of the relative risks of contamination to USDWs for the RAs under consideration. The expected change in risk based on promulgation of the selected RA and the potential nonquantified benefits of compliance with this RA are also discussed.

a. Relative Risk Framework—Qualitative Analysis

Table IV–1 below presents the projected directional change in risk of the selected RA relative to the baseline. As detailed in Chapter 5 in the Cost Analysis, the term "baseline" in the exhibit refers to risks as they exist under the current UIC program regulations for Class I industrial wells. The terms "decrease" and "increase" indicates the change in risk relative to this baseline. The Agency has used best professional judgment to qualitatively assess the relative risk associated with each RA.

[3] Note that although pilot projects are conducted on a small scale, they are considered geologic sequestration demonstration projects for a given site, not Class V experimental technology well projects.

[4] Although both estimated costs and benefits are discussed in detail, the final policy decisions regarding this rulemaking are not premised solely on a cost/benefit basis.

This assessment was made with contributions from a wide range of injection well and hydrogeological experts, ranging from scientists and well owners or operators to administrators and regulatory experts.

TABLE IV–1—RELATIVE RISK OF REGULATORY COMPONENTS FOR SELECTED RA VERSUS THE CURRENT REGULATIONS [5]

Requirements	Direction of change in risk for selected RA (relative to baseline)
1. Geologic Characterization	
Baseline Identify a geologic system consisting of a receiving zone; trapping mechanism; and confining system to allow injection at planned rates and volumes. Provide maps and cross sections of local and regional geology, AoR, and USDWs; characterize the overburden and subsurface; and provide information on fractures, stress, rock strength, and in-situ fluid pressures within cap rock and storage reservoir. *Incremental Requirements under RA3* Perform detailed assessment of geologic, hydrogeologic, geochemical and geomechanical properties of proposed site. Identify additional zones above the confining zone that will impede vertical fluid movement (at Director's discretion). Collect seismic history data; identify and evaluate faults and fractures.	Decrease.
2. Area of Review (AoR) Study and Corrective Action	
Baseline The AoR determined as either a ¼ mile radius or by mathematical formula. Identify all wells in the AoR that penetrate the injection zone and provide a description of each; identify the status of corrective action for wells in the AoR; and remediate those posing a risk to USDWs. *Incremental Requirements under RA3* Define the AoR using sophisticated computational models based on site specific data that accounts for multiphase flow and the buoyancy of CO_2. Perform corrective action using materials that are compatible with CO_2. Periodically reevaluate the AoR over the life of the injection project.	Decrease.
3. Injection Well Construction	
Baseline The well must be cased and cemented to prevent movement of fluids into or between USDWs and to withstand the injected materials at the anticipated pressure, temperature and other operational conditions. Wells must be constructed to inject below the lowermost USDW. *Incremental Requirements under RA3* Construct and cement wells with casing, tubing, and packer that meet API or ASTM International standards and are compatible with CO_2. Cemented surface casing (base of the lowermost USDW to surface) and long string casing (cemented from injection zone to surface) must be compatible with fluids with which they may be expected to come into contact. (A waiver of the Class VI requirement that projects inject below the lowermost USDW may be permitted in limited cases.)	Decrease (enhanced well construction requirements); Increase (A waiver to inject above the lowermost USDW in limited cases).
4. Well Operation	
Baseline Limit injection pressure to avoid initiating new fractures or propagating existing fractures in the confining zone adjacent to the USDWs. *Incremental Requirements under RA3* Limit injection pressure to less than the fracture pressure of the injection formation in any portion of the area defined by the anticipated pressure front. Equip injection wells with down-hole shut-off systems.	Decrease.
5. Mechanical Integrity Testing (MIT)	
Baseline Demonstrate internal mechanical integrity, and conduct a pressure fall-off test every 5 years ..... *Incremental Requirements under RA3* Continuously monitor injection pressure, flow rate, injected volumes, and pressure on the annulus between the tubing and the long string casing. Demonstrate external mechanical integrity annually, and conduct casing inspection logs at the discretion of the Director.	Decrease.
6. Monitoring	
Baseline Monitor the nature of injected fluids at a frequency sufficient to yield data representative of their characteristics. Conduct ground water monitoring within the AoR (Director's discretion). Report semi-annually on the characteristics of injection fluids, injection pressure, injection flow rate, injection volume and annular pressure, and on the results of MITs and groundwater monitoring.	Decrease.

TABLE IV–1—RELATIVE RISK OF REGULATORY COMPONENTS FOR SELECTED RA VERSUS THE CURRENT REGULATIONS [5]—Continued

Requirements	Direction of change in risk for selected RA (relative to baseline)
Incremental Requirements under RA3 Develop, implement, and periodically review a Testing and Monitoring plan for the site. Monitor injectate; corrosion of the well's tubular, mechanical and cement components. Conduct pressure fall-off testing; CO_2 plume and pressure front tracking; and ground water quality monitoring. Report operating and monitoring results twice per year in operating reports, unless the monthly MIT or other periodic tests revealed operations were somehow compromised, in which case 24 hour notification is required.	
7. Well Plugging and Post-Injection Site Care (PISC)	
Baseline Ensure that the well is in a state of static equilibrium and plugged using approved methods. Plugs shall be tagged and tested. Conduct PISC monitoring to confirm that CO_2 movement is limited to intended zones. *Incremental Requirements under RA3* Flush the well with a buffer fluid, determine bottom-hole reservoir pressure, and perform a final external MIT. Develop and implement a plan to conduct PISC monitoring, (which may include pressure monitoring, geophysical monitoring, and geochemical monitoring in and above the injection zone and the USDW). Following the PISC monitoring (50 years), perform a non-endangerment demonstration to ensure no threat to USDWs and that no further monitoring is necessary.	Decrease.
8. Financial Responsibility	
Baseline Demonstrate and maintain financial responsibility and resources to plug and abandon the injection well ..... *Incremental Requirements under RA3* Demonstrate and maintain financial responsibility for all needed corrective action, emergency and remedial response, and PISC and closure. Adjust the cost estimates for these activities periodically to account for inflation and other conditions that may affect costs.	Decrease.
9. Emergency and Remedial Response	
Baseline No specific requirement under Baseline. *Incremental Requirements under RA3* Develop and periodically review an emergency and remedial response plan that describes actions to be taken to address events that may cause an endangerment to a USDW during construction, operation and PISC.	Decrease.
Overall	Decrease.

[5] The activity baseline used for costing purposes in this analysis is based on the UIC program Class I industrial waste disposal well category because of the similarity of early CO_2 sequestration permits to the permits from that well class.

Note: Chapters 2 and 4 of the GS rule Cost Analysis provide detail on the components of the regulatory alternatives considered in this analysis and on the direction of change in risk associated with them, respectively.

In considering the benefits of the GS rule, the direction of change in risk compared to the baseline regulatory scenario was assessed for each component of the four RAs considered. An overall assessment for each alternative as a whole requires consideration of the relative importance of the risk being mitigated by each component of the rule.

As shown in Table IV–1, EPA estimates that under the selected alternative, RA3, risk will decrease relative to the baseline for each of the nine components assessed.

b. Other Nonquantified Benefits

Finalization of this rule will result in direct benefits, that is, protection of USDWs as is required of EPA under SDWA; and indirect benefits, which are those protections afforded to entities as a by-product of protecting USDWs. Indirect benefits are described in Chapter 4 of the GS Rule Cost Analysis. They include mitigation of potential risk to surface ecology and to human health through exposure to elevated concentrations of CO_2. Potential benefits from any climate change mitigation are not included in the assessment.

2. National Cost Summary

a. Cost of the Selected RA

EPA estimated the incremental one-time, capital, and operations and maintenance (O&M) costs associated with today's rulemaking. As Table IV–2 shows, the total annualized incremental cost associated with the selected RA is $38.1 million (as compared to $15.0 million for the proposed rule) and $31.7 million (as compared to $15.6 million in the proposed rule), using a 3-percent and 7-percent discount rate, respectively. These costs are in addition to the baseline costs that would be incurred if GS activities were instead subject to the current rules for UIC Class I industrial wells. As can be seen from Table IV–2, today's rule increases the costs of complying with UIC regulations for these wells from approximately a baseline total of $70.2 million ($32.3 million in the proposed rule) to $108.3 million ($47.3 million in the proposed rule) in annualized terms using a 3-percent discount rate, which is an increase of 54 percent. EPA believes these increased costs are needed to ensure the protection of UDWSs from endangerment. The details of the costs associated with each RA are presented in the Cost Analysis, along with a discussion of how EPA derived these estimates (EPA, 2010d).

Table IV-2. Annualized Incremental Costs of Selected RA for Initial Baseline[1] of 29 Projects (2008$, $million)[2]

Regulatory Alternative	One-Time Costs	Capital Costs	O&M Costs	Total
	3 Percent Discount Rate			
RA0	$ 10.0	$ 15.5	$ 44.8	$ 70.2
RA3	$ 16.6	$ 21.5	$ 70.2	$ 108.3
RA3 Incremental	$ 6.6	$ 6.0	$ 25.4	$ 38.1
	7 Percent Discount Rate			
RA0	$ 11.2	$ 16.5	$ 30.4	$ 58.1
RA3	$ 18.2	$ 23.5	$ 48.1	$ 89.8
RA3 Incremental	$ 7.0	$ 7.0	$ 17.7	$ 31.7

Notes:

1) Depending on the RA, it is estimated that 25-26 of the 29 baseline projects (25.1 under RA0 and 26.4 under RA3) will successfully deploy over the 50 year period of analysis. Annualized one-time, capital, and O&M costs are based on the number of successfully deployed projects.

2) Detail may not add due to rounding.

Table IV–3 presents a breakout of the annualized incremental costs of the selected RA by rule component using a 3-percent discount rate:

- Monitoring activities account for approximately 49 percent of the incremental regulatory costs. Most of this cost is for the construction, operation, and maintenance of corrosion-resistant monitoring wells. This cost includes tracking of the plume and pressure front as well as the cost of incorporating monitoring results into fluid-flow models that are used to reevaluate the AoR. These activities are a key component of decreasing risk associated with GS because they facilitate early detection of unacceptable movement of CO_2 or formation fluids.
- The next largest cost component of the selected RA is injection well operation, which accounts for approximately 22 percent of the total incremental cost. This component ensures that the wells operate within established parameters in the permit to prevent unacceptable fluid movement.
- Mechanical integrity testing accounts for approximately 6.8 percent of the cost. Continuous pressure monitoring is a key component of decreasing risk because it provides an early warning that a CO_2 leak may have occurred and allows the owner or operator to prevent compromises to well integrity.
- Construction of Class VI wells using the corrosion-resistant design and materials necessary to withstand exposure to CO_2 accounts for approximately 3.2 percent of the incremental cost of the selected RA.
- Geologic site characterization, which ensures that the site geology is safe and appropriate for GS, accounts for approximately 12.1 percent of the incremental cost of the selected RA. Costs for this component were determined using a site selection factor that accounts for the expense of characterizing multiple sites prior to finding an appropriate site.
- Well plugging and post-injection site care activities, which ensure that the injection well is properly closed and that the geologic sequestration project no longer poses a risk to USDWs, account for approximately 5.7 percent of the total incremental cost of RA 3.
- AoR activities, which include modeling the AoR and remediating wells in the AoR, account for approximately 1.0 percent of the total incremental cost of RA3.

Table IV-3. Annualized Incremental Rule Costs of Selected RA for Initial Baseline of 29 Projects by Rule Component (2008$, $million)

Regulatory Alternative	Rule Component									
	Geologic Site Characterization	Monitoring	Injection Well Construction	Area of Review	Well Operation	MIT	Well Plugging and Post-Injection Site Care[1]	Financial Responsibility[2]	Permitting Authority Admin	TOTAL
	3 Percent Discount Rate									
Baseline	$6.7	$3.4	$16.2	$1.1	$41.8	$0.2	$0.6	$0.0	$0.3	$70.2
Alternative 3	$11.3	$22.0	$17.4	$1.5	$50.3	$2.7	$2.8	$0.0	$0.4	$108.3
Alt 3 Incremental	$4.6	$18.6	$1.2	$0.4	$8.5	$2.6	$2.2	$0.0	$0.1	$38.1
Alt 3 as % of Total	12.1%	49%	3.2%	1.0%	22%	6.8%	5.7%	0.0%	0.3%	100%
	7 Percent Discount Rate									
Baseline	$8.3	$2.9	$17.0	$1.0	$28.2	$0.1	$0.2	$0.0	$0.3	$58.1
Alternative 3	$14.1	$18.7	$18.4	$1.3	$34.2	$1.7	$1.0	$0.0	$0.4	$89.8
Alt 3 Incremental	$5.7	$15.8	$1.4	$0.3	$5.9	$1.6	$0.8	$0.0	$0.2	$31.7
Alt 3 as % of Total	18%	50%	4.3%	1.1%	19%	5.1%	2.4%	0.0%	0.5%	100%

Notes:

1) With the exception of the two pilot saline projects in the baseline, the GS Rule Cost Model does not capture the full PISC period for projects under the baseline and RA3, and because these costs mostly occur near (or after) the end of the 50 year period of analysis they are also significantly influenced by the discount rate.

2) Costs related to demonstration of Financial Responsibility are less than $100,000 in annualized terms.

3) Detail may not add due to rounding.

b. Nonquantified Costs and Uncertainties in Cost Estimates

Should this rule somehow impede GS from happening, then the opportunity costs of not capturing the benefits associated with GS could be attributed to this regulation; however, the Agency has tried to develop a rule that balances risk with practicability, site specific flexibility and economic considerations and believes the probability of such impedance is low. This rule ensures protection of USDWs from endangerment associated with GS activities while also providing regulatory certainty to industry and permitting authorities and an increased understanding of GS through public participation and outreach. Thus, EPA believes the rule will not impede GS from happening and has not quantified such risk.

Uncertainties in the analysis are inherent in some of the basic assumptions as well as some detailed cost items. Uncertainties related to economic trends, the future rate of CCS deployment, and GS implementation choices may affect three basic assumptions on which the analysis is based: (1) The estimated number of projects that will be affected by the GS rule; (2) the labor rates applied; and (3) the estimated number of monitoring wells to be constructed per square mile of the AoR to adequately monitor in a given geologic setting.

First, the number of projects that will deploy from 2011 through 2060 may be significantly underestimated in this analysis given the uncertainty in future deployment of this technology. The current baseline assumption is that 29 projects (changed from 22 projects in the proposed rule) will deploy during the 50-year period (changed from 25 years in the proposed rule), as described in Chapter 3 of the Cost Analysis. To address the uncertainty inherent in projecting the GS baseline, the final rule cost analysis also presents sensitivity analyses that considers 5 and 54 projects as the lower and upper bound project numbers to be consistent with the Mandatory Reporting of Greenhouse Gases: injection and Geologic Sequestration of CO_2 rule (subpart RR). EPA developed this rule simultaneously with subpart RR to ensure coordination of requirements and costs between the two rules. The sensitivity analysis numbers (5 and 54 projects) are based on projected deployment highlighted in the presidential memorandum establishing the CCS Task Force and an EPA legislative analysis model of deployment under the American Power Act, respectively.

Second, the labor rate adopted for each of the labor categories for owners or operators described in Section 5.2.1 of the Cost Analysis (*i.e.,* geoscientist, mining and geological engineer) may be underestimated. The labor rates used in the Cost Analysis are based on current industry costs; therefore, the level and pace of price responses as the level of GS deployment increases represents a potentially uncertain component in the cost estimates. The practice of CO_2 injection represents an activity that, although already practiced widely in some contexts (*i.e.,* ER), has the potential to expand rapidly in the coming years. This expansion may be exponential under certain climate legislative scenarios, which may lead to shortages in labor and equipment in the short term and result in rapid cost escalation for many of the cost components discussed in the Cost Analysis. However, based on current research, potential increases in costs due to increased deployment rates and an associated rise in demand for labor or services in the field are not expected to cause a rapid, wide-scale increase in deployment. To address the potential underestimate of labor rates in the event that rapid deployment does drive up costs, EPA conducted sensitivity analyses using labor rates that were 50% higher than those used in the primary analysis. EPA found that the 50% increase in industry labor rates results in annualized incremental rule costs of $38.6 million based on a 3 percent discount rate, an approximately 1% increase in costs from the primary analysis.

Third, for the purpose of estimating national costs, the Agency assumes one monitoring well above the injection zone per two square miles of AoR; for monitoring wells into the injection zone, the Agency assumes one monitoring well per four square miles. EPA assumes monitoring wells into the injection zone will also be used to sample above the injection zone. However, the Agency recognizes that operators and primacy agency Directors may choose more or fewer monitoring

wells depending on project site characteristics. Because the monitoring wells and associated costs represent a significant component of the cost analysis, the Agency acknowledges that this factor may be significant in the overall uncertainty of the cost analysis. To address this source of uncertainty, the Agency conducted sensitivity analyses based on alternative estimates of 25 percent more and 25 percent fewer monitoring wells than the number assumed for the primary analysis. These analyses resulted in annualized incremental rule costs of approximately $43.1 million and $33.0 million respectively, a 13 percent increase or decrease from the primary analysis results of $38.1 million at a 3 percent discount rate.

Additional uncertainties correspond more directly to specific assumptions made in constructing the cost model. If the assumptions for such items are incorrect, there may be significant cost implications outside of the general price level uncertainties discussed above. These cost items are described in Section 5.9.2 of the Cost Analysis.

EPA requested and received comments on the cost analysis presented in the preamble of the proposed rule. One commenter expressed concern that EPA overstated risks to USDWs, which may discourage investment in CCS. EPA notes that the risks have been discussed as low, based on the rule requirements and the redundancy in those requirements. One commenter requested that costs be estimated for a range of projects, rather than only the number of projects estimated in the cost analysis. EPA notes that the cost analysis for the final rule presents sensitivity analyses that consider 5 and 54 projects as the lower and upper bound number of projects deployed which is comparable with the Subpart RR analysis. The sensitivity analyses are intended to further explore the implications of alternative climate policy scenarios.

EPA received comments on the proposal cost analysis section that suggested that various estimated costs were too high, too low, or absent. EPA clarifies that cost estimates are presented in incremental terms. For this reason, costs may seem lower or less comprehensive than expected. However, EPA increased some costs, such as labor rates, in response to comments. Using industry survey data from the American Association of Petroleum Geologists and the Society for Petroleum Engineers, as presented in the Cost Analysis, EPA increased the estimated labor rates significantly from the Bureau of Labor Statistics estimates used in the analysis for the proposed rule. The updated rates (weighted by 1.6 for overhead) in the analysis for the final rule are $110.62 and $107.23 in 2008$ for engineers and geologists, respectively. These correspond approximately to annual salaries of $143,800 and $139,400 and represent an approximately 115 percent and a one percent increase, respectively, for engineers and geologists from the proposed rule analysis. For more details please see the Cost Analysis for the Final GS Rule (USEPA, 2010d).

Lastly, many commenters believed that an assumption of three monitoring wells per GS injection well was too high or too low a ratio, or should be modeled for a range of values. EPA changed the algorithm for calculating the number of monitoring wells to be based on the AoR, instead of the number of injection wells. For a representative saline project of approximately 23.3 square miles, EPA assumed 12 monitoring wells (six above the injection zone, and six into the injection zone), which EPA understands will be an overestimate in some cases and an underestimate in others. Because EPA recognizes the inherent uncertainty in this assumption, the cost analysis for the proposed rule presented and for the final rule presents a sensitivity analysis based on alternative estimates of 25 percent more and 25 percent fewer monitoring wells than the number assumed for the primary analysis.

c. Supplementary Cost and Uncertainties in Cost Estimates

To better establish the context in which to evaluate the cost analysis for this rule, EPA considers three types of costs that are not accounted for explicitly for this rule: (1) Costs that are incurred beyond the 50-year timeframe of the analysis, (2) costs that could arise due to a higher rate of deployment of CCS in the future in response to climate change legislation, and (3) overall costs of CCS and their relationship to the proportion of such costs attributable to the requirements. Because GS is in the early phase of development, and given the significant interest in research, development, and eventual commercialization of CCS, EPA provides a preliminary discussion of the potential significance of these costs below.

The cost analysis for this rule estimates costs that EPA anticipates will be incurred during a 50-year timeframe beginning with rule promulgation.[6] When analyzing costs for a commercial-size saline formation sequestration project that begins in year one of the cost analysis, EPA assumes that the first year is a pre-construction and construction period, followed by 40 years of injection and then either 10, 50, or 100 years of PISC as indicated in the cost analysis for the RAs considered. Given the 50-year timeframe (changed from 25 years in the proposed rule) of the analysis, the first nine years (changed from four years in proposed rule) of the PISC period would be captured in the cost analysis for a project beginning in year one, and fewer or no years of PISC for a project beginning later in the 50-year analytical timeframe would be included. EPA estimates that the incremental present value sequestration costs above the baseline costs incurred for one representative large deep saline project within the 50-year timeframe of the cost analysis are approximately $1.26/metric tonne CO_2. These costs over the full lifetime of the sequestration project are estimated to be $1.40/metric tonne CO_2. Thus the 50-year timeframe (changed from 25 years in proposed rule) captures approximately 90 percent (changed from 75 percent in the proposed rule) of the present value lifetime incremental costs associated with implementing this rule. EPA notes, however, that the longer time horizon over which costs are estimated inherently introduces increasing amounts of uncertainty into those estimates, and that the relatively low percentage share of these costs as a fraction of the total costs is significantly influenced by the long horizon (greater than 50 years) over which they are discounted.

The cost analysis assumes that Class VI well owners or operators will inject approximately 1.0 billion metric tons (or 1.0 Petagram, Pg) of CO_2 cumulatively over the next 50 years.[7] The start years of these projects, for both pilot and large-scale saline, are staggered over the first seven years of the period of analysis.[8] Based on the assumed deployment schedule, the analysis captures the full injection periods for approximately 10 large scale saline projects (with an injection period of 40 years) and 2 pilot saline projects (with an injection period of four years), and for 14 ER projects (with an assumed injection period of 10 years), which are

[6] A detailed discussion of the timeframe over which the costs of the final requirements were estimated can be found in the Cost Analysis. The 50 years of costs are calculated in terms of their present value (2008$) and then annualized over a 25-year period for a more consistent comparison to other regulations.

[7] A more detailed discussion of these projects can be found in the Cost Analysis.

[8] A detailed table of the scheduled deployment of projects assumed in the baseline over the 50-year timeframe can be found in Exhibit 3.1 of the Cost Analysis.

in oil and gas reservoirs. The analysis assumes that 10 percent of projects initiated will include waiver applications, and that 50 percent of those applications will be approved, while the other 50 percent of waiver applicants are removed from the baseline. The analysis also assumes that five percent of project permits for the initial baseline estimate of 29 projects will not be approved for geological or mechanical reasons.[9] While the baseline injection amount represents a significant step towards demonstrating the feasibility of CCS on an annual basis, it represents a small amount of current CO_2 emissions in the United States (approximately one percent).

The U.S. fleet of 1,493 coal-fired power generators emits 1.932 Pg CO_2 equivalent per year. The technical or economic viability of retrofitting these or other industrial facilities with CCS is not the subject of this rulemaking. However, if some percentage of these facilities undertook CCS and used GS, they (or the owner or operator of the Class VI injection wells) would be subject to the UIC requirements. For example, if 25 percent of these facilities undertook CCS (assuming a 90 percent capture rate and the incremental rule costs outlined in Table IV–4) the annualized incremental sequestration costs associated with meeting the Class VI requirements would be on the order of $546 million. Similarly, if 100 percent of these plants undertook CCS, the annualized incremental costs would be on the order of $2.2 billion, although it is unlikely that all coal plants would deploy CCS simultaneously. These preliminary cost estimates represent the annualized incremental cost of meeting the additional sequestration requirements in the rule, which would be incurred over the lifetime of the sequestration projects, assuming that all sequestration projects begin in the same year. These cost estimates were not generated from a full economic analysis or included in the cost analysis for this rule, due to the uncertainty of what percentage, if any, of such facilities will deploy CCS in the future. However, based on current research, the uncertainty in labor or service costs is not likely to contribute significantly as a rapid, wide-scale increase in deployment is not expected.[10] Therefore, the cost estimates presented represent a sensitivity analysis of the potential costs, assuming that 25 percent or 100 percent of all plants undertake CCS beginning in the same year, and do not take into consideration CCS deployment rates and project-specific costs. Actual annualized costs incurred as CCS deploys in the future could be higher or lower, depending on a number of factors, including deployment rates, capital and labor cost trends, and the shape of the learning curve among industry and State/Federal operators.

Based on current literature, sequestration costs are expected to be a small component of total CCS project costs. Table IV–4 shows example total annualized CCS project costs broken down by capture, transportation, and sequestration components. The largest component of total CCS project costs is the cost of capturing CO_2 ($42.90/metric tonne CO_2 for capture from an integrated gasification combined cycle power plant.[11]) Transportation costs vary widely depending on the distance from emission source to sequestration site, but EPA uses a long-term average estimate of $4.60/metric tonne CO_2.[12] EPA estimates total sequestration costs for a commercial-size deep saline project to be approximately $3.80/metric tonne CO_2, of which approximately $1.40/metric tonne CO_2 is attributable to complying with requirements of this rule (including PISC). Based on the project costs outlined in Table IV–4, the requirements amount to approximately 2.7 percent of the total CCS project costs.

[7] A more detailed discussion of these projects can be found in the Cost Analysis.

[8] A detailed table of the scheduled deployment of projects assumed in the baseline over the 50-year timeframe can be found in Exhibit 3.1 of the Cost Analysis.

[9] Of the 29 projects that compose the initial baseline, a total of 10 percent, or approximately 3 projects, will not be approved based on their permit or waiver applications; costs for compiling the applications and reviewing them are included in the cost analysis, but no further costs are incurred for those projects that do not get approved. EPA recognizes that this may omit opportunity costs of projects that do not go forward.

[10] Potential increase in costs due to increased deployment rates and an associated rise in demand for labor or services in the field were considered in

Table IV-4. Example Total Annualized CCS Project Costs

Example Total CCS Project Costs (including capture at an IGCC plant, transportation, and deep saline reservoir at commercial scale sequestration)			
	Cost over lifetime of project ($/metric tonne)		Percentage of Total CCS Project Cost (%)
Capture (IGCC plant)	$	42.90	83.6%
Transportation Estimate	$	4.60	9.0%
Baseline Sequestration	$	2.40	4.7%
Incremental Final Rule Sequestration Requirements	$	1.40	2.7%
Total CCS Project Cost	**$**	**51.30**	**100%**

Notes:

1) Detail may not add due to rounding.

2) Transportation cost estimates are based on a distance of 150 miles.

B. Comparison of Benefits and Costs of RAs Considered

1. Costs Relative to Benefits; Maximizing Net Social Benefits

EPA developed a relative risk analysis in place of a comparison of quantified benefits (a direct numerical comparison of costs to benefits) because GS is a new technology and data collection on the potential effects of GS on USDWs are ongoing. Costs can only be compared to qualitative relative risks as discussed in section IV.A.1.

Compared to the baseline, RA3 provides greater protection to USDWs because it is specifically tailored to GS injection activities. The current regulatory requirements do not specifically consider the injection of a buoyant, corrosive (in the presence of water) fluid. In particular, RA3 includes increased monitoring requirements that provide the amount of protection the Agency estimates is necessary for USDWs. As described in section IV.A. (National Benefits and Costs of the Rule), monitoring requirements account for 49 percent of the incremental regulatory costs, of which 74 percent is incurred for the construction, operation, and maintenance of monitoring wells, and the other 26 percent for tracking of the plume and pressure front through complex modeling at a minimum of every five years for all operators and for monitoring for CO_2 leakage. Public awareness of these protective measures would be expected to enhance public acceptance of GS.

EPA also compared RA1 and RA2 to the baseline (discussed in the proposed rule of July 2008). RA1 does not contain specific requirements but requires operators to meet a performance standard regarding protection of USDWs. RA2 is similar to the Class II UIC requirements, with some additional construction and PISC requirements. See the Cost Analysis (USEPA, 2010d) for a more detailed description. RA1 and RA2 do not provide the specific safeguards against CO_2 migration that RA3 does because of a significantly greater amount of discretion allowed to Directors and operators for interpreting requirements, and less stringent requirements for some compliance activities. Only RA3 and RA4 require the periodic complex modeling exercise for tracking the plume, for example. RA4 provides greater safeguards against CO_2 migration, but at a much higher cost.

2. Cost Effectiveness and Incremental Net Benefits

RA1 and RA2 provide lower costs than RA3 but at increased levels of risk to USDWs. Although RA4 has more stringent requirements, EPA does not believe that the increased requirements and the increased costs are necessary to provide protection to USDWs. Therefore EPA believes that RA3 is the most appropriate alternative.

C. Conclusions

RA3 provides a high level of protection to USDWs overlying and underlying GS CO_2 injection zones. It does so at lower costs than the more stringent RA4 while providing significantly more protection than RA1 or RA2. Therefore EPA has selected RA3 for the final GS Rule.

V. Statutory and Executive Order Review

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a "significant regulatory action." Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act (PRA)

The information collection requirements in this rule will be submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.* The information collection requirements are not enforceable until OMB approves them.

The information collected as a result of this rule will allow EPA and State permitting authorities to review geologic information about a proposed injection project to evaluate its suitability for safe and effective GS. It also allows the Agency to fulfill the requirements of the UIC program to verify throughout the life of the injection project that protective requirements are in place and that USDWs are protected. The collection requirements are mandatory under the SDWA (42 U.S.C. 300h *et seq.*).

For the first three years after publication of the final rule in the **Federal Register**, the major information requirements apply to a total of 38 respondents, for an average of 12.6 respondents per year. The total

incremental burden (for owners or operators, permitting authorities, and the Agency) associated with the change in moving from the information requirements of the UIC program for Class I non-hazardous wells (baseline) to the selected alternative under the GS Rule over the three years covered by the Information Collection Request (ICR) for the Geologic Sequestration Rule is 53,740 hours, for an average of 17,913 hours per year. The total incremental reporting and recordkeeping cost over the three year clearance period is $36.9 million, for an average of $12.3 million per year (simple average over three years). The average burden per response (*i.e.,* the amount of time needed for each activity that requires a collection of information) is 423 hours; the average cost per response is $290,695. The collection requirements are mandatory under SDWA (42 U.S.C. 3501 *et seq.*). Details on the calculation of the rule information collection burden and costs can be found in the ICR (USEPA, 2010e) and Chapter 5 of the Cost Analysis (USEPA, 2010d). A summary of the burden and costs of the collection is presented in Exhibit V–1.

Exhibit V-1 Average Annual Net Change Burden and Costs for the GS ICR

Respondent Type	Annual Respondents	Annual Burden Hours	Cost				Annual Responses
			Annual Labor Cost	Annual Capital Cost	Annual O&M Cost	Total Annual Cost	
Owners or Operators	1.0	1,549	$ 204,574	$ 5,827,027	$ 5,454,346	$ 11,485,946	6.9
Permitting Authorities	10.7	11,241	$ 555,763	$ -	$ -	$ 555,763	23.6
Agency	1.0	5,123	$ 256,880	$ -	$ -	$ 256,880	11.7
Total	12.6	17,913	$ 1,017,217	$ 5,827,027	$ 5,454,346	$ 12,298,589	42.3

Source:

Information Collection Request for the Geologic Sequestration Rule (USEPA, 2010c).

Notes:

1) Detail may not add exactly to total due to independent rounding.

2) "Annual Burden Hours" reflects an annual average for all project types over the 3-year ICR period.

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 EPA's regulations in 40 CFR are listed in 40 CFR part 9. In addition, EPA is amending the table in 40 CFR part 9 of currently approved OMB control numbers for various regulations to list the regulatory citations for the information requirements contained in this final rule.

C. Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedures Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business primarily engaged in the generation, transmission, and/or distribution of electric energy for sale as defined by North American Industry Classification System (NAICS) codes 221111, 221112, 221113, 221119, 221121, 221122 with total electric output for the preceding fiscal year that did not exceed 4 million megawatt hours; (2) a small business primarily engaged in petroleum production as defined by NAICS code 324110 with fewer than 1,500 employees and less than 125,000 barrels per calendar day in total Operable Atmospheric Crude Oil Distillation capacity, as specified for government procurement purposes (capacity includes owned or leased facilities as well as facilities under a processing agreement or an arrangement such as an exchange agreement or a throughput); (3) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (4) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. The small entity definitions for commercial operations focus on the electricity and oil and gas sectors because these are the sectors most likely to deploy GS.

After considering the economic impacts of today's final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This rule does not impose any requirements on small entities.

Furthermore, GS is a technologically complex activity, the cost of which is anticipated to be prohibitive to small entities. Therefore it is anticipated small entities would not elect to sequester CO_2 via injection wells, and thus the rule will not have any impact on them.

D. Unfunded Mandates Reform Act (UMRA)

This rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. The total annual incremental costs estimated for the implementation of this rule are well under $100 million, resulting in expenditures for the entity groupings required under an UMRA analysis that also fall far below the $100 million per year threshold. Thus, this rule is not subject to the requirements of sections 202 or 205 of UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. Government responsibilities for oversight and implementation of this rule reside with State or Federal agencies and not with small governments.

E. Executive Order 13132: Federalism

Under section 6(b) of Executive Order 13132, EPA may not issue an action that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides

the funds necessary to pay the direct compliance costs incurred by State and Local governments, or EPA consults with State and Local officials early in the process of developing the proposed action. In addition, under section 6(c) of Executive Order 13132, EPA may not issue an action that has federalism implications and that preempts State law, unless the Agency consults with State and Local officials early in the process of developing the proposed action.

EPA concluded that today's action does not have federalism implications. This rule will not impose substantial direct compliance costs on State or Local governments, nor does EPA anticipate that it will preempt State law. Thus, the requirements of sections 6(b) and 6(c) of the Executive Order do not apply to this action.

Consistent with EPA policy, EPA nonetheless consulted with representatives of State and local governments early in the process of developing the proposed action to permit them to have meaningful and timely input into its development. Representatives included the National Governors' Association, the National Conference of State Legislatures, the Council of State Governments, the National League of Cities, the U.S. Conference of Mayors, the National Association of Counties, the International City/County Management Association, the National Association of Towns and Townships, and the County Executives of America. In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicited comment on the proposed action from State and local officials. See section II of the Preamble for more details on consultation with State and local officials.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Subject to the Executive Order 13175 (65 FR 67249, November 9, 2000) EPA may not issue a regulation that has Tribal implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by Tribal governments, or EPA consults with Tribal officials early in the process of developing the proposed regulation and develops a Tribal summary impact statement.

EPA has concluded that this action may have Tribal implications. However, it will neither impose substantial direct compliance costs on Tribal governments, nor preempt Tribal law. Indian Tribes may voluntarily apply for primary enforcement responsibility to regulate the UIC program in lands under their jurisdiction (See section II.G for more details on primacy). Currently, two Tribes have received primacy for the UIC program under section 1425 of the SDWA since the publication of the proposed rule. EPA is responsible for implementing the UIC program in the event that States or Tribes do not seek primary enforcement responsibility. EPA clarifies that regardless of whether Tribes have UIC program primacy, the rule protects USDWs from contamination and therefore protects all populations from adverse health effects related to potential USDW contamination.

EPA consulted with Tribal officials early in the process of developing this regulation to permit them to have meaningful and timely input into its development. A summary of the Tribal consultation calls are included in the docket for the GS rulemaking. See section II.E.3 for more information on the details of the Tribal consultation process.

As required by section 7(a), EPA's Tribal Consultation Official has certified that the requirements of the Executive Order have been met in a meaningful and timely manner. A copy of the certification is included in the docket for this action.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

This action is not subject to EO 13045 (62 FR 19885, April 23, 1997) because it is not economically significant as defined by EO 12866 and because the Agency does not believe the environmental health risks or safety risks addressed by this action present a disproportionate risk to children. Today's rule does not require or provide incentive for firms to engage in GS, however, it does protect USDWs from potential negative impacts from GS of CO_2 should a firm decide to undertake such a project. Health and risk assessments related to GS of CO_2 and its effects on humans and the environment are presented in the *Vulnerability Evaluation Framework for Geologic Sequestration of Carbon Dioxide* (USEPA, 2008b). Additionally, EPA notes that it is funding and monitoring research related to the potential for USDW contamination associated with GS projects. Much of this research focuses on potential exceedances of drinking water standards (as suggested), which were developed by EPA and take into account impacts on children. Please see section II of this Preamble for more details on this research.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not a "significant energy action" as defined in Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The higher degree of regulatory certainty and clarity in the permitting process may, in fact, have a positive effect on the energy sector. Specifically, if climate change legislation that imposes caps or taxes on CO_2 emissions is passed in the future, energy generation firms and other CO_2 producing industries will have an economic incentive to reduce emissions, and this rule will provide regulatory certainty in determining how best to meet any new requirements (for example, by maintaining or increasing production while staying within the emissions cap or avoiding some carbon taxes). The rule may allow some firms to extend the life of their existing capital investment in plant machinery or plant processes.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This rulemaking involves environmental monitoring or measurement. Consistent with the Agency's Performance Based Measurement System (PBMS), EPA has decided not to require the use of specific, prescribed analytic methods. Rather, the rule will allow the use of any method that meets the performance criteria. The PBMS approach is intended to be more flexible and cost-effective for the regulated community; it is also intended to encourage innovation in analytical technology and improved

data quality. While EPA is not precluding the use of any method, whether it constitutes a voluntary consensus standard or not, as long as it meets the performance criteria specified, the PBMS approach is fully consistent with the use of voluntary consensus standards, as such standards are generally designed to address the same types of criteria required by PBMS.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629; February 16, 1994) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations. Existing electric power generation plants that burn fossil fuels may be more prevalent in areas with higher percentages of people who are minorities or have lower incomes on average, but it is hard to predict where new plants with CCS will be built. EPA is developing guidance for UIC Directors that places emphasis on considering the potential impact of any Class VI permits on communities (such as minority and low income populations) when evaluating Class VI injection well permit applications, as well as provides suggestions and tools for targeted outreach to ensure more meaningful public input and participation from the most affected communities during the permit evaluation and approval process.

This rule does not require that GS be undertaken; but does require that if it is undertaken, operators will conduct the activity in such a way as to protect USDWs from endangerment caused by CO_2. Additionally, this rule will ensure that all areas of the United States are subject to the same minimum Federal requirements for protection of USDWs from endangerment from GS. Additional detail regarding the potential risk of the rule is presented in the *Vulnerability Evaluation Framework for Geologic Sequestration of Carbon Dioxide* (USEPA, 2008b).

K. Congressional Review Act

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 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). This rule will be effective January 10, 2011.

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List of Subjects

40 CFR Part 124

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous waste, Indians—lands, Reporting and recordkeeping requirements, Water pollution control, Water supply.

40 CFR Part 144

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous waste, Indians—lands, Reporting and recordkeeping requirements, Surety bonds, Water supply.

40 CFR Part 145

Environmental protection, Confidential business information, Indian—lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water supply.

40 CFR Part 146

Environmental protection, Hazardous waste, Indian—lands, Reporting and recordkeeping requirements, Water supply.

40 CFR Part 147

Environmental protection, Indian—lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water supply.

Dated: November 22, 2010.

Lisa P. Jackson,

Administrator.

■ For the reasons set forth in the preamble, title 40 chapter I of the Code of Federal Regulations is amended as follows:

PART 124—PROCEDURES FOR DECISION MAKING

■ 1. The authority citation for part 124 continues to read as follows:

Authority: Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.;* Safe Drinking Water Act, 42 U.S.C. 300f *et seq.;* Clean Water Act, 33 U.S.C. 1251 *et seq.;* Clean Air Act, 42 U.S.C. 7401 *et seq.*

Subpart A—General Program Requirements

■ 2. Section 124.10 is amended by revising paragraph (c) introductory text and by adding paragraph (c)(1)(xi) to read as follows:

§ 124.10 Public notice of permit actions and public comment period.

* * * * *

(c) Methods (applicable to State programs, see 40 CFR 123.25 (NPDES), 145.11 (UIC), 233.23 (404), and 271.14 (RCRA)). Public notice of activities described in paragraph (a)(1) of this section shall be given by the following methods:

(1) * * *

(xi) For Class VI injection well UIC permits, mailing or e-mailing a notice to State and local oil and gas regulatory agencies and State agencies regulating mineral exploration and recovery, the Director of the Public Water Supply Supervision program in the State, and all agencies that oversee injection wells in the State.

* * * * *

PART 144—UNDERGROUND INJECTION CONTROL PROGRAM

■ 3. The authority citation for part 144 continues to read as follows:

Authority: Safe Drinking Water Act, 42 U.S.C. 300f *et seq.;* Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.*

Subpart A—General Provisions

■ 4. Section 144.1 is amended by adding paragraph (f)(1)(viii) and by revising paragraph (g) introductory text to read as follows.

§ 144.1 Purpose and scope of part 144.

* * * * *

(f) * * *

(1) * * *

(viii) Subpart H of part 146 sets forth requirements for owners or operators of Class VI injection wells.

* * * * *

(g) *Scope of the permit or rule requirement.* The UIC permit program regulates underground injection by six classes of wells (see definition of "well injection," § 144.3). The six classes of wells are set forth in § 144.6. All owners or operators of these injection wells must be authorized either by permit or rule by the Director. In carrying out the mandate of the SDWA, this subpart provides that no injection shall be authorized by permit or rule if it results in the movement of fluid containing any contaminant into underground sources of drinking water (USDWs—see § 144.3 for definition), if the presence of that contaminant may cause a violation of any primary drinking water regulation under 40 CFR part 141 or may adversely affect the health of persons (§ 144.12). Existing Class IV wells which inject hazardous waste directly into an underground source of drinking water are to be eliminated over a period of six months and new such Class IV wells are to be prohibited (§ 144.13). For Class V wells, if remedial action appears necessary, a permit may be required (§ 144.25) or the Director must require remedial action or closure by order (§ 144.6(c)). During UIC program development, the Director may identify aquifers and portions of aquifers which are actual or potential sources of drinking water. This will provide an aid to the Director in carrying out his or her duty to protect all USDWs. An aquifer is a USDW if it fits the definition under § 144.3, even if it has not been "identified." The Director may also designate "exempted aquifers" using the

criteria in 40 CFR 146.4 of this chapter. Such aquifers are those which would otherwise qualify as "underground sources of drinking water" to be protected, but which have no real potential to be used as drinking water sources. Therefore, they are not USDWs. No aquifer is an exempted aquifer until it has been affirmatively designated under the procedures at § 144.7. Aquifers which do not fit the definition of "underground source of drinking water" are not "exempted aquifers." They are simply not subject to the special protection afforded USDWs. During initial Class VI program development, the Director shall not expand the areal extent of an existing Class II enhanced oil recovery or enhanced gas recovery aquifer exemption for Class VI injection wells and EPA shall not approve a program that applies for aquifer exemption expansions of Class II–Class VI exemptions as part of the program description. All Class II to Class VI aquifer exemption expansions previously issued by EPA must be incorporated into the Class VI program descriptions pursuant to requirements at § 145.23(f)(9).

* * * * *

■ 5. Section 144.3 is amended by adding in alphabetic order the definition "geologic sequestration" to read as follows:

§ 144.3 Definitions.

* * * * *

Geologic sequestration means the long-term containment of a gaseous, liquid, or supercritical carbon dioxide stream in subsurface geologic formations. This term does not apply to carbon dioxide capture or transport.

* * * * *

■ 6. Section 144.6 is amended by revising paragraph (e) and adding paragraph (f) to read as follows:

§ 144.6 Classification of wells.

* * * * *

(e) *Class V.* Injection wells not included in Class I, II, III, IV, or VI. Specific types of Class V injection wells are described in § 144.81.

(f) *Class VI.* Wells that are not experimental in nature that are used for geologic sequestration of carbon dioxide beneath the lowermost formation containing a USDW; or, wells used for geologic sequestration of carbon dioxide that have been granted a waiver of the injection depth requirements pursuant to requirements at § 146.95 of this chapter; or, wells used for geologic sequestration of carbon dioxide that have received an expansion to the areal extent of an existing Class II enhanced oil recovery or enhanced gas recovery aquifer exemption pursuant to §§ 146.4 of this chapter and 144.7(d).

■ 7. Section 144.7 is amended as follows:

■ a. Revising paragraph (a);

■ b. Revising paragraphs (b)(1) and (b)(2); and

■ c. Adding paragraph (d) as follows:

§ 144.7 Identification of underground sources of drinking water and exempted aquifers.

(a) The Director may identify (by narrative description, illustrations, maps, or other means) and shall protect as underground sources of drinking water, all aquifers and parts of aquifers which meet the definition of "underground source of drinking water" in § 144.3, except to the extent there is an applicable aquifer exemption under paragraph (b) of this section or an expansion to the areal extent of an existing Class II enhanced oil recovery or enhanced gas recovery aquifer exemption for the exclusive purpose of Class VI injection for geologic sequestration under paragraph (d) of this section. Other than EPA approved aquifer exemption expansions that meet the criteria set forth in § 146.4(d) of this chapter, new aquifer exemptions shall not be issued for Class VI injection wells. Even if an aquifer has not been specifically identified by the Director, it is an underground source of drinking water if it meets the definition in § 144.3.

(b)(1) The Director may identify (by narrative description, illustrations, maps, or other means) and describe in geographic and/or geometric terms (such as vertical and lateral limits and gradient) which are clear and definite, all aquifers or parts thereof which the Director proposes to designate as exempted aquifers using the criteria in § 146.4 of this chapter.

(2) No designation of an exempted aquifer submitted as part of a UIC program shall be final until approved by the Administrator as part of a UIC program. No designation of an expansion to the areal extent of a Class II enhanced oil recovery or enhanced gas recovery aquifer exemption for the exclusive purpose of Class VI injection for geologic sequestration shall be final until approved by the Administrator as a revision to the applicable Federal UIC program under part 147 or as a substantial revision of an approved State UIC program in accordance with § 145.32 of this chapter.

* * * * *

(d) *Expansion to the Areal Extent of Existing Class II Aquifer Exemptions for Class VI Wells.* Owners or operators of Class II enhanced oil recovery or enhanced gas recovery wells may request that the Director approve an expansion to the areal extent of an aquifer exemption already in place for a Class II enhanced oil recovery or enhanced gas recovery well for the exclusive purpose of Class VI injection for geologic sequestration. Such requests must be treated as a revision to the applicable Federal UIC program under part 147 or as a substantial program revision to an approved State UIC program under § 145.32 of this chapter and will not be final until approved by EPA.

(1) The owner or operator of a Class II enhanced oil recovery or enhanced gas recovery well that requests an expansion of the areal extent of an existing aquifer exemption for the exclusive purpose of Class VI injection for geologic sequestration must define (by narrative description, illustrations, maps, or other means) and describe in geographic and/or geometric terms (such as vertical and lateral limits and gradient) that are clear and definite, all aquifers or parts thereof that are requested to be designated as exempted using the criteria in § 146.4 of this chapter.

(2) In evaluating a request to expand the areal extent of an aquifer exemption of a Class II enhanced oil recovery or enhanced gas recovery well for the purpose of Class VI injection, the Director must determine that the request meets the criteria for exemptions in § 146.4. In making the determination, the Director shall consider:

(i) Current and potential future use of the USDWs to be exempted as drinking water resources;

(ii) The predicted extent of the injected carbon dioxide plume, and any mobilized fluids that may result in degradation of water quality, over the lifetime of the GS project, as informed by computational modeling performed pursuant to § 146.84(c)(1), in order to ensure that the proposed injection operation will not at any time endanger USDWs including non-exempted portions of the injection formation;

(iii) Whether the areal extent of the expanded aquifer exemption is of sufficient size to account for any possible revisions to the computational model during reevaluation of the area of review, pursuant to § 146.84(e); and

(iv) Any information submitted to support a waiver request made by the owner or operator under § 146.95, if appropriate.

■ 8. Section 144.8 is amended by adding paragraph (b)(2)(iii) to read as follows:

§ 144.8 Noncompliance and program reporting by the Director.

* * * * *

(b) * * *

(2) * * *

(iii) All Class VI program reports shall be consistent with reporting requirements set forth in § 146.91 of this chapter.

* * * * *

Subpart B—General Program Requirements

■ 9. Section 144.12 is amended by revising the first sentence in paragraph (b) to read as follows:

§ 144.12 Prohibition of movement of fluid into underground sources of drinking water.

* * * * *

(b) For Class I, II, III, and VI wells, if any water quality monitoring of an underground source of drinking water indicates the movement of any contaminant into the underground source of drinking water, except as authorized under part 146, the Director shall prescribe such additional requirements for construction, corrective action, operation, monitoring, or reporting (including closure of the injection well) as are necessary to prevent such movement. * * *

* * * * *

■ 10. Section 144.15 is added to read as follows:

§ 144.15 Prohibition of non-experimental Class V wells for geologic sequestration.

The construction, operation or maintenance of any non-experimental Class V geologic sequestration well is prohibited.

■ 11. Section 144.18 is added to subpart B to read as follows:

§ 144.18 Requirements for Class VI wells.

Owners or operators of Class VI wells must obtain a permit. Class VI wells cannot be authorized by rule to inject carbon dioxide.

■ 12. Section 144.19 is added to subpart B to read as follows:

§ 144.19 Transitioning from Class II to Class VI.

(a) Owners or operators that are injecting carbon dioxide for the primary purpose of long-term storage into an oil and gas reservoir must apply for and obtain a Class VI geologic sequestration permit when there is an increased risk to USDWs compared to Class II operations. In determining if there is an increased risk to USDWs, the owner or operator must consider the factors specified in § 144.19(b).

(b) The Director shall determine when there is an increased risk to USDWs compared to Class II operations and a Class VI permit is required. In order to make this determination the Director must consider the following:

(1) Increase in reservoir pressure within the injection zone(s);

(2) Increase in carbon dioxide injection rates;

(3) Decrease in reservoir production rates;

(4) Distance between the injection zone(s) and USDWs;

(5) Suitability of the Class II area of review delineation;

(6) Quality of abandoned well plugs within the area of review;

(7) The owner's or operator's plan for recovery of carbon dioxide at the cessation of injection;

(8) The source and properties of injected carbon dioxide; and

(9) Any additional site-specific factors as determined by the Director.

Subpart C—Authorization of Underground Injection by Rule

■ 13. Section 144.22 is amended by revising paragraph (b) to read as follows:

§ 144.22 Existing Class II enhanced recovery and hydrocarbon storage wells.

* * * * *

(b) *Duration of well authorization by rule.* Well authorization under this section expires upon the effective date of a permit issued pursuant to §§ 144.19, 144.25, 144.31, 144.33 or 144.34; after plugging and abandonment in accordance with an approved plugging and abandonment plan pursuant to §§ 144.28(c) and 146.10 of this chapter; and upon submission of a plugging and abandonment report pursuant to § 144.28(k); or upon conversion in compliance with § 144.28(j).

Subpart D—Authorization by Permit

■ 14. Section 144.31 is amended by revising paragraph (e) introductory text to read as follows:

§ 144.31 Application for a permit; authorization by permit.

* * * * *

(e) *Information requirements.* All applicants for Class I, II, III, and V permits shall provide the following information to the Director, using the application form provided by the Director. Applicants for Class VI permits shall follow the criteria provided in § 146.82 of this chapter.

* * * * *

■ 15. Section 144.33 is amended by revising paragraph (a)(4) and adding paragraph (a)(5).

§ 144.33 Area permits.

(a) * * *

(4) Used to inject other than hazardous waste; and

(5) Other than Class VI wells.

* * * * *

■ 16. Section 144.36 is amended by revising paragraph (a) to read as follows:

§ 144.36 Duration of permits.

(a) Permits for Class I and V wells shall be effective for a fixed term not to exceed 10 years. UIC permits for Class II and III wells shall be issued for a period up to the operating life of the facility. UIC permits for Class VI wells shall be issued for the operating life of the facility and the post-injection site care period. The Director shall review each issued Class II, III, and VI well UIC permit at least once every 5 years to determine whether it should be modified, revoked and reissued, terminated or a minor modification made as provided in §§ 144.39, 144.40, or 144.41.

* * * * *

■ 17. Section 144.38 is amended by revising paragraph (b) introductory text to read as follows:

§ 144.38 Transfer of permits.

* * * * *

(b) *Automatic transfers.* As an alternative to transfers under paragraph (a) of this section, any UIC permit for a well not injecting hazardous waste or injecting carbon dioxide for geologic sequestration may be automatically transferred to a new permittee if:

* * * * *

■ 18. Section 144.39 is amended as follows:

■ a. Revising the second sentence in paragraph (a) introductory text;

■ b. Revising the second sentence in paragraph (a)(3) introductory text; and

■ c. Adding a new paragraph (a)(5) to read as follows:

§ 144.39 Modification or revocation and reissuance of permits.

* * * * *

(a) * * * For Class I hazardous waste injection wells, Class II, Class III or Class VI wells the following may be causes for revocation and reissuance as well as modification; and for all other wells the following may be cause for revocation or reissuance as well as modification when the permittee requests or agrees.

* * * * *

(3) * * * Permits other than for Class I hazardous waste injection wells, Class II, Class III or Class VI wells may be

modified during their permit terms for this cause only as follows:

* * * * *

(5) *Basis for modification of Class VI permits.* Additionally, for Class VI wells, whenever the Director determines that permit changes are necessary based on:

(i) Area of review reevaluations under § 146.84(e)(1) of this chapter;

(ii) Any amendments to the testing and monitoring plan under § 146.90(j) of this chapter;

(iii) Any amendments to the injection well plugging plan under § 146.92(c) of this chapter;

(iv) Any amendments to the post-injection site care and site closure plan under § 146.93(a)(3) of this chapter;

(v) Any amendments to the emergency and remedial response plan under § 146.94(d) of this chapter; or

(vi) A review of monitoring and/or testing results conducted in accordance with permit requirements.

* * * * *

■ 19. Section 144.41 is amended by adding a new paragraph (h) to read as follows:

§ 144.41 Minor modifications of permits.

* * * * *

(h) Amend a Class VI injection well testing and monitoring plan, plugging plan, post-injection site care and site closure plan, or emergency and remedial response plan where the modifications merely clarify or correct the plan, as determined by the Director.

Subpart E—Permit Conditions

■ 20. Section 144.51 is amended to read as follows:

■ a. Adding a new paragraph (j)(4);

■ b. Revising paragraph (o); and

■ c. Removing the first sentence in paragraph (q)(1) and adding two sentences in its place; and

■ d. Revising the first sentence in paragraph (q)(2).

§ 144.51 Conditions applicable to all permits.

* * * * *

(j) * * *

(4) Owners or operators of Class VI wells shall retain records as specified in subpart H of part 146, including §§ 146.84(g), 146.91(f), 146.92(d), 146.93(f), and 146.93(h) of this chapter.

* * * * *

(o) A Class I, II or III permit shall include and a Class V permit may include conditions which meet the applicable requirements of § 146.10 of this chapter to ensure that plugging and abandonment of the well will not allow the movement of fluids into or between USDWs. Where the plan meets the requirements of § 146.10 of this chapter, the Director shall incorporate the plan into the permit as a permit condition. Where the Director's review of an application indicates that the permittee's plan is inadequate, the Director may require the applicant to revise the plan, prescribe conditions meeting the requirements of this paragraph, or deny the permit. A Class VI permit shall include conditions which meet the requirements set forth in § 146.92 of this chapter. Where the plan meets the requirements of § 146.92 of this chapter, the Director shall incorporate it into the permit as a permit condition. For purposes of this paragraph, temporary or intermittent cessation of injection operations is not abandonment.

* * * * *

(q) * * *

(1) The owner or operator of a Class I, II, III or VI well permitted under this part shall establish mechanical integrity prior to commencing injection or on a schedule determined by the Director. Thereafter the owner or operator of Class I, II, and III wells must maintain mechanical integrity as defined in § 146.8 of this chapter and the owner or operator of Class VI wells must maintain mechanical integrity as defined in § 146.89 of this chapter. * * *

(2) When the Director determines that a Class I, II, III or VI well lacks mechanical integrity pursuant to §§ 146.8 or 146.89 of this chapter for Class VI of this chapter, he/she shall give written notice of his/her determination to the owner or operator. * * *

* * * * *

■ 21. Section 144.52 is amended as follows:

■ a. By revising paragraph (a) introductory text;

■ b. Revising paragraph (a)(2);

■ c. Revising paragraphs (a)(7)(i)(A) and (a)(7)(ii); and

■ d. Revising paragraph (a)(8).

§ 144.52 Establishing permit conditions.

(a) In addition to conditions required in § 144.51, the Director shall establish conditions, as required on a case-by-case basis under § 144.36 (duration of permits), § 144.53(a) (schedules of compliance), § 144.54 (monitoring), and for EPA permits only § 144.53(b) (alternate schedules of compliance), and § 144.4 (considerations under Federal law). Permits for owners or operators of hazardous waste injection wells shall include conditions meeting the requirements of § 144.14 (requirements for wells injecting hazardous waste), paragraphs (a)(7) and (a)(9) of this section, and subpart G of part 146. Permits for owners or operators of Class VI injection wells shall include conditions meeting the requirements of subpart H of part 146. Permits for other wells shall contain the following requirements, when applicable.

* * * * *

(2) Corrective action as set forth in §§ 144.55, 146.7, and 146.84 of this chapter.

* * * * *

(7) * * *

(i) * * *

(A) The well has been plugged and abandoned in accordance with an approved plugging and abandonment plan pursuant to §§ 144.51(o), 146.10, and 146.92 of this chapter, and submitted a plugging and abandonment report pursuant to § 144.51(p); or

* * * * *

(ii) The permittee shall show evidence of such financial responsibility to the Director by the submission of a surety bond, or other adequate assurance, such as a financial statement or other materials acceptable to the Director. For EPA administered programs, the Regional Administrator may on a periodic basis require the holder of a lifetime permit to submit an estimate of the resources needed to plug and abandon the well revised to reflect inflation of such costs, and a revised demonstration of financial responsibility, if necessary. The owner or operator of a well injecting hazardous waste must comply with the financial responsibility requirements of subpart F of this part. For Class VI wells, the permittee shall show evidence of such financial responsibility to the Director by the submission of a qualifying instrument (see § 146.85(a) of this chapter), such as a financial statement or other materials acceptable to the Director. The owner or operator of a Class VI well must comply with the financial responsibility requirements set forth in § 146.85 of this chapter.

(8) *Mechanical integrity.* A permit for any Class I, II, III or VI well or injection project which lacks mechanical integrity shall include, and for any Class V well may include, a condition prohibiting injection operations until the permittee shows to the satisfaction of the Director under § 146.8, or § 146.89 of this chapter for Class VI, that the well has mechanical integrity.

* * * * *

Subpart G—Requirements for Owners and Operators of Class V Injection Wells

■ 22. Section 144.80 is amended by revising the first sentence in paragraph (e) and by adding paragraph (f) to read as follows:

§ 144.80 What is a Class V injection well?

* * * * *

(e) *Class V.* Injection wells not included in Class I, II, III, IV or VI.

* * *

(f) *Class VI.* Wells used for geologic sequestration of carbon dioxide beneath the lowermost formation containing a USDW, except those wells that are experimental in nature; or, wells used for geologic sequestration of carbon dioxide that have been granted a waiver of the injection depth requirements pursuant to requirements at § 146.95 of this chapter; or, wells used for geologic sequestration of carbon dioxide that have received an expansion to the areal extent of a existing Class II enhanced oil recovery or enhanced gas recovery aquifer exemption pursuant to § 146.4 of this chapter and § 144.7(d).

PART 145—STATE UIC PROGRAM REQUIREMENTS

■ 23. The authority citation for part 145 continues to read as follows:

Authority: 42 U.S.C. 300f *et seq.*

Subpart A—General Program Requirements

■ 24. Section 145.1 is amended by adding paragraph (i) to read as follows:

§ 145.1 Purpose and scope.

* * * * *

(i) States seeking primary enforcement responsibility for Class VI wells must submit a primacy application in accordance with subpart C of this part and meet all requirements of this part. States may apply for primary enforcement responsibility for Class VI wells independently of other injection well classes.

Subpart C—State Program Submissions

■ 25. Section 145.21 is amended by adding paragraph (h) to read as follows:

§ 145.21 General requirements for program approvals.

* * * * *

(h) To establish a Federal UIC Class VI program in States not seeking full UIC primary enforcement responsibility approval, pursuant to the SDWA section 1422(c), States shall, by September 6, 2011, submit to the Administrator a new or revised State UIC program complying with §§ 145.22 or 145.32 of this part. Beginning on September 6, 2011 the requirements of subpart H of part 146 of this chapter will be applicable and enforceable by EPA in each State that has not received approval of a new Class VI program application under section 1422 of the Safe Drinking Water Act or a revision of its UIC program under section 1422 of the Safe Drinking Water Act to incorporate subpart H of part 146. Following September 6, 2011, EPA will publish a list of the States where subpart H of part 146 has become applicable.

■ 26. Section 145.22 is amended by revising paragraphs (a) introductory text and (a)(5) to read as follows:

§ 145.22 Elements of a program submission.

(a) Any State that seeks to administer a program under this part shall submit to the Administrator at least three copies of a program submission. For Class VI programs, the entire submission can be sent electronically. The submission shall contain the following:

* * * * *

(5) Copies of all applicable State statutes and regulations, including those governing State administrative procedures;

* * * * *

■ 27. Section 145.23 is amended as follows:

■ a. By revising the introductory text;

■ b. Revising paragraph (c);

■ c. Revising paragraph (d);

■ d. Revising paragraphs (f)(1), (f)(2), (f)(3), (f)(4), and (f)(9); and

■ e. Adding paragraph (f)(13) to read as follows:

§ 145.23 Program description.

Any State that seeks to administer a program under this part shall submit a description of the program it proposes to administer in lieu of the Federal program under State law or under an interstate compact. For Class VI programs, the entire submission can be sent electronically. The program description shall include:

* * * * *

(c) A description of applicable State procedures, including permitting procedures and any State administrative or judicial review procedures.

(d) Copies of the permit form(s), application form(s), reporting form(s), and manifest format the State intends to employ in its program. Forms used by States need not be identical to the forms used by EPA but should require the same basic information. The State need not provide copies of uniform national forms it intends to use but should note its intention to use such forms. For Class VI programs, submit copies of the current forms in use by the State, if any.

* * * * *

(f) * * *

(1) A schedule for issuing permits within five years after program approval to all injection wells within the State which are required to have permits under this part and 40 CFR part 144. For Class VI programs, a schedule for issuing permits within two years after program approval;

(2) The priorities (according to criteria set forth in § 146.9 of this chapter) for issuing permits, including the number of permits in each class of injection well which will be issued each year during the first five years of program operation. For Class VI programs, include the priorities for issuing permits and the number of permits which will be issued during the first two years of program operation;

(3) A description of how the Director will implement the mechanical integrity testing requirements of § 146.8 of this chapter, or, for Class VI wells, the mechanical integrity testing requirements of § 146.89 of this chapter, including the frequency of testing that will be required and the number of tests that will be reviewed by the Director each year;

(4) A description of the procedure whereby the Director will notify owners or operators of injection wells of the requirement that they apply for and obtain a permit. The notification required by this paragraph shall require applications to be filed as soon as possible, but not later than four years after program approval for all injection wells requiring a permit. For Class VI programs approved before December 10, 2011, a description of the procedure whereby the Director will notify owners or operators of any Class I wells previously permitted for the purpose of geologic sequestration or Class V experimental technology wells no longer being used for experimental purposes that will continue injection of carbon dioxide for the purpose of GS that they must apply for a Class VI permit pursuant to requirements at § 146.81(c) within one year of December 10, 2011. For Class VI programs approved following December 10, 2011, a description of the procedure whereby the Director will notify owners or operators of any Class I wells previously permitted for the purpose of geologic sequestration or Class V experimental technology wells no longer being used

for experimental purposes that will continue injection of carbon dioxide for the purpose of GS or Class VI wells previously permitted by EPA that they must apply for a Class VI permit pursuant to requirements at § 146.81(c) within one year of Class VI program approval;

* * * * *

(9) A description of aquifers, or parts thereof, which the Director has identified under § 144.7(b) as exempted aquifers, and a summary of supporting data. For Class VI programs only, States must incorporate information related to any EPA approved exemptions expanding the areal extent of existing aquifer exemptions for Class II enhanced oil recovery or enhanced gas recovery wells transitioning to Class VI injection for geologic sequestration pursuant to requirements at §§ 146.4(d) and 144.7(d), including a summary of supporting data and the specific location of the aquifer exemption expansions. Other than expansions of the areal extent of Class II enhanced oil recovery or enhanced gas recovery well aquifer exemptions for Class VI injection, new aquifer exemptions shall not be issued for Class VI wells or injection activities;

* * * * *

(13) For Class VI programs, a description of the procedure whereby the Director must notify, in writing, any States, Tribes, and Territories of any permit applications for geologic sequestration of carbon dioxide wherein the area of review crosses State, Tribal, or Territory boundaries, resulting in the need for trans-boundary coordination related to an injection operation.

■ 28. Section 145.32 is amended by adding a sentence at the end of paragraph (b)(2) to read as follows:

§ 145.32 Procedures for revision of State programs.

* * * * *

(b) * * *

(2) * * * All requests for expansions to the areal extent of Class II enhanced oil recovery or enhanced gas recovery aquifer exemptions for Class VI wells must be treated as substantial program revisions.

* * * * *

PART 146—UNDERGROUND INJECTION CONTROL PROGRAM: CRITERIA AND STANDARDS

■ 29. The authority citation for part 146 continues to read as follows:

Authority: Safe Drinking Water Act 42, U.S.C. 300f *et seq.;* Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.*

■ 30. Section 146.4 is amended by revising the introductory text and adding paragraph (d) to read as follows:

§ 146.4 Criteria for exempted aquifers.

An aquifer or a portion thereof which meets the criteria for an "underground source of drinking water" in § 146.3 may be determined under § 144.7 of this chapter to be an "exempted aquifer" for Class I–V wells if it meets the criteria in paragraphs (a) through (c) of this section. Class VI wells must meet the criteria under paragraph (d) of this section:

* * * * *

(d) The areal extent of an aquifer exemption for a Class II enhanced oil recovery or enhanced gas recovery well may be expanded for the exclusive purpose of Class VI injection for geologic sequestration under § 144.7(d) of this chapter if it meets the following criteria:

(1) It does not currently serve as a source of drinking water; and

(2) The total dissolved solids content of the ground water is more than 3,000 mg/l and less than 10,000 mg/l; and

(3) It is not reasonably expected to supply a public water system.

■ 31. Section 146.5 is amended by revising the first sentence in paragraph (e) introductory text and by adding paragraph (f) to read as follows:

§ 146.5 Classification of injection wells.

* * * * *

(e) *Class V.* Injection wells not included in Class I, II, III, IV or VI.

* * *

* * * * *

(f) *Class VI.* Wells that are not experimental in nature that are used for geologic sequestration of carbon dioxide beneath the lowermost formation containing a USDW; or, wells used for geologic sequestration of carbon dioxide that have been granted a waiver of the injection depth requirements pursuant to requirements at § 146.95; or, wells used for geologic sequestration of carbon dioxide that have received an expansion to the areal extent of an existing Class II enhanced oil recovery or enhanced gas recovery aquifer exemption pursuant to § 146.4 and § 144.7(d) of this chapter.

■ 32. Subpart H is added to read as follows:

Subpart H—Criteria and Standards Applicable to Class VI Wells

Sec.

Subpart H—Criteria and Standards Applicable to Class VI Wells

§ 146.81 Applicability.

(a) This subpart establishes criteria and standards for underground injection control programs to regulate any Class VI carbon dioxide geologic sequestration injection wells.

(b) This subpart applies to any wells used to inject carbon dioxide specifically for the purpose of geologic sequestration, *i.e.,* the long-term containment of a gaseous, liquid, or supercritical carbon dioxide stream in subsurface geologic formations.

(c) This subpart also applies to owners or operators of permit- or rule-authorized Class I, Class II, or Class V experimental carbon dioxide injection projects who seek to apply for a Class VI geologic sequestration permit for their well or wells. Owners or operators seeking to convert existing Class I, Class II, or Class V experimental wells to Class VI geologic sequestration wells must demonstrate to the Director that the wells were engineered and constructed to meet the requirements at § 146.86(a) and ensure protection of USDWs, in lieu of requirements at §§ 146.86(b) and 146.87(a). By December 10, 2011, owners or operators of either Class I wells previously permitted for the purpose of geologic sequestration or Class V experimental technology wells no longer being used for experimental purposes that will continue injection of carbon dioxide for the purpose of GS must apply for a Class VI permit. A converted well must still meet all other requirements under part 146.

(d) *Definitions.* The following definitions apply to this subpart. To the extent that these definitions conflict with those in §§ 144.3 or 146.3 of this chapter these definitions govern for Class VI wells:

Area of review means the region surrounding the geologic sequestration project where USDWs may be endangered by the injection activity. The area of review is delineated using

computational modeling that accounts for the physical and chemical properties of all phases of the injected carbon dioxide stream and displaced fluids, and is based on available site characterization, monitoring, and operational data as set forth in § 146.84.

Carbon dioxide plume means the extent underground, in three dimensions, of an injected carbon dioxide stream.

Carbon dioxide stream means carbon dioxide that has been captured from an emission source (*e.g.,* a power plant), plus incidental associated substances derived from the source materials and the capture process, and any substances added to the stream to enable or improve the injection process. This subpart does not apply to any carbon dioxide stream that meets the definition of a hazardous waste under 40 CFR part 261.

Confining zone means a geologic formation, group of formations, or part of a formation stratigraphically overlying the injection zone(s) that acts as barrier to fluid movement. For Class VI wells operating under an injection depth waiver, confining zone means a geologic formation, group of formations, or part of a formation stratigraphically overlying and underlying the injection zone(s).

Corrective action means the use of Director-approved methods to ensure that wells within the area of review do not serve as conduits for the movement of fluids into underground sources of drinking water (USDW).

Geologic sequestration means the long-term containment of a gaseous, liquid, or supercritical carbon dioxide stream in subsurface geologic formations. This term does not apply to carbon dioxide capture or transport.

Geologic sequestration project means an injection well or wells used to emplace a carbon dioxide stream beneath the lowermost formation containing a USDW; or, wells used for geologic sequestration of carbon dioxide that have been granted a waiver of the injection depth requirements pursuant to requirements at § 146.95; or, wells used for geologic sequestration of carbon dioxide that have received an expansion to the areal extent of an existing Class II enhanced oil recovery or enhanced gas recovery aquifer exemption pursuant to § 146.4 and § 144.7(d) of this chapter. It includes the subsurface three-dimensional extent of the carbon dioxide plume, associated area of elevated pressure, and displaced fluids, as well as the surface area above that delineated region.

Injection zone means a geologic formation, group of formations, or part of a formation that is of sufficient areal extent, thickness, porosity, and permeability to receive carbon dioxide through a well or wells associated with a geologic sequestration project.

Post-injection site care means appropriate monitoring and other actions (including corrective action) needed following cessation of injection to ensure that USDWs are not endangered, as required under § 146.93.

Pressure front means the zone of elevated pressure that is created by the injection of carbon dioxide into the subsurface. For the purposes of this subpart, the pressure front of a carbon dioxide plume refers to a zone where there is a pressure differential sufficient to cause the movement of injected fluids or formation fluids into a USDW.

Site closure means the point/time, as determined by the Director following the requirements under § 146.93, at which the owner or operator of a geologic sequestration site is released from post-injection site care responsibilities.

Transmissive fault or fracture means a fault or fracture that has sufficient permeability and vertical extent to allow fluids to move between formations.

§ 146.82 Required Class VI permit information.

This section sets forth the information which must be considered by the Director in authorizing Class VI wells. For converted Class I, Class II, or Class V experimental wells, certain maps, cross-sections, tabulations of wells within the area of review and other data may be included in the application by reference provided they are current, readily available to the Director, and sufficiently identified to be retrieved. In cases where EPA issues the permit, all the information in this section must be submitted to the Regional Administrator.

(a) Prior to the issuance of a permit for the construction of a new Class VI well or the conversion of an existing Class I, Class II, or Class V well to a Class VI well, the owner or operator shall submit, pursuant to § 146.91(e), and the Director shall consider the following:

(1) Information required in § 144.31(e)(1) through (6) of this chapter;

(2) A map showing the injection well for which a permit is sought and the applicable area of review consistent with § 146.84. Within the area of review, the map must show the number or name, and location of all injection wells, producing wells, abandoned wells, plugged wells or dry holes, deep stratigraphic boreholes, State- or EPA-approved subsurface cleanup sites, surface bodies of water, springs, mines (surface and subsurface), quarries, water wells, other pertinent surface features including structures intended for human occupancy, State, Tribal, and Territory boundaries, and roads. The map should also show faults, if known or suspected. Only information of public record is required to be included on this map;

(3) Information on the geologic structure and hydrogeologic properties of the proposed storage site and overlying formations, including:

(i) Maps and cross sections of the area of review;

(ii) The location, orientation, and properties of known or suspected faults and fractures that may transect the confining zone(s) in the area of review and a determination that they would not interfere with containment;

(iii) Data on the depth, areal extent, thickness, mineralogy, porosity, permeability, and capillary pressure of the injection and confining zone(s); including geology/facies changes based on field data which may include geologic cores, outcrop data, seismic surveys, well logs, and names and lithologic descriptions;

(iv) Geomechanical information on fractures, stress, ductility, rock strength, and in situ fluid pressures within the confining zone(s);

(v) Information on the seismic history including the presence and depth of seismic sources and a determination that the seismicity would not interfere with containment; and

(vi) Geologic and topographic maps and cross sections illustrating regional geology, hydrogeology, and the geologic structure of the local area.

(4) A tabulation of all wells within the area of review which penetrate the injection or confining zone(s). Such data must include a description of each well's type, construction, date drilled, location, depth, record of plugging and/or completion, and any additional information the Director may require;

(5) Maps and stratigraphic cross sections indicating the general vertical and lateral limits of all USDWs, water wells and springs within the area of review, their positions relative to the injection zone(s), and the direction of water movement, where known;

(6) Baseline geochemical data on subsurface formations, including all USDWs in the area of review;

(7) Proposed operating data for the proposed geologic sequestration site:

(i) Average and maximum daily rate and volume and/or mass and total anticipated volume and/or mass of the carbon dioxide stream;

(ii) Average and maximum injection pressure;

(iii) The source(s) of the carbon dioxide stream; and

(iv) An analysis of the chemical and physical characteristics of the carbon dioxide stream.

(8) Proposed pre-operational formation testing program to obtain an analysis of the chemical and physical characteristics of the injection zone(s) and confining zone(s) and that meets the requirements at § 146.87;

(9) Proposed stimulation program, a description of stimulation fluids to be used and a determination that stimulation will not interfere with containment;

(10) Proposed procedure to outline steps necessary to conduct injection operation;

(11) Schematics or other appropriate drawings of the surface and subsurface construction details of the well;

(12) Injection well construction procedures that meet the requirements of § 146.86;

(13) Proposed area of review and corrective action plan that meets the requirements under § 146.84;

(14) A demonstration, satisfactory to the Director, that the applicant has met the financial responsibility requirements under § 146.85;

(15) Proposed testing and monitoring plan required by § 146.90;

(16) Proposed injection well plugging plan required by § 146.92(b);

(17) Proposed post-injection site care and site closure plan required by § 146.93(a);

(18) At the Director's discretion, a demonstration of an alternative post-injection site care timeframe required by § 146.93(c);

(19) Proposed emergency and remedial response plan required by § 146.94(a);

(20) A list of contacts, submitted to the Director, for those States, Tribes, and Territories identified to be within the area of review of the Class VI project based on information provided in paragraph (a)(2) of this section; and

(21) Any other information requested by the Director.

(b) The Director shall notify, in writing, any States, Tribes, or Territories within the area of review of the Class VI project based on information provided in paragraphs (a)(2) and (a)(20) of this section of the permit application and pursuant to the requirements at § 145.23(f)(13) of this chapter.

(c) Prior to granting approval for the operation of a Class VI well, the Director shall consider the following information:

(1) The final area of review based on modeling, using data obtained during logging and testing of the well and the formation as required by paragraphs (c)(2), (3), (4), (6), (7), and (10) of this section;

(2) Any relevant updates, based on data obtained during logging and testing of the well and the formation as required by paragraphs (c)(3), (4), (6), (7), and (10) of this section, to the information on the geologic structure and hydrogeologic properties of the proposed storage site and overlying formations, submitted to satisfy the requirements of paragraph (a)(3) of this section;

(3) Information on the compatibility of the carbon dioxide stream with fluids in the injection zone(s) and minerals in both the injection and the confining zone(s), based on the results of the formation testing program, and with the materials used to construct the well;

(4) The results of the formation testing program required at paragraph (a)(8) of this section;

(5) Final injection well construction procedures that meet the requirements of § 146.86;

(6) The status of corrective action on wells in the area of review;

(7) All available logging and testing program data on the well required by § 146.87;

(8) A demonstration of mechanical integrity pursuant to § 146.89;

(9) Any updates to the proposed area of review and corrective action plan, testing and monitoring plan, injection well plugging plan, post-injection site care and site closure plan, or the emergency and remedial response plan submitted under paragraph (a) of this section, which are necessary to address new information collected during logging and testing of the well and the formation as required by all paragraphs of this section, and any updates to the alternative post-injection site care timeframe demonstration submitted under paragraph (a) of this section, which are necessary to address new information collected during the logging and testing of the well and the formation as required by all paragraphs of this section; and

(10) Any other information requested by the Director.

(d) Owners or operators seeking a waiver of the requirement to inject below the lowermost USDW must also refer to § 146.95 and submit a supplemental report, as required at § 146.95(a). The supplemental report is not part of the permit application.

§ 146.83 Minimum criteria for siting.

(a) Owners or operators of Class VI wells must demonstrate to the satisfaction of the Director that the wells will be sited in areas with a suitable geologic system. The owners or operators must demonstrate that the geologic system comprises:

(1) An injection zone(s) of sufficient areal extent, thickness, porosity, and permeability to receive the total anticipated volume of the carbon dioxide stream;

(2) Confining zone(s) free of transmissive faults or fractures and of sufficient areal extent and integrity to contain the injected carbon dioxide stream and displaced formation fluids and allow injection at proposed maximum pressures and volumes without initiating or propagating fractures in the confining zone(s).

(b) The Director may require owners or operators of Class VI wells to identify and characterize additional zones that will impede vertical fluid movement, are free of faults and fractures that may interfere with containment, allow for pressure dissipation, and provide additional opportunities for monitoring, mitigation, and remediation.

§ 146.84 Area of review and corrective action.

(a) The area of review is the region surrounding the geologic sequestration project where USDWs may be endangered by the injection activity. The area of review is delineated using computational modeling that accounts for the physical and chemical properties of all phases of the injected carbon dioxide stream and is based on available site characterization, monitoring, and operational data.

(b) The owner or operator of a Class VI well must prepare, maintain, and comply with a plan to delineate the area of review for a proposed geologic sequestration project, periodically reevaluate the delineation, and perform corrective action that meets the requirements of this section and is acceptable to the Director. The requirement to maintain and implement an approved plan is directly enforceable regardless of whether the requirement is a condition of the permit. As a part of the permit application for approval by the Director, the owner or operator must submit an area of review and corrective action plan that includes the following information:

(1) The method for delineating the area of review that meets the requirements of paragraph (c) of this section, including the model to be used, assumptions that will be made, and the site characterization data on which the model will be based;

(2) A description of:

(i) The minimum fixed frequency, not to exceed five years, at which the owner

or operator proposes to reevaluate the area of review;

(ii) The monitoring and operational conditions that would warrant a reevaluation of the area of review prior to the next scheduled reevaluation as determined by the minimum fixed frequency established in paragraph (b)(2)(i) of this section.

(iii) How monitoring and operational data (*e.g.,* injection rate and pressure) will be used to inform an area of review reevaluation; and

(iv) How corrective action will be conducted to meet the requirements of paragraph (d) of this section, including what corrective action will be performed prior to injection and what, if any, portions of the area of review will have corrective action addressed on a phased basis and how the phasing will be determined; how corrective action will be adjusted if there are changes in the area of review; and how site access will be guaranteed for future corrective action.

(c) Owners or operators of Class VI wells must perform the following actions to delineate the area of review and identify all wells that require corrective action:

(1) Predict, using existing site characterization, monitoring and operational data, and computational modeling, the projected lateral and vertical migration of the carbon dioxide plume and formation fluids in the subsurface from the commencement of injection activities until the plume movement ceases, until pressure differentials sufficient to cause the movement of injected fluids or formation fluids into a USDW are no longer present, or until the end of a fixed time period as determined by the Director. The model must:

(i) Be based on detailed geologic data collected to characterize the injection zone(s), confining zone(s) and any additional zones; and anticipated operating data, including injection pressures, rates, and total volumes over the proposed life of the geologic sequestration project;

(ii) Take into account any geologic heterogeneities, other discontinuities, data quality, and their possible impact on model predictions; and

(iii) Consider potential migration through faults, fractures, and artificial penetrations.

(2) Using methods approved by the Director, identify all penetrations, including active and abandoned wells and underground mines, in the area of review that may penetrate the confining zone(s). Provide a description of each well's type, construction, date drilled, location, depth, record of plugging and/or completion, and any additional information the Director may require; and

(3) Determine which abandoned wells in the area of review have been plugged in a manner that prevents the movement of carbon dioxide or other fluids that may endanger USDWs, including use of materials compatible with the carbon dioxide stream.

(d) Owners or operators of Class VI wells must perform corrective action on all wells in the area of review that are determined to need corrective action, using methods designed to prevent the movement of fluid into or between USDWs, including use of materials compatible with the carbon dioxide stream, where appropriate.

(e) At the minimum fixed frequency, not to exceed five years, as specified in the area of review and corrective action plan, or when monitoring and operational conditions warrant, owners or operators must:

(1) Reevaluate the area of review in the same manner specified in paragraph (c)(1) of this section;

(2) Identify all wells in the reevaluated area of review that require corrective action in the same manner specified in paragraph (c) of this section;

(3) Perform corrective action on wells requiring corrective action in the reevaluated area of review in the same manner specified in paragraph (d) of this section; and

(4) Submit an amended area of review and corrective action plan or demonstrate to the Director through monitoring data and modeling results that no amendment to the area of review and corrective action plan is needed. Any amendments to the area of review and corrective action plan must be approved by the Director, must be incorporated into the permit, and are subject to the permit modification requirements at §§ 144.39 or 144.41 of this chapter, as appropriate.

(f) The emergency and remedial response plan (as required by § 146.94) and the demonstration of financial responsibility (as described by § 146.85) must account for the area of review delineated as specified in paragraph (c)(1) of this section or the most recently evaluated area of review delineated under paragraph (e) of this section, regardless of whether or not corrective action in the area of review is phased.

(g) All modeling inputs and data used to support area of review reevaluations under paragraph (e) of this section shall be retained for 10 years.

§ 146.85 Financial responsibility.

(a) The owner or operator must demonstrate and maintain financial responsibility as determined by the Director that meets the following conditions:

(1) The financial responsibility instrument(s) used must be from the following list of qualifying instruments:

(i) Trust Funds.

(ii) Surety Bonds.

(iii) Letter of Credit.

(iv) Insurance.

(v) Self Insurance (*i.e.,* Financial Test and Corporate Guarantee).

(vi) Escrow Account.

(vii) Any other instrument(s) satisfactory to the Director.

(2) The qualifying instrument(s) must be sufficient to cover the cost of:

(i) Corrective action (that meets the requirements of § 146.84);

(ii) Injection well plugging (that meets the requirements of § 146.92);

(iii) Post injection site care and site closure (that meets the requirements of § 146.93); and

(iv) Emergency and remedial response (that meets the requirements of § 146.94).

(3) The financial responsibility instrument(s) must be sufficient to address endangerment of underground sources of drinking water.

(4) The qualifying financial responsibility instrument(s) must comprise protective conditions of coverage.

(i) Protective conditions of coverage must include at a minimum cancellation, renewal, and continuation provisions, specifications on when the provider becomes liable following a notice of cancellation if there is a failure to renew with a new qualifying financial instrument, and requirements for the provider to meet a minimum rating, minimum capitalization, and ability to pass the bond rating when applicable.

(A) Cancellation—for purposes of this part, an owner or operator must provide that their financial mechanism may not cancel, terminate or fail to renew except for failure to pay such financial instrument. If there is a failure to pay the financial instrument, the financial institution may elect to cancel, terminate, or fail to renew the instrument by sending notice by certified mail to the owner or operator and the Director. The cancellation must not be final for 120 days after receipt of cancellation notice. The owner or operator must provide an alternate financial responsibility demonstration within 60 days of notice of cancellation, and if an alternate financial responsibility demonstration is not acceptable (or possible), any funds from

the instrument being cancelled must be released within 60 days of notification by the Director.

(B) Renewal—for purposes of this part, owners or operators must renew all financial instruments, if an instrument expires, for the entire term of the geologic sequestration project. The instrument may be automatically renewed as long as the owner or operator has the option of renewal at the face amount of the expiring instrument. The automatic renewal of the instrument must, at a minimum, provide the holder with the option of renewal at the face amount of the expiring financial instrument.

(C) Cancellation, termination, or failure to renew may not occur and the financial instrument will remain in full force and effect in the event that on or before the date of expiration: The Director deems the facility abandoned; or the permit is terminated or revoked or a new permit is denied; or closure is ordered by the Director or a U.S. district court or other court of competent jurisdiction; or the owner or operator is named as debtor in a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code; or the amount due is paid.

(5) The qualifying financial responsibility instrument(s) must be approved by the Director.

(i) The Director shall consider and approve the financial responsibility demonstration for all the phases of the geologic sequestration project prior to issue a Class VI permit (§ 146.82).

(ii) The owner or operator must provide any updated information related to their financial responsibility instrument(s) on an annual basis and if there are any changes, the Director must evaluate, within a reasonable time, the financial responsibility demonstration to confirm that the instrument(s) used remain adequate for use. The owner or operator must maintain financial responsibility requirements regardless of the status of the Director's review of the financial responsibility demonstration.

(iii) The Director may disapprove the use of a financial instrument if he determines that it is not sufficient to meet the requirements of this section.

(6) The owner or operator may demonstrate financial responsibility by using one or multiple qualifying financial instruments for specific phases of the geologic sequestration project.

(i) In the event that the owner or operator combines more than one instrument for a specific geologic sequestration phase (*e.g.,* well plugging), such combination must be limited to instruments that are not based on financial strength or performance (*i.e.,* self insurance or performance bond), for example trust funds, surety bonds guaranteeing payment into a trust fund, letters of credit, escrow account, and insurance. In this case, it is the combination of mechanisms, rather than the single mechanism, which must provide financial responsibility for an amount at least equal to the current cost estimate.

(ii) When using a third-party instrument to demonstrate financial responsibility, the owner or operator must provide a proof that the third-party providers either have passed financial strength requirements based on credit ratings; or has met a minimum rating, minimum capitalization, and ability to pass the bond rating when applicable.

(iii) An owner or operator using certain types of third-party instruments must establish a standby trust to enable EPA to be party to the financial responsibility agreement without EPA being the beneficiary of any funds. The standby trust fund must be used along with other financial responsibility instruments (*e.g.,* surety bonds, letters of credit, or escrow accounts) to provide a location to place funds if needed.

(iv) An owner or operator may deposit money to an escrow account to cover financial responsibility requirements; this account must segregate funds sufficient to cover estimated costs for Class VI (geologic sequestration) financial responsibility from other accounts and uses.

(v) An owner or operator or its guarantor may use self insurance to demonstrate financial responsibility for geologic sequestration projects. In order to satisfy this requirement the owner or operator must meet a Tangible Net Worth of an amount approved by the Director, have a Net working capital and tangible net worth each at least six times the sum of the current well plugging, post injection site care and site closure cost, have assets located in the United States amounting to at least 90 percent of total assets or at least six times the sum of the current well plugging, post injection site care and site closure cost, and must submit a report of its bond rating and financial information annually. In addition the owner or operator must either: Have a bond rating test of AAA, AA, A, or BBB as issued by Standard & Poor's or Aaa, Aa, A, or Baa as issued by Moody's; or meet all of the following five financial ratio thresholds: A ratio of total liabilities to net worth less than 2.0; a ratio of current assets to current liabilities greater than 1.5; a ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities greater than 0.1; A ratio of current assets minus current liabilities to total assets greater than -0.1; and a net profit (revenues minus expenses) greater than 0.

(vi) An owner or operator who is not able to meet corporate financial test criteria may arrange a corporate guarantee by demonstrating that its corporate parent meets the financial test requirements on its behalf. The parent's demonstration that it meets the financial test requirement is insufficient if it has not also guaranteed to fulfill the obligations for the owner or operator.

(vii) An owner or operator may obtain an insurance policy to cover the estimated costs of geologic sequestration activities requiring financial responsibility. This insurance policy must be obtained from a third party provider.

(b) The requirement to maintain adequate financial responsibility and resources is directly enforceable regardless of whether the requirement is a condition of the permit.

(1) The owner or operator must maintain financial responsibility and resources until:

(i) The Director receives and approves the completed post-injection site care and site closure plan; and

(ii) The Director approves site closure.

(2) The owner or operator may be released from a financial instrument in the following circumstances:

(i) The owner or operator has completed the phase of the geologic sequestration project for which the financial instrument was required and has fulfilled all its financial obligations as determined by the Director, including obtaining financial responsibility for the next phase of the GS project, if required; or

(ii) The owner or operator has submitted a replacement financial instrument and received written approval from the Director accepting the new financial instrument and releasing the owner or operator from the previous financial instrument.

(c) The owner or operator must have a detailed written estimate, in current dollars, of the cost of performing corrective action on wells in the area of review, plugging the injection well(s), post-injection site care and site closure, and emergency and remedial response.

(1) The cost estimate must be performed for each phase separately and must be based on the costs to the regulatory agency of hiring a third party to perform the required activities. A third party is a party who is not within the corporate structure of the owner or operator.

(2) During the active life of the geologic sequestration project, the

owner or operator must adjust the cost estimate for inflation within 60 days prior to the anniversary date of the establishment of the financial instrument(s) used to comply with paragraph (a) of this section and provide this adjustment to the Director. The owner or operator must also provide to the Director written updates of adjustments to the cost estimate within 60 days of any amendments to the area of review and corrective action plan (§ 146.84), the injection well plugging plan (§ 146.92), the post-injection site care and site closure plan (§ 146.93), and the emergency and remedial response plan (§ 146.94).

(3) The Director must approve any decrease or increase to the initial cost estimate. During the active life of the geologic sequestration project, the owner or operator must revise the cost estimate no later than 60 days after the Director has approved the request to modify the area of review and corrective action plan (§ 146.84), the injection well plugging plan (§ 146.92), the post-injection site care and site closure plan (§ 146.93), and the emergency and response plan (§ 146.94), if the change in the plan increases the cost. If the change to the plans decreases the cost, any withdrawal of funds must be approved by the Director. Any decrease to the value of the financial assurance instrument must first be approved by the Director. The revised cost estimate must be adjusted for inflation as specified at paragraph (c)(2) of this section.

(4) Whenever the current cost estimate increases to an amount greater than the face amount of a financial instrument currently in use, the owner or operator, within 60 days after the increase, must either cause the face amount to be increased to an amount at least equal to the current cost estimate and submit evidence of such increase to the Director, or obtain other financial responsibility instruments to cover the increase. Whenever the current cost estimate decreases, the face amount of the financial assurance instrument may be reduced to the amount of the current cost estimate only after the owner or operator has received written approval from the Director.

(d) The owner or operator must notify the Director by certified mail of adverse financial conditions such as bankruptcy that may affect the ability to carry out injection well plugging and post-injection site care and site closure.

(1) In the event that the owner or operator or the third party provider of a financial responsibility instrument is going through a bankruptcy, the owner or operator must notify the Director by certified mail of the commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming the owner or operator as debtor, within 10 days after commencement of the proceeding.

(2) A guarantor of a corporate guarantee must make such a notification to the Director if he/she is named as debtor, as required under the terms of the corporate guarantee.

(3) An owner or operator who fulfills the requirements of paragraph (a) of this section by obtaining a trust fund, surety bond, letter of credit, escrow account, or insurance policy will be deemed to be without the required financial assurance in the event of bankruptcy of the trustee or issuing institution, or a suspension or revocation of the authority of the trustee institution to act as trustee of the institution issuing the trust fund, surety bond, letter of credit, escrow account, or insurance policy. The owner or operator must establish other financial assurance within 60 days after such an event.

(e) The owner or operator must provide an adjustment of the cost estimate to the Director within 60 days of notification by the Director, if the Director determines during the annual evaluation of the qualifying financial responsibility instrument(s) that the most recent demonstration is no longer adequate to cover the cost of corrective action (as required by § 146.84), injection well plugging (as required by § 146.92), post-injection site care and site closure (as required by § 146.93), and emergency and remedial response (as required by § 146.94).

(f) The Director must approve the use and length of pay-in-periods for trust funds or escrow accounts.

§ 146.86 Injection well construction requirements.

(a) *General.* The owner or operator must ensure that all Class VI wells are constructed and completed to:

(1) Prevent the movement of fluids into or between USDWs or into any unauthorized zones;

(2) Permit the use of appropriate testing devices and workover tools; and

(3) Permit continuous monitoring of the annulus space between the injection tubing and long string casing.

(b) *Casing and Cementing of Class VI Wells.*

(1) Casing and cement or other materials used in the construction of each Class VI well must have sufficient structural strength and be designed for the life of the geologic sequestration project. All well materials must be compatible with fluids with which the materials may be expected to come into contact and must meet or exceed standards developed for such materials by the American Petroleum Institute, ASTM International, or comparable standards acceptable to the Director. The casing and cementing program must be designed to prevent the movement of fluids into or between USDWs. In order to allow the Director to determine and specify casing and cementing requirements, the owner or operator must provide the following information:

(i) Depth to the injection zone(s);

(ii) Injection pressure, external pressure, internal pressure, and axial loading;

(iii) Hole size;

(iv) Size and grade of all casing strings (wall thickness, external diameter, nominal weight, length, joint specification, and construction material);

(v) Corrosiveness of the carbon dioxide stream and formation fluids;

(vi) Down-hole temperatures;

(vii) Lithology of injection and confining zone(s);

(viii) Type or grade of cement and cement additives; and

(ix) Quantity, chemical composition, and temperature of the carbon dioxide stream.

(2) Surface casing must extend through the base of the lowermost USDW and be cemented to the surface through the use of a single or multiple strings of casing and cement.

(3) At least one long string casing, using a sufficient number of centralizers, must extend to the injection zone and must be cemented by circulating cement to the surface in one or more stages.

(4) Circulation of cement may be accomplished by staging. The Director may approve an alternative method of cementing in cases where the cement cannot be recirculated to the surface, provided the owner or operator can demonstrate by using logs that the cement does not allow fluid movement behind the well bore.

(5) Cement and cement additives must be compatible with the carbon dioxide stream and formation fluids and of sufficient quality and quantity to maintain integrity over the design life of the geologic sequestration project. The integrity and location of the cement shall be verified using technology capable of evaluating cement quality radially and identifying the location of channels to ensure that USDWs are not endangered.

(c) *Tubing and packer.*

(1) Tubing and packer materials used in the construction of each Class VI well must be compatible with fluids with which the materials may be expected to come into contact and must meet or

exceed standards developed for such materials by the American Petroleum Institute, ASTM International, or comparable standards acceptable to the Director.

(2) All owners or operators of Class VI wells must inject fluids through tubing with a packer set at a depth opposite a cemented interval at the location approved by the Director.

(3) In order for the Director to determine and specify requirements for tubing and packer, the owner or operator must submit the following information:

(i) Depth of setting;

(ii) Characteristics of the carbon dioxide stream (chemical content, corrosiveness, temperature, and density) and formation fluids;

(iii) Maximum proposed injection pressure;

(iv) Maximum proposed annular pressure;

(v) Proposed injection rate (intermittent or continuous) and volume and/or mass of the carbon dioxide stream;

(vi) Size of tubing and casing; and

(vii) Tubing tensile, burst, and collapse strengths.

§ 146.87 Logging, sampling, and testing prior to injection well operation.

(a) During the drilling and construction of a Class VI injection well, the owner or operator must run appropriate logs, surveys and tests to determine or verify the depth, thickness, porosity, permeability, and lithology of, and the salinity of any formation fluids in all relevant geologic formations to ensure conformance with the injection well construction requirements under § 146.86 and to establish accurate baseline data against which future measurements may be compared. The owner or operator must submit to the Director a descriptive report prepared by a knowledgeable log analyst that includes an interpretation of the results of such logs and tests. At a minimum, such logs and tests must include:

(1) Deviation checks during drilling on all holes constructed by drilling a pilot hole which is enlarged by reaming or another method. Such checks must be at sufficiently frequent intervals to determine the location of the borehole and to ensure that vertical avenues for fluid movement in the form of diverging holes are not created during drilling; and

(2) Before and upon installation of the surface casing:

(i) Resistivity, spontaneous potential, and caliper logs before the casing is installed; and

(ii) A cement bond and variable density log to evaluate cement quality radially, and a temperature log after the casing is set and cemented.

(3) Before and upon installation of the long string casing:

(i) Resistivity, spontaneous potential, porosity, caliper, gamma ray, fracture finder logs, and any other logs the Director requires for the given geology before the casing is installed; and

(ii) A cement bond and variable density log, and a temperature log after the casing is set and cemented.

(4) A series of tests designed to demonstrate the internal and external mechanical integrity of injection wells, which may include:

(i) A pressure test with liquid or gas;

(ii) A tracer survey such as oxygen-activation logging;

(iii) A temperature or noise log;

(iv) A casing inspection log; and

(5) Any alternative methods that provide equivalent or better information and that are required by and/or approved of by the Director.

(b) The owner or operator must take whole cores or sidewall cores of the injection zone and confining system and formation fluid samples from the injection zone(s), and must submit to the Director a detailed report prepared by a log analyst that includes: Well log analyses (including well logs), core analyses, and formation fluid sample information. The Director may accept information on cores from nearby wells if the owner or operator can demonstrate that core retrieval is not possible and that such cores are representative of conditions at the well. The Director may require the owner or operator to core other formations in the borehole.

(c) The owner or operator must record the fluid temperature, pH, conductivity, reservoir pressure, and static fluid level of the injection zone(s).

(d) At a minimum, the owner or operator must determine or calculate the following information concerning the injection and confining zone(s):

(1) Fracture pressure;

(2) Other physical and chemical characteristics of the injection and confining zone(s); and

(3) Physical and chemical characteristics of the formation fluids in the injection zone(s).

(e) Upon completion, but prior to operation, the owner or operator must conduct the following tests to verify hydrogeologic characteristics of the injection zone(s):

(1) A pressure fall-off test; and,

(2) A pump test; or

(3) Injectivity tests.

(f) The owner or operator must provide the Director with the opportunity to witness all logging and testing by this subpart. The owner or operator must submit a schedule of such activities to the Director 30 days prior to conducting the first test and submit any changes to the schedule 30 days prior to the next scheduled test.

§ 146.88 Injection well operating requirements.

(a) Except during stimulation, the owner or operator must ensure that injection pressure does not exceed 90 percent of the fracture pressure of the injection zone(s) so as to ensure that the injection does not initiate new fractures or propagate existing fractures in the injection zone(s). In no case may injection pressure initiate fractures in the confining zone(s) or cause the movement of injection or formation fluids that endangers a USDW. Pursuant to requirements at § 146.82(a)(9), all stimulation programs must be approved by the Director as part of the permit application and incorporated into the permit.

(b) Injection between the outermost casing protecting USDWs and the well bore is prohibited.

(c) The owner or operator must fill the annulus between the tubing and the long string casing with a non-corrosive fluid approved by the Director. The owner or operator must maintain on the annulus a pressure that exceeds the operating injection pressure, unless the Director determines that such requirement might harm the integrity of the well or endanger USDWs.

(d) Other than during periods of well workover (maintenance) approved by the Director in which the sealed tubing-casing annulus is disassembled for maintenance or corrective procedures, the owner or operator must maintain mechanical integrity of the injection well at all times.

(e) The owner or operator must install and use:

(1) Continuous recording devices to monitor: The injection pressure; the rate, volume and/or mass, and temperature of the carbon dioxide stream; and the pressure on the annulus between the tubing and the long string casing and annulus fluid volume; and

(2) Alarms and automatic surface shut-off systems or, at the discretion of the Director, down-hole shut-off systems (*e.g.,* automatic shut-off, check valves) for onshore wells or, other mechanical devices that provide equivalent protection; and

(3) Alarms and automatic down-hole shut-off systems for wells located offshore but within State territorial waters, designed to alert the operator and shut-in the well when operating parameters such as annulus pressure,

injection rate, or other parameters diverge beyond permitted ranges and/or gradients specified in the permit.

(f) If a shutdown (*i.e.,* down-hole or at the surface) is triggered or a loss of mechanical integrity is discovered, the owner or operator must immediately investigate and identify as expeditiously as possible the cause of the shutoff. If, upon such investigation, the well appears to be lacking mechanical integrity, or if monitoring required under paragraph (e) of this section otherwise indicates that the well may be lacking mechanical integrity, the owner or operator must:

(1) Immediately cease injection;

(2) Take all steps reasonably necessary to determine whether there may have been a release of the injected carbon dioxide stream or formation fluids into any unauthorized zone;

(3) Notify the Director within 24 hours;

(4) Restore and demonstrate mechanical integrity to the satisfaction of the Director prior to resuming injection; and

(5) Notify the Director when injection can be expected to resume.

§ 146.89 Mechanical integrity.

(a) A Class VI well has mechanical integrity if:

(1) There is no significant leak in the casing, tubing, or packer; and

(2) There is no significant fluid movement into a USDW through channels adjacent to the injection well bore.

(b) To evaluate the absence of significant leaks under paragraph (a)(1) of this section, owners or operators must, following an initial annulus pressure test, continuously monitor injection pressure, rate, injected volumes; pressure on the annulus between tubing and long-string casing; and annulus fluid volume as specified in § 146.88 (e);

(c) At least once per year, the owner or operator must use one of the following methods to determine the absence of significant fluid movement under paragraph (a)(2) of this section:

(1) An approved tracer survey such as an oxygen-activation log; or

(2) A temperature or noise log.

(d) If required by the Director, at a frequency specified in the testing and monitoring plan required at § 146.90, the owner or operator must run a casing inspection log to determine the presence or absence of corrosion in the long-string casing.

(e) The Director may require any other test to evaluate mechanical integrity under paragraphs (a)(1) or (a)(2) of this section. Also, the Director may allow the use of a test to demonstrate mechanical integrity other than those listed above with the written approval of the Administrator. To obtain approval for a new mechanical integrity test, the Director must submit a written request to the Administrator setting forth the proposed test and all technical data supporting its use. The Administrator may approve the request if he or she determines that it will reliably demonstrate the mechanical integrity of wells for which its use is proposed. Any alternate method approved by the Administrator will be published in the **Federal Register** and may be used in all States in accordance with applicable State law unless its use is restricted at the time of approval by the Administrator.

(f) In conducting and evaluating the tests enumerated in this section or others to be allowed by the Director, the owner or operator and the Director must apply methods and standards generally accepted in the industry. When the owner or operator reports the results of mechanical integrity tests to the Director, he/she shall include a description of the test(s) and the method(s) used. In making his/her evaluation, the Director must review monitoring and other test data submitted since the previous evaluation.

(g) The Director may require additional or alternative tests if the results presented by the owner or operator under paragraphs (a) through (d) of this section are not satisfactory to the Director to demonstrate that there is no significant leak in the casing, tubing, or packer, or to demonstrate that there is no significant movement of fluid into a USDW resulting from the injection activity as stated in paragraphs (a)(1) and (2) of this section.

§ 146.90 Testing and monitoring requirements.

The owner or operator of a Class VI well must prepare, maintain, and comply with a testing and monitoring plan to verify that the geologic sequestration project is operating as permitted and is not endangering USDWs. The requirement to maintain and implement an approved plan is directly enforceable regardless of whether the requirement is a condition of the permit. The testing and monitoring plan must be submitted with the permit application, for Director approval, and must include a description of how the owner or operator will meet the requirements of this section, including accessing sites for all necessary monitoring and testing during the life of the project. Testing and monitoring associated with geologic sequestration projects must, at a minimum, include:

(a) Analysis of the carbon dioxide stream with sufficient frequency to yield data representative of its chemical and physical characteristics;

(b) Installation and use, except during well workovers as defined in § 146.88(d), of continuous recording devices to monitor injection pressure, rate, and volume; the pressure on the annulus between the tubing and the long string casing; and the annulus fluid volume added;

(c) Corrosion monitoring of the well materials for loss of mass, thickness, cracking, pitting, and other signs of corrosion, which must be performed on a quarterly basis to ensure that the well components meet the minimum standards for material strength and performance set forth in § 146.86(b), by:

(1) Analyzing coupons of the well construction materials placed in contact with the carbon dioxide stream; or

(2) Routing the carbon dioxide stream through a loop constructed with the material used in the well and inspecting the materials in the loop; or

(3) Using an alternative method approved by the Director;

(d) Periodic monitoring of the ground water quality and geochemical changes above the confining zone(s) that may be a result of carbon dioxide movement through the confining zone(s) or additional identified zones including:

(1) The location and number of monitoring wells based on specific information about the geologic sequestration project, including injection rate and volume, geology, the presence of artificial penetrations, and other factors; and

(2) The monitoring frequency and spatial distribution of monitoring wells based on baseline geochemical data that has been collected under § 146.82(a)(6) and on any modeling results in the area of review evaluation required by § 146.84(c).

(e) A demonstration of external mechanical integrity pursuant to § 146.89(c) at least once per year until the injection well is plugged; and, if required by the Director, a casing inspection log pursuant to requirements at § 146.89(d) at a frequency established in the testing and monitoring plan;

(f) A pressure fall-off test at least once every five years unless more frequent testing is required by the Director based on site-specific information;

(g) Testing and monitoring to track the extent of the carbon dioxide plume and the presence or absence of elevated pressure (*e.g.,* the pressure front) by using:

(1) Direct methods in the injection zone(s); and,

(2) Indirect methods (*e.g.,* seismic, electrical, gravity, or electromagnetic surveys and/or down-hole carbon dioxide detection tools), unless the Director determines, based on site-specific geology, that such methods are not appropriate;

(h) The Director may require surface air monitoring and/or soil gas monitoring to detect movement of carbon dioxide that could endanger a USDW.

(1) Design of Class VI surface air and/or soil gas monitoring must be based on potential risks to USDWs within the area of review;

(2) The monitoring frequency and spatial distribution of surface air monitoring and/or soil gas monitoring must be decided using baseline data, and the monitoring plan must describe how the proposed monitoring will yield useful information on the area of review delineation and/or compliance with standards under § 144.12 of this chapter;

(3) If an owner or operator demonstrates that monitoring employed under §§ 98.440 to 98.449 of this chapter (Clean Air Act, 42 U.S.C. 7401 *et seq.*) accomplishes the goals of paragraphs (h)(1) and (2) of this section, and meets the requirements pursuant to § 146.91(c)(5), a Director that requires surface air/soil gas monitoring must approve the use of monitoring employed under §§ 98.440 to 98.449 of this chapter. Compliance with §§ 98.440 to 98.449 of this chapter pursuant to this provision is considered a condition of the Class VI permit;

(i) Any additional monitoring, as required by the Director, necessary to support, upgrade, and improve computational modeling of the area of review evaluation required under § 146.84(c) and to determine compliance with standards under § 144.12 of this chapter;

(j) The owner or operator shall periodically review the testing and monitoring plan to incorporate monitoring data collected under this subpart, operational data collected under § 146.88, and the most recent area of review reevaluation performed under § 146.84(e). In no case shall the owner or operator review the testing and monitoring plan less often than once every five years. Based on this review, the owner or operator shall submit an amended testing and monitoring plan or demonstrate to the Director that no amendment to the testing and monitoring plan is needed. Any amendments to the testing and monitoring plan must be approved by the Director, must be incorporated into the permit, and are subject to the permit modification requirements at §§ 144.39 or 144.41 of this chapter, as appropriate. Amended plans or demonstrations shall be submitted to the Director as follows:

(1) Within one year of an area of review reevaluation;

(2) Following any significant changes to the facility, such as addition of monitoring wells or newly permitted injection wells within the area of review, on a schedule determined by the Director; or

(3) When required by the Director.

(k) A quality assurance and surveillance plan for all testing and monitoring requirements.

§ 146.91 Reporting requirements.

The owner or operator must, at a minimum, provide, as specified in paragraph (e) of this section, the following reports to the Director, for each permitted Class VI well:

(a) Semi-annual reports containing:

(1) Any changes to the physical, chemical, and other relevant characteristics of the carbon dioxide stream from the proposed operating data;

(2) Monthly average, maximum, and minimum values for injection pressure, flow rate and volume, and annular pressure;

(3) A description of any event that exceeds operating parameters for annulus pressure or injection pressure specified in the permit;

(4) A description of any event which triggers a shut-off device required pursuant to § 146.88(e) and the response taken;

(5) The monthly volume and/or mass of the carbon dioxide stream injected over the reporting period and the volume injected cumulatively over the life of the project;

(6) Monthly annulus fluid volume added; and

(7) The results of monitoring prescribed under § 146.90.

(b) Report, within 30 days, the results of:

(1) Periodic tests of mechanical integrity;

(2) Any well workover; and,

(3) Any other test of the injection well conducted by the permittee if required by the Director.

(c) Report, within 24 hours:

(1) Any evidence that the injected carbon dioxide stream or associated pressure front may cause an endangerment to a USDW;

(2) Any noncompliance with a permit condition, or malfunction of the injection system, which may cause fluid migration into or between USDWs;

(3) Any triggering of a shut-off system (*i.e.,* down-hole or at the surface);

(4) Any failure to maintain mechanical integrity; or.

(5) Pursuant to compliance with the requirement at § 146.90(h) for surface air/soil gas monitoring or other monitoring technologies, if required by the Director, any release of carbon dioxide to the atmosphere or biosphere.

(d) Owners or operators must notify the Director in writing 30 days in advance of:

(1) Any planned well workover;

(2) Any planned stimulation activities, other than stimulation for formation testing conducted under § 146.82; and

(3) Any other planned test of the injection well conducted by the permittee.

(e) Regardless of whether a State has primary enforcement responsibility, owners or operators must submit all required reports, submittals, and notifications under subpart H of this part to EPA in an electronic format approved by EPA.

(f) Records shall be retained by the owner or operator as follows:

(1) All data collected under § 146.82 for Class VI permit applications shall be retained throughout the life of the geologic sequestration project and for 10 years following site closure.

(2) Data on the nature and composition of all injected fluids collected pursuant to § 146.90(a) shall be retained until 10 years after site closure. The Director may require the owner or operator to deliver the records to the Director at the conclusion of the retention period.

(3) Monitoring data collected pursuant to § 146.90(b) through (i) shall be retained for 10 years after it is collected.

(4) Well plugging reports, post-injection site care data, including, if appropriate, data and information used to develop the demonstration of the alternative post-injection site care timeframe, and the site closure report collected pursuant to requirements at §§ 146.93(f) and (h) shall be retained for 10 years following site closure.

(5) The Director has authority to require the owner or operator to retain any records required in this subpart for longer than 10 years after site closure.

§ 146.92 Injection well plugging.

(a) Prior to the well plugging, the owner or operator must flush each Class VI injection well with a buffer fluid, determine bottomhole reservoir pressure, and perform a final external mechanical integrity test.

(b) *Well plugging plan.* The owner or operator of a Class VI well must prepare, maintain, and comply with a plan that

is acceptable to the Director. The requirement to maintain and implement an approved plan is directly enforceable regardless of whether the requirement is a condition of the permit. The well plugging plan must be submitted as part of the permit application and must include the following information:

(1) Appropriate tests or measures for determining bottomhole reservoir pressure;

(2) Appropriate testing methods to ensure external mechanical integrity as specified in § 146.89;

(3) The type and number of plugs to be used;

(4) The placement of each plug, including the elevation of the top and bottom of each plug;

(5) The type, grade, and quantity of material to be used in plugging. The material must be compatible with the carbon dioxide stream; and

(6) The method of placement of the plugs.

(c) *Notice of intent to plug.* The owner or operator must notify the Director in writing pursuant to § 146.91(e), at least 60 days before plugging of a well. At this time, if any changes have been made to the original well plugging plan, the owner or operator must also provide the revised well plugging plan. The Director may allow for a shorter notice period. Any amendments to the injection well plugging plan must be approved by the Director, must be incorporated into the permit, and are subject to the permit modification requirements at §§ 144.39 or 144.41 of this chapter, as appropriate.

(d) *Plugging report.* Within 60 days after plugging, the owner or operator must submit, pursuant to § 146.91(e), a plugging report to the Director. The report must be certified as accurate by the owner or operator and by the person who performed the plugging operation (if other than the owner or operator.) The owner or operator shall retain the well plugging report for 10 years following site closure.

§ 146.93 Post-injection site care and site closure.

(a) The owner or operator of a Class VI well must prepare, maintain, and comply with a plan for post-injection site care and site closure that meets the requirements of paragraph (a)(2) of this section and is acceptable to the Director. The requirement to maintain and implement an approved plan is directly enforceable regardless of whether the requirement is a condition of the permit.

(1) The owner or operator must submit the post-injection site care and site closure plan as a part of the permit application to be approved by the Director.

(2) The post-injection site care and site closure plan must include the following information:

(i) The pressure differential between pre-injection and predicted post-injection pressures in the injection zone(s);

(ii) The predicted position of the carbon dioxide plume and associated pressure front at site closure as demonstrated in the area of review evaluation required under § 146.84(c)(1);

(iii) A description of post-injection monitoring location, methods, and proposed frequency;

(iv) A proposed schedule for submitting post-injection site care monitoring results to the Director pursuant to § 146.91(e); and,

(v) The duration of the post-injection site care timeframe and, if approved by the Director, the demonstration of the alternative post-injection site care timeframe that ensures non-endangerment of USDWs.

(3) Upon cessation of injection, owners or operators of Class VI wells must either submit an amended post-injection site care and site closure plan or demonstrate to the Director through monitoring data and modeling results that no amendment to the plan is needed. Any amendments to the post-injection site care and site closure plan must be approved by the Director, be incorporated into the permit, and are subject to the permit modification requirements at §§ 144.39 or 144.41 of this chapter, as appropriate.

(4) At any time during the life of the geologic sequestration project, the owner or operator may modify and resubmit the post-injection site care and site closure plan for the Director's approval within 30 days of such change.

(b) The owner or operator shall monitor the site following the cessation of injection to show the position of the carbon dioxide plume and pressure front and demonstrate that USDWs are not being endangered.

(1) Following the cessation of injection, the owner or operator shall continue to conduct monitoring as specified in the Director-approved post-injection site care and site closure plan for at least 50 years or for the duration of the alternative timeframe approved by the Director pursuant to requirements in paragraph (c) of this section, unless he/she makes a demonstration under (b)(2) of this section. The monitoring must continue until the geologic sequestration project no longer poses an endangerment to USDWs and the demonstration under (b)(2) of this section is submitted and approved by the Director.

(2) If the owner or operator can demonstrate to the satisfaction of the Director before 50 years or prior to the end of the approved alternative timeframe based on monitoring and other site-specific data, that the geologic sequestration project no longer poses an endangerment to USDWs, the Director may approve an amendment to the post-injection site care and site closure plan to reduce the frequency of monitoring or may authorize site closure before the end of the 50-year period or prior to the end of the approved alternative timeframe, where he or she has substantial evidence that the geologic sequestration project no longer poses a risk of endangerment to USDWs.

(3) Prior to authorization for site closure, the owner or operator must submit to the Director for review and approval a demonstration, based on monitoring and other site-specific data, that no additional monitoring is needed to ensure that the geologic sequestration project does not pose an endangerment to USDWs.

(4) If the demonstration in paragraph (b)(3) of this section cannot be made (*i.e.,* additional monitoring is needed to ensure that the geologic sequestration project does not pose an endangerment to USDWs) at the end of the 50-year period or at the end of the approved alternative timeframe, or if the Director does not approve the demonstration, the owner or operator must submit to the Director a plan to continue post-injection site care until a demonstration can be made and approved by the Director.

(c) *Demonstration of alternative post-injection site care timeframe.* At the Director's discretion, the Director may approve, in consultation with EPA, an alternative post-injection site care timeframe other than the 50 year default, if an owner or operator can demonstrate during the permitting process that an alternative post-injection site care timeframe is appropriate and ensures non-endangerment of USDWs. The demonstration must be based on significant, site-specific data and information including all data and information collected pursuant to §§ 146.82 and 146.83, and must contain substantial evidence that the geologic sequestration project will no longer pose a risk of endangerment to USDWs at the end of the alternative post-injection site care timeframe.

(1) A demonstration of an alternative post-injection site care timeframe must include consideration and documentation of:

(i) The results of computational modeling performed pursuant to delineation of the area of review under § 146.84;

(ii) The predicted timeframe for pressure decline within the injection zone, and any other zones, such that formation fluids may not be forced into any USDWs; and/or the timeframe for pressure decline to pre-injection pressures;

(iii) The predicted rate of carbon dioxide plume migration within the injection zone, and the predicted timeframe for the cessation of migration;

(iv) A description of the site-specific processes that will result in carbon dioxide trapping including immobilization by capillary trapping, dissolution, and mineralization at the site;

(v) The predicted rate of carbon dioxide trapping in the immobile capillary phase, dissolved phase, and/or mineral phase;

(vi) The results of laboratory analyses, research studies, and/or field or site-specific studies to verify the information required in paragraphs (iv) and (v) of this section;

(vii) A characterization of the confining zone(s) including a demonstration that it is free of transmissive faults, fractures, and micro-fractures and of appropriate thickness, permeability, and integrity to impede fluid (*e.g.,* carbon dioxide, formation fluids) movement;

(viii) The presence of potential conduits for fluid movement including planned injection wells and project monitoring wells associated with the proposed geologic sequestration project or any other projects in proximity to the predicted/modeled, final extent of the carbon dioxide plume and area of elevated pressure;

(ix) A description of the well construction and an assessment of the quality of plugs of all abandoned wells within the area of review;

(x) The distance between the injection zone and the nearest USDWs above and/or below the injection zone; and

(xi) Any additional site-specific factors required by the Director.

(2) Information submitted to support the demonstration in paragraph (c)(1) of this section must meet the following criteria:

(i) All analyses and tests performed to support the demonstration must be accurate, reproducible, and performed in accordance with the established quality assurance standards;

(ii) Estimation techniques must be appropriate and EPA-certified test protocols must be used where available;

(iii) Predictive models must be appropriate and tailored to the site conditions, composition of the carbon dioxide stream and injection and site conditions over the life of the geologic sequestration project;

(iv) Predictive models must be calibrated using existing information (*e.g.,* at Class I, Class II, or Class V experimental technology well sites) where sufficient data are available;

(v) Reasonably conservative values and modeling assumptions must be used and disclosed to the Director whenever values are estimated on the basis of known, historical information instead of site-specific measurements;

(vi) An analysis must be performed to identify and assess aspects of the alternative post-injection site care timeframe demonstration that contribute significantly to uncertainty. The owner or operator must conduct sensitivity analyses to determine the effect that significant uncertainty may contribute to the modeling demonstration.

(vii) An approved quality assurance and quality control plan must address all aspects of the demonstration; and,

(viii) Any additional criteria required by the Director.

(d) *Notice of intent for site closure.* The owner or operator must notify the Director in writing at least 120 days before site closure. At this time, if any changes have been made to the original post-injection site care and site closure plan, the owner or operator must also provide the revised plan. The Director may allow for a shorter notice period.

(e) After the Director has authorized site closure, the owner or operator must plug all monitoring wells in a manner which will not allow movement of injection or formation fluids that endangers a USDW.

(f) The owner or operator must submit a site closure report to the Director within 90 days of site closure, which must thereafter be retained at a location designated by the Director for 10 years. The report must include:

(1) Documentation of appropriate injection and monitoring well plugging as specified in § 146.92 and paragraph (e) of this section. The owner or operator must provide a copy of a survey plat which has been submitted to the local zoning authority designated by the Director. The plat must indicate the location of the injection well relative to permanently surveyed benchmarks. The owner or operator must also submit a copy of the plat to the Regional Administrator of the appropriate EPA Regional Office;

(2) Documentation of appropriate notification and information to such State, local and Tribal authorities that have authority over drilling activities to enable such State, local, and Tribal authorities to impose appropriate conditions on subsequent drilling activities that may penetrate the injection and confining zone(s); and

(3) Records reflecting the nature, composition, and volume of the carbon dioxide stream.

(g) Each owner or operator of a Class VI injection well must record a notation on the deed to the facility property or any other document that is normally examined during title search that will in perpetuity provide any potential purchaser of the property the following information:

(1) The fact that land has been used to sequester carbon dioxide;

(2) The name of the State agency, local authority, and/or Tribe with which the survey plat was filed, as well as the address of the Environmental Protection Agency Regional Office to which it was submitted; and

(3) The volume of fluid injected, the injection zone or zones into which it was injected, and the period over which injection occurred.

(h) The owner or operator must retain for 10 years following site closure, records collected during the post-injection site care period. The owner or operator must deliver the records to the Director at the conclusion of the retention period, and the records must thereafter be retained at a location designated by the Director for that purpose.

§ 146.94 Emergency and remedial response.

(a) As part of the permit application, the owner or operator must provide the Director with an emergency and remedial response plan that describes actions the owner or operator must take to address movement of the injection or formation fluids that may cause an endangerment to a USDW during construction, operation, and post-injection site care periods. The requirement to maintain and implement an approved plan is directly enforceable regardless of whether the requirement is a condition of the permit.

(b) If the owner or operator obtains evidence that the injected carbon dioxide stream and associated pressure front may cause an endangerment to a USDW, the owner or operator must:

(1) Immediately cease injection;

(2) Take all steps reasonably necessary to identify and characterize any release;

(3) Notify the Director within 24 hours; and

(4) Implement the emergency and remedial response plan approved by the Director.

(c) The Director may allow the operator to resume injection prior to remediation if the owner or operator demonstrates that the injection operation will not endanger USDWs.

(d) The owner or operator shall periodically review the emergency and remedial response plan developed under paragraph (a) of this section. In no case shall the owner or operator review the emergency and remedial response plan less often than once every five years. Based on this review, the owner or operator shall submit an amended emergency and remedial response plan or demonstrate to the Director that no amendment to the emergency and remedial response plan is needed. Any amendments to the emergency and remedial response plan must be approved by the Director, must be incorporated into the permit, and are subject to the permit modification requirements at §§ 144.39 or 144.41 of this chapter, as appropriate. Amended plans or demonstrations shall be submitted to the Director as follows:

(1) Within one year of an area of review reevaluation;

(2) Following any significant changes to the facility, such as addition of injection or monitoring wells, on a schedule determined by the Director; or

(3) When required by the Director.

§ 146.95 Class VI injection depth waiver requirements.

This section sets forth information which an owner or operator seeking a waiver of the Class VI injection depth requirements must submit to the Director; information the Director must consider in consultation with all affected Public Water System Supervision Directors; the procedure for Director—Regional Administrator communication and waiver issuance; and the additional requirements that apply to owners or operators of Class VI wells granted a waiver of the injection depth requirements.

(a) In seeking a waiver of the requirement to inject below the lowermost USDW, the owner or operator must submit a supplemental report concurrent with permit application. The supplemental report must include the following,

(1) A demonstration that the injection zone(s) is/are laterally continuous, is not a USDW, and is not hydraulically connected to USDWs; does not outcrop; has adequate injectivity, volume, and sufficient porosity to safely contain the injected carbon dioxide and formation fluids; and has appropriate geochemistry.

(2) A demonstration that the injection zone(s) is/are bounded by laterally continuous, impermeable confining units above and below the injection zone(s) adequate to prevent fluid movement and pressure buildup outside of the injection zone(s); and that the confining unit(s) is/are free of transmissive faults and fractures. The report shall further characterize the regional fracture properties and contain a demonstration that such fractures will not interfere with injection, serve as conduits, or endanger USDWs.

(3) A demonstration, using computational modeling, that USDWs above and below the injection zone will not be endangered as a result of fluid movement. This modeling should be conducted in conjunction with the area of review determination, as described in § 146.84, and is subject to requirements, as described in § 146.84(c), and periodic reevaluation, as described in § 146.84(e).

(4) A demonstration that well design and construction, in conjunction with the waiver, will ensure isolation of the injectate in lieu of requirements at 146.86(a)(1) and will meet well construction requirements in paragraph (f) of this section.

(5) A description of how the monitoring and testing and any additional plans will be tailored to the geologic sequestration project to ensure protection of USDWs above and below the injection zone(s), if a waiver is granted.

(6) Information on the location of all the public water supplies affected, reasonably likely to be affected, or served by USDWs in the area of review.

(7) Any other information requested by the Director to inform the Regional Administrator's decision to issue a waiver.

(b) To inform the Regional Administrator's decision on whether to grant a waiver of the injection depth requirements at §§ 144.6 of this chapter, 146.5(f), and 146.86(a)(1), the Director must submit, to the Regional Administrator, documentation of the following:

(1) An evaluation of the following information as it relates to siting, construction, and operation of a geologic sequestration project with a waiver:

(i) The integrity of the upper and lower confining units;

(ii) The suitability of the injection zone(s) (*e.g.,* lateral continuity; lack of transmissive faults and fractures; knowledge of current or planned artificial penetrations into the injection zone(s) or formations below the injection zone);

(iii) The potential capacity of the geologic formation(s) to sequester carbon dioxide, accounting for the availability of alternative injection sites;

(iv) All other site characterization data, the proposed emergency and remedial response plan, and a demonstration of financial responsibility;

(v) Community needs, demands, and supply from drinking water resources;

(vi) Planned needs, potential and/or future use of USDWs and non-USDWs in the area;

(vii) Planned or permitted water, hydrocarbon, or mineral resource exploitation potential of the proposed injection formation(s) and other formations both above and below the injection zone to determine if there are any plans to drill through the formation to access resources in or beneath the proposed injection zone(s)/formation(s);

(viii) The proposed plan for securing alternative resources or treating USDW formation waters in the event of contamination related to the Class VI injection activity; and,

(ix) Any other applicable considerations or information requested by the Director.

(2) Consultation with the Public Water System Supervision Directors of all States and Tribes having jurisdiction over lands within the area of review of a well for which a waiver is sought.

(3) Any written waiver-related information submitted by the Public Water System Supervision Director(s) to the (UIC) Director.

(c) Pursuant to requirements at § 124.10 of this chapter and concurrent with the Class VI permit application notice process, the Director shall give public notice that a waiver application has been submitted. The notice shall clearly state:

(1) The depth of the proposed injection zone(s);

(2) The location of the injection well(s);

(3) The name and depth of all USDWs within the area of review;

(4) A map of the area of review;

(5) The names of any public water supplies affected, reasonably likely to be affected, or served by USDWs in the area of review; and,

(6) The results of UIC-Public Water System Supervision consultation required under paragraph (b)(2) of this section.

(d) Following public notice, the Director shall provide all information received through the waiver application process to the Regional Administrator. Based on the information provided, the Regional Administrator shall provide written concurrence or non-concurrence regarding waiver issuance.

(1) If the Regional Administrator determines that additional information

is required to support a decision, the Director shall provide the information. At his or her discretion, the Regional Administrator may require that public notice of the new information be initiated.

(2) In no case shall a Director of a State-approved program issue a waiver without receipt of written concurrence from the Regional Administrator.

(e) If a waiver is issued, within 30 days of waiver issuance, EPA shall post the following information on the Office of Water's Web site:

(1) The depth of the proposed injection zone(s);

(2) The location of the injection well(s);

(3) The name and depth of all USDWs within the area of review;

(4) A map of the area of review;

(5) The names of any public water supplies affected, reasonably likely to be affected, or served by USDWs in the area of review; and

(6) The date of waiver issuance.

(f) Upon receipt of a waiver of the requirement to inject below the lowermost USDW for geologic sequestration, the owner or operator of the Class VI well must comply with:

(1) All requirements at §§ 146.84, 146.85, 146.87, 146.88, 146.89, 146.91, 146.92, and 146.94;

(2) All requirements at § 146.86 with the following modified requirements:

(i) The owner or operator must ensure that Class VI wells with a waiver are constructed and completed to prevent movement of fluids into any unauthorized zones including USDWs, in lieu of requirements at § 146.86(a)(1).

(ii) The casing and cementing program must be designed to prevent the movement of fluids into any unauthorized zones including USDWs in lieu of requirements at § 146.86(b)(1).

(iii) The surface casing must extend through the base of the nearest USDW directly above the injection zone and be cemented to the surface; or, at the Director's discretion, another formation above the injection zone and below the nearest USDW above the injection zone.

(3) All requirements at § 146.90 with the following modified requirements:

(i) The owner or operator shall monitor the groundwater quality, geochemical changes, and pressure in the first USDWs immediately above and below the injection zone(s); and in any other formations at the discretion of the Director.

(ii) Testing and monitoring to track the extent of the carbon dioxide plume and the presence or absence of elevated pressure (*e.g.,* the pressure front) by using direct methods to monitor for pressure changes in the injection zone(s); and, indirect methods (*e.g.,* seismic, electrical, gravity, or electromagnetic surveys and/or down-hole carbon dioxide detection tools), unless the Director determines, based on site-specific geology, that such methods are not appropriate.

(4) All requirements at § 146.93 with the following, modified post-injection site care monitoring requirements:

(i) The owner or operator shall monitor the groundwater quality, geochemical changes and pressure in the first USDWs immediately above and below the injection zone; and in any other formations at the discretion of the Director.

(ii) Testing and monitoring to track the extent of the carbon dioxide plume and the presence or absence of elevated pressure (*e.g.,* the pressure front) by using direct methods in the injection zone(s); and indirect methods (*e.g.,* seismic, electrical, gravity, or electromagnetic surveys and/or down-hole carbon dioxide detection tools), unless the Director determines based on site-specific geology, that such methods are not appropriate;

(5) Any additional requirements requested by the Director designed to ensure protection of USDWs above and below the injection zone(s).

PART 147—STATE, TRIBAL, AND EPA-ADMINISTERED UNDERGROUND INJECTION CONTROL PROGRAMS

■ 33. The authority citation for part 147 continues to read as follows:

Authority: 42, U.S.C. 300f *et seq.;* 42 U.S.C. 6901 *et seq.*

■ 34. Section 147.1 is amended by adding paragraph (f) to read as follows:

§ 147.1 Purpose and scope.

* * * * *

(f) Class VI well owners or operators must comply with § 146.91(e) notwithstanding any State program approvals.

[FR Doc. 2010–29954 Filed 12–9–10; 8:45 am]

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Federal Register

Friday,
December 10, 2010

Part IV

Securities and Exchange Commission

17 CFR Parts 240 and 249

Security-Based Swap Data Repository Registration, Duties, and Core Principles; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 249

[Release No. 34–63347; File No. S7–35–10]

RIN 3235–AK79

Security-Based Swap Data Repository Registration, Duties, and Core Principles

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: In accordance with Section 763(i) of Title VII ("Title VII") of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act"), the Securities and Exchange Commission ("Commission") is proposing new rules under the Securities Exchange Act of 1934 ("Exchange Act") governing the security-based swap data repository ("SDR") registration process, duties, and core principles.

DATES: Comments should be submitted on or before January 24, 2011.

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 e-mail to *rule-comments@sec.gov.* Please include File Number S7–53–10 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549.

All submissions should refer to File Number S7–53–10. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/proposed.shtml*). Comments are also available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: John Ramsay, Deputy Director; Jo Anne Swindler, Assistant Director; Richard Vorosmarti, Special Counsel; Angie Le, Special Counsel; Miles Treakle, Staff Attorney; or Bradley Gude, Special Counsel, Division of Trading and Markets, at (202) 551–5777, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission is proposing Rules 13n–1 to 13n–11 under the Exchange Act governing SDRs. The Commission is soliciting comment on all aspects of the proposed rules and will carefully consider any comments received.

I. Introduction

On July 21, 2010, President Barack Obama signed the Dodd-Frank Act into law.[1] The Dodd-Frank Act was enacted to, among other things, promote the financial stability of the United States by improving accountability and transparency in the financial system.[2] Specifically, Title VII of the Dodd-Frank Act provides the Commission and the Commodity Futures Trading Commission ("CFTC") with the authority to regulate over-the-counter ("OTC") derivatives in light of the recent financial crisis, which demonstrated the need for enhanced regulation of the OTC derivatives market. The Dodd-Frank Act is intended to strengthen the existing regulatory structure and to provide the Commission and the CFTC with effective regulatory tools to oversee the OTC derivatives market, which has grown exponentially in recent years and is capable of affecting significant sectors of the U.S. economy.

The Dodd-Frank Act provides the CFTC with authority to regulate "swaps," the Commission with authority to regulate "security-based swaps" ("SBSs"), and both the CFTC and the Commission with authority to regulate "mixed swaps."[3] The Dodd-Frank Act amends the Exchange Act to require the following with respect to transactions in SBSs regulated by the Commission: (1) Transactions in SBSs must be cleared through a clearing agency if they are of a type that the Commission determines must be cleared, unless an exemption applies;[4] (2) if an SBS is subject to the clearing requirement, then it must be traded on a registered trading platform, *i.e.,* a security-based swap execution facility ("SB SEF") or SBS exchange, unless no facility makes such SBS available for trading;[5] and (3) transactions in SBSs (whether cleared or uncleared) must be reported to a registered SDR or the Commission.[6]

The Dodd-Frank Act provides the Commission with broad authority to adopt rules governing SDRs and to develop additional duties applicable to SDRs.[7] Today, the Commission is proposing in this release new Rules 13n–1 to 13n–11 under the Exchange Act governing SDR registration process, duties, and core principles, including duties related to data maintenance and access by relevant authorities and those seeking to use the SDR's repository services.[8] Pursuant to the legislation,

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[1] The Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

[2] *See* Public Law 111–203, Preamble.

[3] Section 712(d) of the Dodd-Frank Act provides that the Commission and the CFTC, in consultation with the Board of Governors of the Federal Reserve System ("Federal Reserve"), shall jointly further define the terms "swap," "security-based swap," "swap dealer," "security-based swap dealer," "major swap participant," "major security-based swap participant," "eligible contract participant," and "security-based swap agreement." These terms are defined in Sections 721 and 761 of the Dodd-Frank Act and, with respect to the term "eligible contract participant," in Section 1a(18) of the Commodity Exchange Act ("CEA"), 7 U.S.C. 1a(18), as re-designated and amended by Section 721 of the Dodd-Frank Act. Further, Section 721(c) of the Dodd-Frank Act requires the CFTC to adopt a rule to further define the terms "swap," "swap dealer," "major swap participant," and "eligible contract participant," and Section 761(b) of the Dodd-Frank Act permits the Commission to adopt a rule to further define the terms "security-based swap," "security-based swap dealer," "major security-based swap participant," and "eligible contract participant," with regard to SBSs, for the purpose of including transactions and entities that have been structured to evade Title VII. Finally, Section 712(a) of the Dodd-Frank Act provides that the Commission and CFTC, after consultation with the Federal Reserve, shall jointly prescribe regulations regarding "mixed swaps," as may be necessary to carry out the purposes of Title VII. To assist the Commission and CFTC in further defining the terms specified above, and to prescribe regulations regarding "mixed swaps" as may be necessary to carry out the purposes of Title VII, the Commission and the CFTC are currently seeking comments from interested parties. *See* Exchange Act Release No. 62717 (Aug. 13, 2010), 75 FR 51429 (Aug. 20, 2010) (File No. S7–16–10) (advance joint notice of proposed rulemaking regarding definitions contained in Title VII).

[4] *See* Public Law 111–203, § 763(a) (adding Exchange Act Section 3C).

[5] *See* Public Law 111–203, § 763(c) (adding Exchange Act Section 3D).

[6] *See* Public Law 111–203, §§ 763(i) and 766(a) (adding Exchange Act Sections 13(m)(1)(G) and 13A(A)(1), respectively). The Dodd-Frank Act amends the CEA to provide for a similar regulatory framework with respect to transactions in swaps regulated by the CFTC.

[7] *See* Public Law 111–203, § 763(i) (adding Exchange Act Sections 13(n)(7)(D)(i) and 13(n)(9)).

[8] Section 712(a)(2) of the Dodd-Frank Act provides that, before commencing any rulemaking regarding SBSs, security-based swap dealers ("SBS dealers"), major security-based swap participants

SDRs are required to collect and maintain accurate SBS transaction data so that relevant authorities can access and analyze the data from secure, central locations to better monitor for systemic risk and potential market abuse.

A separate release issued by the Commission today proposes Regulation SBSR, which, among other things, implements the provisions of the Dodd-Frank Act for reporting SBS transactions to SDRs, including standards for the data elements that must be provided.[9] In addition, the Dodd-Frank Act requires the Commission to engage in rulemaking for the public dissemination of SBS transaction, volume, and pricing data,[10] and provides the Commission with discretion to determine an appropriate approach to implement this important function. In Regulation SBSR, the Commission proposes to require SDRs to undertake this role.[11]

Taken together, the rules that the Commission proposes today seek to provide improved transparency to regulators and the markets through comprehensive regulations for SBS transaction data and SDRs. The proposed rules would require SBS transaction information to be (1) provided to SDRs in accordance with uniform data standards; (2) verified and maintained by SDRs, which serve as secure, centralized recordkeeping facilities that are accessible by relevant authorities; and (3) publicly disseminated in a timely fashion by SDRs. In combination, these proposed rules represent a significant step forward in providing a regulatory framework that promotes transparency and efficiency in the OTC derivatives markets and creates important infrastructure to assist relevant authorities in performing their market oversight functions.

In preparation for the rulemakings related to SDRs, Commission and CFTC staff held a joint public roundtable (the "Data Roundtable") on September 14, 2010 to gain further insight into many of the issues addressed in this proposal.[12] The rules proposed today take into account the views expressed at the Data Roundtable, as well as the comments received.

This proposed rulemaking is among the first that the Commission has considered in connection with its mandates under the Dodd-Frank Act, and the Commission is mindful of the considerations raised by this timing. The Commission notes that the SBS market is in a nascent stage of regulatory development compared to the markets for equity securities and listed options and that the SBS market could develop further as the Dodd-Frank Act is fully implemented and these transactions move to central clearing and trading on organized markets. Accordingly, the Commission urges all interested parties to comment on all aspects of this proposed rulemaking, including whether this proposal, taken as a whole, appropriately advances the objectives of the Dodd-Frank Act in a manner that adequately takes into account the characteristics of the relevant markets.

II. Role, Regulation, and Business Models of SDRs

Under the Dodd-Frank Act, SDRs are intended to play a key role in enhancing transparency in the SBS market by retaining complete records of SBS transactions, maintaining the integrity of those records, and providing effective access to those records to relevant authorities and the public in line with their respective information needs. The enhanced transparency provided by an SDR is important to help regulators and others monitor the build-up and concentration of risk exposures in the SBS market. Without an SDR, data on SBS transactions is dispersed and not readily available to regulators and others. SDRs may be especially critical during times of market turmoil, both by giving relevant authorities information to help limit systemic risk and by promoting stability through enhanced transparency. By enhancing stability in the SBS market, SDRs may also indirectly enhance stability across markets, including equities and bond markets.[13]

In addition, SDRs have the potential to reduce operational risk and enhance operational efficiency in the SBS market. By maintaining transaction records that are accessible by both counterparties to an SBS, SDRs will provide a mechanism for counterparties to ensure that their records reconcile on all of the key economic details, which may decrease the likelihood of disputes. The Dodd-Frank Act's requirement of having all SBSs reported to an SDR encourages standardization of data elements, which promotes operational and market efficiency.

The data maintained by an SDR may also assist regulators in (i) preventing market manipulation, fraud, and other market abuses; (ii) performing market surveillance, prudential supervision, and macroprudential (systemic risk) supervision; and (iii) resolving issues and positions after an institution fails.[14]

SDRs themselves are, however, subject to certain operational risks. The inability of an SDR to protect the accuracy and integrity of the data that it maintains or the inability of an SDR to make such data available to regulators, market participants, and others in a timely manner could have a significant negative impact on the SBS market. Failure to maintain privacy of such data could lead to market abuse and subsequent loss of liquidity. Therefore, it is important that SDRs are well-run and effectively regulated.

("major SBS participants"), SDRs, SBS clearing agencies, persons associated with an SBS dealer or major SBS participant, eligible contract participants with regard to SBSs, or SB SEFs pursuant to Subtitle B of Title VII, the Commission must consult and coordinate with the CFTC and other prudential regulators for the purposes of assuring regulatory consistency and comparability, to the extent possible. *See* Public Law 111–203, § 712(a)(2). Any person that is required to be registered as an SDR under Exchange Act Section 13(n) must register with the Commission, regardless of whether that person is also registered under the CEA as a swap data repository. Public Law 111–203, § 763(i) (adding Exchange Act Section 13(n)(8)). The Commission preliminarily believes that an entity that registers with the Commission as an SDR is likely to register also with the CFTC as a swap data repository. As a result, the Commission staff and the CFTC staff have consulted and coordinated with one another regarding their respective Commissions' proposed rules regarding SDRs and swap data repositories as mandated by Sections 763 and 728 of the Dodd-Frank Act, respectively. The Commission staff has also consulted and coordinated with other prudential regulators.

[9] *See* Exchange Act Release No. 63346 (Nov. 19, 2010) ("Regulation SBSR Release").

[10] Public Law 111–203, § 763(i) (adding Exchange Act Section 13(m)(1)).

[11] *See* Regulation SBSR Release, *supra* note 9.

[12] The Commission and the CFTC solicited comments on the Data Roundtable. *See* Exchange Act Release No. 62863 (Sept. 8, 2010), 75 FR 55575 (Sept. 13, 2010). Comments received by the Commission are available at *http://www.sec.gov/cgi-bin/ruling-comments?ruling=df-title-vii-swap-data-repositories&rule_path=/comments/df-title-vii/swap-data-repositories&file_num=DF%20Title%20VII%20-%20Swap%20Data%20Repositories&action=Show_Form&title=Swap%20Data%20Repositories%20-%20Title%20VII%20Provisions%20of%20the%20Dodd-Frank%20Wall%20Street%20Reform%20and%20Consumer%20Protection%20Act.*

[13] *See* Darrell Duffie, Ada Li, and Theo Lubke, *Policy Perspectives of OTC Derivatives Market Infrastructure,* Federal Reserve Bank of New York Staff Report No. 424, dated January 2010, as revised March 2010 ("Transparency can have a calming influence on trading patterns at the onset of a potential financial crisis, and thus act as a source of market stability to a wider range of markets, including those for equities and bonds.").

[14] *See* Letter from DTCC to Chairmen Mary Schapiro and Gary Gensler (Nov. 15, 2010) (*available at http://www.sec.gov/comments/df-title-vii/swap-data-repositories/swapdatarepositories-13.pdf*) ("A registered SDR should be able to provide (i) enforcement agents with necessary information on trading activity; (ii) regulatory agencies with counterparty-specific information about systemic risk based on trading activity; (iii) aggregate trade information for publication on market-wide activity; and (iv) a framework for real-time reporting from swap execution facilities and derivatives clearinghouses.")

The Commission is cognizant that the proposed rules discussed herein, as well as other proposals that the Commission may consider in the coming months to implement the Dodd-Frank Act, if adopted, could significantly affect—and be significantly affected by—the nature and scope of the SBS market in a number of ways. For example, the Commission recognizes that if the measures that are adopted are too onerous for new entrants, they could discourage competition and formation of SDRs. On the other hand, if the Commission adopts rules that are too permissive, SDRs might be prone to deficiencies such as limited access to their services or potential lack of data integrity. The Commission is also mindful that further development of the SBS market may alter the calculus for future regulation of SDRs. As commenters review this release, they are urged to consider generally the role that regulation may play in fostering or limiting development of the SBS market (or, vice versa, the role that market developments may play in changing the nature and implications of regulation) and to focus specifically on this issue with respect to the proposals regarding SDRs that are discussed below.

The Commission is also aware that the regulatory framework for SDRs being developed by the Commission must take into account the commercial viability of SDRs, because realizing the benefits of SDRs requires that entities seek to engage in the business of being an SDR. In this regard, the Commission, which has limited experience with data repositories, seeks to understand the potential revenue streams and operating costs for SDRs. Based on our understanding of existing data repositories and discussions with industry representatives, it appears that SDRs might operate under any one of a number of business models. For example, an SDR could provide basic services and access to data on an at-cost utility model basis. Alternatively, an SDR might seek to earn a profit from fees charged to participants for reporting SBS transaction data to the SDR or for providing raw data to participants or others. In either of these two models, the SDR could also offer to participants additional or ancilliary services related to the SBS data that is reported to the SDR, such as calculating quarterly coupon and other payments (*e.g.,* upfront fees or credit event payments) due between counterparties of an SBS; providing bilateral netting calculations; and providing automated life cycle processing for successor events such as reorganizations and renaming of corporate entities, and credit events such as bankruptcies, restructurings, and insolvencies. Further, an entity that already offers post-trade processing or matching and confirmation services might seek to expand its business to include acting as a data repository. Finally, any of these models could involve the sale of enhanced data or tools derived from the use and analysis of data reported to the repository.

The SDR regulatory regime set forth in the Dodd-Frank Act and any rules that the Commission may adopt to implement the Act will likely affect an entity's decision over which business model to adopt. An entity likely will remain in or enter into the SBS market as a registered SDR based upon the interplay between the business model that it selects and the regulatory requirements that the Commission imposes under the Dodd-Frank Act.

The Commission recognizes the importance of promoting the development of SDRs to collect, maintain, and make available accurate SBS data to relevant authorities and the public. The rules that the Commission proposes in this release today reflect its preliminary views on potentially appropriate regulatory requirements to implement the Dodd-Frank Act with respect to SDRs. In this regard, the Commission has considered its experience in regulating the securities market and has sought to propose rules that take into account the obligations the Commission has imposed on other registrants.[15] At the same time, the Commission is interested in gathering additional information regarding the business models that the industry may utilize to operate registered SDRs, views on the potential areas of competition among SDRs, and the interplay between the commercial viability of various SDR business models and any rules implemented under the Dodd-Frank Act. The Commission does not intend by the requirements imposed on an SDR to mandate any particular business model, and it solicits comment on the effect of the proposed rules on business models that SDRs would adopt, and the consequences for market integrity, transparency, and efficiency.

Request for Comment

The Commission also requests comment on the following specific issues:

- Are there business models other than those described above that an SDR may want to adopt? What are the business models, and what are their benefits and drawbacks for SDRs and for the integrity, transparency, and efficiency of the SBS market?
- Do the Commission's proposed rules favor or discourage one business model over another? If so, identify which rule(s) and explain.
- Should the Commission's rules favor or discourage one business model over another? If so, which models should be favored or discouraged and why?
- What factors determine whether an entity decides to operate as an SDR?
- Who are the likely investors in or sources of capital for new SDRs? What are the key sources of risk or uncertainty facing such persons? How would the rules being proposed by the Commission, taken as a whole or individually, facilitate or discourage the investment of capital in SDRs?
- What are the revenue sources available to SDRs? How would the rules proposed or that may be adopted affect potential revenue sources for SDRs, and their commercial viability? Could repositories be commercially viable if the only permissible sources of revenue derived from receiving and generating and providing aggregated data? Which revenue sources are expected to be most important from the standpoint of commercial viability?
- Would there be advantages or disadvantages to the market if SDRs were required to provide basic services on an at-cost or utility model basis?
- Do the rules proposed by the Commission in this release, taken as a whole, reflect an appropriate regulatory burden on SDRs, considering the statutory mandates and policy goals of the Dodd-Frank Act? Should the Commission impose additional or fewer requirements on SDRs? Which

[15] For example, proposed Rule 13n-6 would require SDRs to comply with obligations related to their automated systems' capacity, resiliency, and security that are comparable to the standards applicable to self-regulatory organizations, including clearing agencies, and other registrants pursuant to the Commission's Automation Review Policy standards. And, the requirement in proposed Rule 13n-4 for an SDR to ensure that any dues, fees, or any other charges imposed by, and any discounts or rebates offered by, an SDR be fair and reasonable and not unreasonably discriminatory is similar to obligations imposed by the Exchange Act on other registrants. *See, e.g.,* Exchange Act Section 6(b)(4) ("The rules of the exchange [shall] provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities"); Exchange Act Section 17A(b)(3)(D) ("The rules of the clearing agency [shall] provide for the equitable allocation of reasonable dues, fees and other charges among its participants"); *see also* Exchange Act Sections 11A(c)(1)(C) and (D) (providing that the Commission may prescribe rules to assure that all securities information processors ("SIPs") may, "for purposes of distribution and publication, obtain on fair and reasonable terms such information" and to assure that "all other persons may obtain on terms which are not unreasonably discriminatory" the transaction information published or distributed by SIPs).

requirements should be added or removed and why? Which requirements, if any, in combination or alone, would be unduly burdensome on SDRs?

• With respect to entities that currently perform repository services for SBSs or other instruments, how do current practices compare to the practices that the Commission proposes to require in these rules? What are the incremental costs to potential SDRs in connection with adding to or revising their current practices in order to implement these proposed rules?

• How many SDRs are likely to register with the Commission? Will there likely be more than one SDR for each asset class of SBSs? If there will likely be only one SDR for each asset class, will that be due to the inherent nature of the market and of the SDR business model; will that be due to the rules proposed by the Commission; or will that be due to other factors? Should the Commission impose additional regulatory requirements to mitigate any potential detrimental impact on the SBS market related to a single, dominant SDR for each asset class? Or should the Commission instead seek to encourage more competition among SDRs by modifying or eliminating certain aspects of its proposed rules to facilitate new entrants into the market?

• Exchange Act Section 13(n)(5) requires an SDR to "provide direct electronic access to the Commission (or any designee of the Commission, including another registered entity)." Under this provision, should the Commission designate one SDR as the recipient of the information of other SDRs, through direct electronic access to the SBS data at the other SDRs, in order to provide the Commission and relevant authorities with a consolidated location for SBS data? If so, should the consolidation of data from SDRs be by asset class of SBSs or across all asset classes? What would be the costs and benefits of requiring SDRs to report transaction data to another registered SDR that would consolidate the information? If the Commission were to designate one SDR to be the consolidator of SBS data in an asset class or for all SBS data, are there requirements that should be imposed on such an entity that are different than those imposed on other SDRs? Are there specific criteria that the Commission should consider in selecting an SDR to be a consolidator of SBS data?

III. Discussion of Proposed Rules Governing SDRs

Exchange Act Section 3(a)(75), enacted in Section 761 of the Dodd-Frank Act, defines a "security-based swap data repository" to mean "any person that collects and maintains information or records with respect to transactions or positions in, or the terms and conditions of, security-based swaps entered by third parties for the purpose of providing a centralized recordkeeping facility for security-based swaps." [16] Exchange Act Section 13(n), enacted in Section 763(i) of the Dodd-Frank Act, makes it "unlawful for any person, unless registered with the Commission, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a security-based swap data repository." [17] To be registered and maintain such registration, each SDR is required to comply with the requirements and core principles described in Exchange Act Section 13(n), as well as with any requirements that the Commission adopts by rule or regulation.[18] The Dodd-Frank Act also requires each SDR to appoint a chief compliance officer ("CCO") and specifies the CCO's duties.[19] In addition, the Dodd-Frank Act grants the Commission authority to inspect and examine any registered SDR and to prescribe data standards for SDRs.[20]

A. Proposed Rule Regarding Registration of SDRs [21]

The Commission is proposing Rule 13n–1, which establishes the procedures by which an SDR may apply to the Commission for registration. The proposed rule would provide that an application for the registration of an SDR must be filed electronically in a tagged [22] data format on proposed new Form SDR with the Commission in accordance with the instructions contained in the form.[23] The Commission anticipates developing an online filing system through which an SDR would be able to file and update Form SDR.[24] The information filed would be available on the Commission's Web site.[25] The Commission preliminarily believes that filing Form SDR in an electronic format would be less burdensome and more efficient for both the SDRs and the Commission.

As part of the Commission's longstanding efforts to increase transparency and the usefulness of information, the Commission has been implementing data-tagging of information contained in electronic filings to improve the accuracy of financial information and facilitate its analysis.[26] Data becomes machine-readable when it is labeled, or tagged, using a computer markup language that can be processed by software programs for analysis. Such computer markup languages use standard sets of definitions, or "taxonomies," that translate text-based information in

[16] Public Law 111–203, § 761 (adding Exchange Act Section 3(a)(75)).

[17] Public Law 111–203, § 763(i) (adding Exchange Act Section 13(n)(1)). Any person that is required to be registered as an SDR under Exchange Act Section 13(n) must register with the Commission, regardless of whether that person is also registered under the CEA as a swap data repository. *Id.* (adding Exchange Act Section 13(n)(8)). Under the legislation, a clearing agency may register as an SDR. *Id.* (adding Exchange Act Section 13(m)(1)(H)). In addition, any person that is required to register as an SDR pursuant to this section must register with the Commission regardless of whether that person is also registered as an SB SEF.

[18] *See id.* (adding Exchange Act Section 13(n)(3)).

[19] *See id.* (adding Exchange Act Section 13(n)(6)).

[20] *See id.* (adding Exchange Act Sections 13(n)(2) and 13(n)(4)). In a separate proposal, the Commission is proposing rules prescribing the data elements that an SDR is required to accept for each SBS in association with requirements under Section 763(i), adding Exchange Act Section 13(n)(4)(A) relating to standard setting and data identification. *See* Regulation SBSR Release (proposed Rule 901), *supra* note 9. Any comments regarding the data elements should be submitted in connection with that proposal.

[21] In separate proposals, the Commission is proposing rules requiring each SDR to register as a SIP, as defined in Exchange Act Section 3(a)(22), on Form SIP based on additional requirements proposed in those rules and to register as a clearing agency, depending on an SDR's services. *See, e.g.,* Regulation SBSR Release (proposed Rule 909), *supra* note 9. Any comments regarding such registrations should be submitted in connection with these proposals.

[22] The term "tag" (including the term "tagged") would be defined as an identifier that highlights specific information submitted to the Commission that is in the format required by the Electronic Data Gathering, Analysis, and Retrieval System ("EDGAR") Filer Manual, as described in Rule 301 of Regulation S–T. *See* proposed Rule 13n–1(a)(3); *see also* 17 CFR 232.301. The term "EDGAR Filer Manual" would have the same meaning as set forth in Rule 11 of Regulation S–T (defining "EDGAR Filer Manual" as "the current version of the manual prepared by the Commission setting out the technical format requirements for an electronic submission"). *See* Proposed Rule 13n–1(a)(1); *see also* 17 CFR 232.11.

[23] *See* proposed Rule 13n–1(b).

[24] The Commission anticipates that SDR filings will be submitted through EDGAR, in which case the electronic filing requirements of Regulation S–T would apply. *See generally* 17 CFR 232 (governing the electronic submission of documents filed with the Commission).

[25] If the Commission adopts the rule as proposed, it is possible that SDRs might be required to file Form SDR in paper until such time as an electronic filing system is operational and capable of receiving the form. SDRs would be notified as soon as the electronic system can accept filing of Form SDR. At such time, the Commission may require each SDR to promptly re-file electronically Form SDR and any amendments to the form.

[26] *See* Regulation S–T, 17 CFR 232. *See also* Securities Act Release No. 8891 (Feb. 6, 2008), 73 FR 10592 (Feb. 27, 2008); Securities Act Release No. 9002 (Jan. 30, 2009), 74 FR 6776 (Feb. 10, 2009); Securities Act Release No. 9006 (Feb. 11, 2009), 74 FR 7748 (Feb. 19, 2009); Exchange Act Release No. 61050 (Nov. 23, 2009), 74 FR 63832 (Dec. 4, 2009); Investment Company Release No. 29132 (Feb. 23, 2010), 75 FR 10060 (Mar. 4, 2010).

Commission filings into structured data that can be retrieved, searched, and analyzed through automated means. Requiring the information to be tagged in a machine-readable format using a data standard that is freely available, consistent, and compatible with the tagged data formats already in use for Commission filings would enable the Commission to review and analyze effectively Form SDR submissions.

1. Proposed New Form SDR

Proposed Form SDR includes a set of instructions for its proper completion and submission. These instructions are attached to this release, together with proposed Form SDR. The instructions would require an SDR to indicate the purpose for which it is submitting the form (*i.e.,* application for registration, or amendment to an application or to an effective registration) and then to provide information in seven categories: (1) General information, (2) business organization, (3) financial information, (4) operational capability, (5) access to services and data, (6) other policies and procedures, and (7) legal opinion. As part of the application process, each SDR would be required to provide additional information to the Commission upon request.[27]

The Commission preliminarily believes that permitting an SDR to provide information in narrative form would allow the SDR greater flexibility and opportunity for meaningful disclosure of relevant information. The Commission also preliminarily believes that it is necessary to obtain the requested information in proposed Form SDR to enable the Commission to determine whether to grant or deny an application for registration. Specifically, the information would assist the Commission in understanding the basis for registration as well as an SDR's overall business structure, financial condition, track record in providing access to its services and data, technological reliability, and policies and procedures to comply with its statutory obligations. The information would also be useful to the Commission in tailoring any requests for additional information that it may ask an SDR to provide. Furthermore, the required information would assist the Commission in the preparation of its inspection and examination of an SDR.

General Information. Proposed Form SDR would require an SDR to provide contact information, information concerning successor entities (if applicable), a list of asset classes of SBSs for which the SDR is collecting and maintaining data or for which it proposes to collect and maintain data, and a description of the functions that it performs or proposes to perform. This information would assist the Commission and its staff in evaluating the applications and overseeing registered SDRs.

An SDR would be required to consent that any notice or service of process, pleadings, or other documents in connection with any action or proceeding against the SDR may be effectuated by certified mail to an officer or person specified by the SDR at a given U.S. address. The Commission preliminarily believes that this consent is important to minimize any logistical obstacles (*e.g.,* locating defendants or respondents abroad) that the Commission may encounter when attempting to provide notice to an SDR or to effect service, including service overseas.

Form SDR must be signed by a person who is duly authorized to act on behalf of the SDR. The signer would be required to certify that all information contained in the application, including the required items and exhibits, is true, current, and complete. This certification is consistent with the certification provisions in the registration forms for SIPs, investment advisers, and broker-dealers (*i.e.,* Forms SIP, ADV, and BD).[28]

If an applicant is a non-resident SDR, then the signer of Form SDR would also be required to certify that the SDR can, as a matter of law, provide the Commission with prompt access to the SDR's books and records and that the SDR can, as a matter of law, submit to onsite inspection and examination by the Commission.[29] For purposes of the certification, the term "non-resident security-based swap data repository" would mean (i) in the case of an individual, one who resides in or has his principal place of business in any place not in the United States; (ii) in the case of a corporation, one incorporated in or having its principal place of business in any place not in the United States; or (iii) in the case of a partnership or other unincorporated organization or association, one having its principal place of business in any place not in the United States.[30] Certain foreign jurisdictions may have laws that complicate the ability of financial institutions such as SDRs located in their jurisdictions from sharing and/or transferring certain information, including personal financial data of individuals that the financial institutions come to possess from third persons (*e.g.,* personal data relating to the identity of market participants or their customers). The Commission preliminarily believes that the non-resident SDR certification is important to confirm that each SDR located overseas has taken the necessary steps to be in the position to provide the Commission with prompt access to its books and records and to be subject to onsite inspection and examination by the Commission. Failure to make this certification may be a basis for the Commission to deny an application for registration. If a registered non-resident SDR becomes unable to comply with this certification, then this may be a basis for the Commission to revoke the SDR's registration.

Business Organization. Proposed Form SDR would require each SDR to provide information regarding its business organization, including information about (1) any person who owns 10 percent or more of the SDR's stock or who, either directly or indirectly, through agreement or otherwise, in any other manner, may control or direct the SDR's management or policies, (2) the business experience, qualifications, and disciplinary history of its designated CCOs, officers, directors, governors, and persons performing functions similar to any of the foregoing, and the members of all standing committees,[31] (3) its

[27] *See* proposed Rule 13n–1(b).

[28] *See* 17 CFR 249.1001 (Form SIP, for application for registration as a securities information processor or to amend such an application or registration); Form ADV (*available at http://www.sec.gov/about/forms/formadv.pdf*); and Form BD (*available at http://www.sec.gov/about/forms/formbd.pdf*).

[29] Under Exchange Act Section 13(n)(2), an SDR is subject to inspection and examination by the Commission. *See* Public Law 111–203, § 763(i).

[30] *See also* proposed Rule 13n–1(a)(2). This definition is substantially similar to the definition of "non-resident broker or dealer" in Exchange Act Rule 17a–7(d)(3). *See* 17 CFR 240.17a–7(d)(3).

[31] More specifically, proposed Form SDR would require an SDR to disclose the following information regarding its designated CCOs, officers, directors, governors, and persons performing functions similar to any of the foregoing, and the members of all standing committees: (a) Name, (b) title, (c) date of commencement and, if appropriate, termination of present term of position, (d) length of time such person has held the same position, (e) brief account of the business experience of such person over the last five years, (f) any other business affiliations in the securities industry or OTC derivatives industry, and (g) a description of: (1) Any order of the Commission with respect to such person pursuant to Exchange Act Sections 15(b)(4), 15(b)(6), 19(h)(2), or 19(h)(3); (2) any conviction or injunction of a type described in Exchange Act Sections 15(b)(4)(B) or (C) within the past ten years; (3) any action of a self-regulatory organization with respect to such person imposing a final disciplinary sanction pursuant to Exchange Act Sections 6(b)(6), 15A(b)(7), or 17A(b)(3)(G); (4) any final action by a self-regulatory organization with respect to such person constituting a denial, bar, prohibition, or limitation of membership, participation, or association with a member, or of access to services offered by, such organization of

governance arrangements, (4) the SDR's constitution, articles of incorporation or association with all amendments to them, existing by-laws, rules, procedures, and instruments corresponding to them, (5) the SDR's organizational structure, (6) its affiliates,[32] (7) any material pending legal proceedings to which the SDR or its affiliate is a party or to which any of its property is the subject, (8) the SDR's material contracts with any SB SEF, clearing agency, central counterparty, and third party service provider, and (9) the SDR's policies and procedures to minimize conflicts of interest in its decision-making process and to resolve any such conflicts of interest. Obtaining this information would assist the Commission in understanding an SDR's overall business structure, governance arrangements, and operations, all of which would assist the Commission in its inspection and examination of the SDR.

Financial Information. Each SDR would be required to disclose as exhibits to proposed Form SDR certain financial and related information, including (1) its balance sheet, statement of income and expenses, statement of sources and application of revenues, and all notes or schedules thereto, as of the most recent fiscal year of the SDR, or, alternatively, a financial report, as discussed further in Section III.K.3 of this release, (2) a balance sheet and statement of income and expense for each affiliate of the SDR as of the end of the most recent fiscal year of each such affiliate, or, alternatively, identification of the most recently filed annual report on Form 10–K of the SDR's affiliate, if available, (3) the SDR's schedule of dues, fees, and other charges imposed, or to be imposed, for its services as well as any discounts and rebates offered, or to be offered, and (4) a description of any differentiations in such dues, fees, other charges, discounts, and rebates.

Operational Capability. Proposed Form SDR would also require each SDR to provide information on its operational capability, including (1) its functions and services, (2) the computer hardware that it uses to perform its functions, (3) personnel qualifications for each category of professional, non-professional, and supervisory employees employed by the SDR or the division, subdivision, or other segregable entity within the SDR, (4) the SDR's measures or procedures to provide for the security of any system employed to perform its functions, including any physical and operational safeguards designed to prevent unauthorized access to the system, (5) any circumstances within the past year in which such security measures or safeguards failed to prevent any such unauthorized access to the system and any measures taken to prevent a reoccurrence, (6) any measures used to satisfy itself that the information received or disseminated by the system is accurate, (7) the SDR's backup systems or subsystems that are designed to prevent interruptions in the performance of any SDR functions, (8) limitations on the SDR's capacity to receive (or collect), process, store, or display its data and factors that account for such limitations, and (9) the priorities of assignment of capacity between functions of the SDR and any other uses and methods used to divert capacity between such functions and other uses. Obtaining this information would assist the Commission in determining, among other things, whether an SDR is able to comply with proposed Rule 13n–6, as discussed further in Section III.F of this release.

Access to Services and Data. Proposed Form SDR would further require an SDR to provide information regarding access to its services and data, including (1) the number of persons who presently subscribe, or who have notified the SDR of their intention to subscribe, to its services, (2) instances in which the SDR has prohibited or limited any person with respect to access to services offered or data maintained by the SDR,[33] (3) the storage media of any service furnished in machine-readable form and the data elements of such service, (4) copies of the contracts governing the terms by which persons may subscribe to the SDR's services, including ancillary services, (5) any specifications, qualifications, and criteria that limit, are interpreted to limit, or have the effect of limiting access to or use of any services offered or data maintained by the SDR, (6) any specifications, qualifications, or other criteria required of persons who supply SBS information to the SDR for collection and maintenance or of persons who seek to connect to or link with the SDR, (7) any specifications, qualifications, or other criteria required of any person who requests access to data maintained by the SDR, and (8) the SDR's policies and procedures to review any prohibition or limitation of any person with respect to access to services offered or data maintained by the SDR and to determine whether any person who has been denied access has been discriminated against unfairly. Obtaining this information would assist the Commission in determining, among other things, whether an SDR can comply with proposed Rule 13n–4(c)(1), as discussed further in Section III.D.2.a in this release.

Other Policies and Procedures. Proposed Form SDR would require each SDR to submit as exhibits: (1) The SDR's policies and procedures to protect the privacy of any and all SBS transaction information that the SDR receives from a market participant or any registered entity, (2) a description of the SDR's safeguards, policies, and procedures to prevent the misappropriation or misuse of (a) any confidential information received by the SDR, including, but not limited to, trade data, position data, and any nonpublic personal information about a market participant or any of its customers; (b) material, nonpublic information; and/or (c) intellectual property by the SDR or any person associated with the SDR for their personal benefit or for the benefit of others, (3) the SDR's policies and procedures regarding its use of the SBS transaction information that it receives from a market participant, any registered entity, or any other person for non-commercial and/or commercial purposes, (4) the SDR's procedures and a description of its facilities for resolving disputes over the accuracy of the transaction data and positions that are recorded in the SDR, (5) the SDR's policies and procedures relating to its calculation of positions, (6) the SDR's policies and procedures to prevent any provision in a valid SBS from being invalidated or modified through the

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a member thereof; and (5) any final action by another federal regulatory agency, including the CFTC, any state regulatory agency, or any foreign financial regulatory authority resulting in: (i) A finding that such person has made a false statement or omission, or has been dishonest, unfair, or unethical; (ii) a finding that such person has been involved in a violation of any securities-related regulations or statutes; (iii) a finding that such person has been a cause of a business having its authorization to do business denied, suspended, revoked, or restricted; (iv) an order entered, in the past ten years, against such person in connection with a securities-related activity; or (v) any disciplinary sanction, including a denial, suspension, or revocation of such person's registration or license or otherwise, by order, a prevention from associating with a securities-related business or a restriction of such person's activities.

[32] For purposes of proposed Form SDR, an "affiliate" of an SDR would be defined as a person that, directly or indirectly, controls, is controlled by, or is under common control with the SDR. *See also* proposed Rule 13n–4(a)(1). This proposed definition of "affiliate" is designed to allow the Commission to collect comprehensive identifying information relating to an SDR.

[33] If the Commission adopts proposed Rule 909 of Regulation SBSR, which would require each SDR to register as a SIP, then Exchange Act Section 11A(b)(5) would govern denials of access to all SDRs' services. *See* Regulation SBSR Release (proposed Rule 909), *supra* note 9.

procedures or operations of the SDR, and (7) a plan to ensure that the transaction data and position data that are recorded in the SDR continue to be maintained after the SDR withdraws from registration, which shall include procedures for transferring transaction data and position data to the Commission or its designee (including another registered SDR). As discussed further below, the Commission is proposing to require each SDR to establish, maintain, and enforce these seven policies and procedures. In addition, an SDR would be required to submit as exhibits to Form SDR all of the policies and procedures set forth in Regulation SBSR.[34]

Legal Opinion. Finally, Form SDR would require each non-resident SDR to provide an opinion of counsel that the SDR can, as a matter of law, provide the Commission with prompt access to the books and records of such SDR and that the SDR can, as a matter of law, submit to onsite inspection and examination by the Commission. Each jurisdiction may have a different legal framework with respect to its laws (*e.g.,* privacy laws) that may limit or restrict the Commission's ability to receive information from an SDR. Providing an opinion of counsel that an SDR can provide prompt access to books and records and can be subject to onsite inspection and examination will allow the Commission to better evaluate an SDR's ability to meet the requirements of registration and ongoing supervision. Failure to provide an opinion of counsel may be a basis for the Commission to deny an application for registration.

Request for Comment

The Commission requests comment on the following specific issues:

- Are the instructions in proposed Form SDR sufficiently clear? If not, identify any instructions that should be clarified and, if possible, offer alternatives.
- Are the Commission's proposed definitions of "affiliate," "non-resident security-based swap data repository," and "tag" appropriate and sufficiently clear? If not, why not and how should they be defined?
- Should the Commission implement an electronic filing system for receipt of Form SDR, and, if so, what particular features should be incorporated into the system?
- Do SDRs anticipate any burdens of filing Form SDR electronically that the Commission should consider?
- In the event that there is a delay in the full implementation of the Commission's electronic filing system for receiving Form SDR, should the Commission require each SDR to promptly re-file electronically Form SDR and any amendments to the form after the system is operational? If so, what would be a reasonable timeframe to allow such re-filing (*e.g.,* 30 days, 60 days)? Would the re-filing be unduly burdensome for SDRs?
- Which information in Form SDR, including exhibits, should be subject to the proposed data tagging requirements?
- Regarding the format of tagged data, as discussed in Section III.K.3 of this release, the Commission is proposing that an SDR's financial reports be submitted in eXtensible Business Reporting Language ("XBRL") format. Should the Commission require a specific format for tagging other information in proposed Form SDR (*e.g.,* financial information that is not a financial report as described in proposed Rule 13n–11(f), operational capability, access to services and data, and other policies and procedures)? If so, which format (*e.g.,* XML, XBRL) would be best suited to such information?
- Would it be useful for the Commission to provide any additional instructions or define any additional terms in proposed Form SDR? If so, what are they?
- Is the consent relating to notice and service of process on proposed Form SDR appropriate and sufficiently clear? If not, why not and what would be a better alternative to obtaining such consent?
- Are there other factors that the Commission should consider, in addition to an opinion of counsel, that address whether the Commission can legally, under applicable foreign law, obtain prompt access to an SDR's books and records and conduct onsite inspection or examination of the SDR?
- Are the representations that would be required to be made by the person who signs Form SDR appropriate and sufficiently clear? Should the Commission require any additional or alternative representations?
- Should the Commission require SDRs to provide information on persons who own ten percent or more of the SDR's stock or who may control or direct the management or policies of the SDR? Would a different ownership or control threshold be more appropriate? If so, why?
- Are the suggested timeframes of the business experience, qualifications, and disciplinary history of an SDR's designated CCOs, officers, directors, governors, and persons performing functions similar to any of the foregoing, and members of all standing committees appropriate? If not, what should the timeframes be?
- Should the suggested timeframe relating to any conviction or injunction of a type described in Exchange Act Sections 15(b)(4)(B) or (C) be ten years as proposed? If not, should it be longer, shorter, or indefinite? Should it be consistent with other forms (*e.g.,* Form BD) or with Section 15(b)(4)(B) itself?
- Is the financial information that the Commission is requesting on proposed Form SDR appropriate? If not, identify any items that are not appropriate, explain why, and, if possible, offer alternatives. For example, should the Commission request financial information of all affiliates of an SDR or only specific affiliates (*e.g.,* an SDR's parent company, an SDR's wholly-owned subsidiaries, entities in which an SDR has at least a 25% interest, entities that have at least a 25% interest in the SDR)?
- Is the information relating to an SDR's operational capability that the Commission is requesting on proposed Form SDR appropriate? If not, identify any items that are not appropriate, explain why, and, if possible, offer alternatives.
- Should the Commission require on Form SDR a narrative description of any interruption in an SDR's functions performed by automated facilities or systems that has lasted for more than thirty minutes within the preceding six months of filing Form SDR, including the date of each interruption, the cause and duration of each interruption, and the total number of interruptions that have lasted thirty minutes or less? If not, why not? Should the timeframes be longer or shorter? Would this request be necessary in light of the Commission's proposed Rule 13n–6(b)(3)'s requirement that an SDR notify the Commission in writing of material systems outages, as discussed further in Section III.F.1.c. of this release?
- Is the information relating to access to an SDR's services and data that the Commission is requesting on proposed Form SDR appropriate? If not, identify any items that are not appropriate, explain why, and, if possible, offer alternatives.
- Is the Commission's request for information on the specified policies and procedures of an SDR appropriate? If not, explain.
- Would any of the requested information on proposed Form SDR be difficult for an SDR to supply? If so, explain.
- Should the Commission require any additional information on proposed

[34] *See* Regulation SBSR Release, *supra* note 9.

Form SDR? If so, what information and why?

• Are there any items on proposed Form SDR that the Commission should not request? If so, which items and why?

• Under proposed Regulation SBSR, an SDR would be required to register with the Commission as a SIP on Form SIP.[35] Should the Commission combine Form SDR and Form SIP such that an SDR would register as an SDR and SIP using only one form? For example, should the Commission add item 28c from Form SIP to Form SDR? Are there other items from Form SIP that should be added to Form SDR that would help facilitate the registration process?

• Should the policies and procedures required under proposed Regulation SBSR be filed with the Commission as exhibits to Form SDR or attachments to a separate schedule to Form SDR?

• What is the likely impact of the Commission's proposed rule on the SBS market? Would the proposed rule potentially promote or impede the establishment of SDRs?

2. *Factors for Approval of Registration and Procedural Process for Review*

Proposed Rule 13n–1(c) would provide that within 90 days of the date of the filing of Form SDR (or within such longer period as to which the SDR consents), the Commission shall either grant the registration by order or institute proceedings to determine whether registration should be denied. The 90-day period would not begin to run until a complete Form SDR has been filed by an SDR with the Commission. Proceedings instituted pursuant to this proposed rule shall include notice of the grounds for denial under consideration and opportunity for hearing on the record and shall be concluded not later than 180 days after the date on which the application for registration is filed with the Commission under proposed Rule 13n–1(b).[36] At the conclusion of such proceedings, the Commission, by order, shall grant or deny such registration.[37] The Commission may extend the time for conclusion of such proceedings for up to 90 days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the SDR consents.[38]

The proposed rule would further provide that the Commission shall grant the registration of an SDR if the Commission finds that such SDR is so organized, and has the capacity, to be able to assure the prompt, accurate, and reliable performance of its functions as an SDR, comply with any applicable provision of the Federal securities laws and the rules and regulations thereunder, and carry out its functions in a manner consistent with the purposes of Exchange Act Section 13(n) and the rules and regulations thereunder.[39] The Commission shall deny the registration of an SDR if the Commission does not make any such finding.[40]

The Commission preliminarily believes that its proposed timeframes for reviewing applications for registration as an SDR are appropriate to allow the Commission staff sufficient time to ask questions and, as needed, to require amendments or changes to address legal or regulatory concerns before the Commission approves an application for registration. In addition, the registration provides a mechanism for an SDR to demonstrate that it can comply with the federal securities laws and the rules and regulations thereunder. The proposed procedural process for reviewing applications for registration as an SDR is consistent with the procedural process for reviewing applications of other registrants by the Commission (*e.g.,* SIPs, broker-dealers, nationally recognized statistical ratings organizations, national securities exchanges, registered securities associations, clearing agencies) although the timeframes for review vary.[41]

In order to form a more complete and informed basis on which to determine whether to grant, deny, or revoke an SDR's registration, the Commission is considering whether to adopt a requirement that an SDR file with the Commission, as a condition of registration or continued registration, a review relating to the SDR's operational capacity and ability to meet its regulatory obligations. The Commission could require such a review to be in the form of a report conducted by the SDR, an independent third party, or both. This review could be required as an exhibit to Form SDR at the time of registration or as an amendment to Form SDR at a later date (*e.g.,* one year after the registration becomes effective) to allow the review to evaluate the SDR's capabilities after some operational experience following registration.

Request for Comment

The Commission requests comment on the following specific issues:

• Is the Commission's proposed registration process appropriate and sufficiently clear? If not, why not and what would be a better alternative?

• Are the timeframes in the proposed registration process appropriate? If not, why not and what would be more appropriate timeframes?

• Are the proposed factors in determining whether the Commission should grant or deny an application for registration appropriate and sufficiently clear? If not, why not? Should the Commission take into consideration any other factors in determining whether to grant or deny an SDR's application for registration?

• If a non-resident SDR is registered as an SDR in a foreign jurisdiction, should the registration process for the non-resident SDR be any different than the Commission's proposed registration process? For example, should the registration process be more streamlined for such non-resident SDR? Should the process instead require more information from a non-resident SDR? What would be the reasons to provide for a different registration process or, on the other hand, to require a uniform process?

• Should the Commission consider any other factors relating to a non-resident SDR with respect to the Commission's registration rules or in general?

• What is the likely impact of the Commission's proposed rule on the SBS market? Would the proposed rule potentially promote or impede the establishment of SDRs?

• Should the Commission require an SDR to conduct or obtain a review relating to the SDR's operational capacity and ability to meet its regulatory obligations? If not, why not? If so, how should the Commission define the nature and scope of this review? Should the Commission identify a specific framework for SDRs or independent third parties to follow when conducting a review? If so, what would the critical components of the framework include? Are existing frameworks available that are suitable for this purpose and, if so, which ones would be considered appropriate? Should the review resemble a report, audit, or something else?

• Should the Commission require the SDR, an independent third party, or some other entity to conduct the review? What are examples of such a review? Should the Commission require a review on a case-by-case basis or for

[35] *See* Regulation SBSR Release (proposed Rule 909), *supra* note 9.

[36] Proposed Rule 13n–1(c).

[37] *Id.*

[38] *Id.*

[39] Proposed Rule 13n–1(c)(3).

[40] *Id.*

[41] *See* 15 U.S.C. 78k–1(b)(3), 78o(b), 78o–7(2), and 78s(a).

all SDRs? Should the Commission require that the review be filed with the Commission? If not, why not? If so, should it be required to be filed with the Commission as a condition of registration pursuant to proposed Rule 13n–1? If not, why not? When should the Commission require the filing of any review? Would conducting or obtaining a review, or filing such review with the Commission, impose impracticable burdens and costs on SDRs? Please explain the burdens and quantify the costs of such a review.

- If the Commission were to adopt a rule requiring a review by an independent third party, should the rule specify some minimum standard of review or the types of review that should be performed? If so, what should the standards be? Should there be minimum qualification standards for the independent third party? Are there any particular types of third party service providers that should not be permitted to conduct a review of an SDR?
- Should the Commission also require that an SDR certify the accuracy of the review and provide disclosure regarding the nature of the review, findings, and conclusions? To what extent should an SDR be permitted to rely on a third party that it hired to perform the review? Should the Commission condition the ability of an SDR to rely on a third party's review?
- Would a review by an independent third party be necessary in light of the CCO's annual compliance report or proposed Rule 13n–6, as discussed further below?

3. *Temporary Registration*

Proposed Rule 13n–1(d) would provide a method for SDRs to register temporarily with the Commission. Specifically, the Commission, upon the request of an SDR, may grant temporary registration of the SDR that shall expire on the earlier of: (1) The date that the Commission grants or denies registration of the SDR, or (2) the date that the Commission rescinds the temporary registration of the SDR.[42] The reasons that the Commission may rescind such temporary registration would be the same as those set forth in proposed Rule 13n–2(c), discussed below, for revoking or cancelling a registration of an SDR—*e.g.,* if the Commission finds that an SDR has made any false and misleading statements with respect to any material fact on its Form SDR, is no longer in existence, has ceased to do business in the capacity specified in its application for registration, or has violated or failed to comply with any provision of the federal securities laws or the rules or regulations thereunder. In addition, the Commission would expect that SDRs registered on a temporary registration basis demonstrate that they have the capacity and resources to comply with their regulatory obligations on an ongoing basis as their business evolves.

The proposed temporary registration would enable an SDR to comply with the Dodd-Frank Act upon its effective date (*i.e.,* the later of 360 days after the date of its enactment or 60 days after publication of the final rule implementing Exchange Act Section 13(n))[43] regardless of any unexpected contingencies that may arise in connection with the filing of Form SDR. The temporary registration would also allow the Commission to implement the registration requirements of the Dodd-Frank Act for SDRs while still giving the Commission sufficient time to review fully the application of an SDR after it becomes operational, but before granting a registration that is not limited in duration. An SDR that is temporarily registered with the Commission would be subject to Exchange Act Section 13(n) and the rules and regulations thereunder during the period in which the Commission is reviewing the SDR's application of registration.

Notwithstanding the potential for temporary registration, the Commission encourages each SDR to apply for registration as soon as possible, following the Commission's adoption of final Rules 13n–1 through 13n–11, to permit sufficient time for an SDR to answer any questions that the Commission staff may have and to provide additional information or documentation, if necessary. The Commission will review applications in the order in which they are received. Applications received close to the effective date of the SDR registration requirement may not be reviewed and approved by the effective date.

Request for Comment

The Commission requests comment on the following specific issues:

- Is the Commission's proposed rule regarding temporary registration appropriate? If not, why not? For example, should the temporary registration be time-limited (*e.g.,* eighteen months from the date the registration is made effective)?
- Is the Commission's proposed rule for temporary registration sufficiently clear? If not, how can it be clarified?
- What conditions should apply to the granting of a temporary registration? For example, should a temporary registration be granted provided that an SDR's completed Form SDR suggests that it can comply with Exchange Act Section 13(n) and the rules and regulations thereunder?
- Is it feasible for an SDR to comply with Exchange Act Section 13(n) and the rules thereunder upon the effective date of the final rules applicable to SDRs? If not, which requirement(s) would be difficult for an SDR to comply with upon the effective date? Should such requirement(s) be imposed on an incremental, phased-in approach? If so, what would be an appropriate timeframe for such requirement(s) to be met?
- Are there specific requirements that the Commission should consider not requiring an SDR to comply with during the temporary registration period for reasons other than feasibility? If so, what requirements and for what reasons?
- Are there any other reasons not specified in this release upon which a temporary registration should be denied or rescinded?
- What is the likely impact of the Commission's proposed rule on the SBS market? Would the proposed rule potentially promote or impede the establishment of SDRs?

4. Amendment on Form SDR

Under proposed Rule 13n–1(e), if any information reported in items 1 through 16, 25, and 44 of Form SDR or in any amendment thereto is or becomes inaccurate for any reason, whether before or after the registration has been granted, an SDR shall promptly file an amendment on Form SDR updating such information ("interim amendment"). Generally, an SDR would be required to file an amendment within 30 days from the time such information becomes inaccurate.

For example, a non-resident SDR should file an amendment promptly after any changes in the legal or regulatory framework that would impact its ability or the manner in which it provides the Commission with prompt access to its books and records or impacts the Commission's ability to inspect and examine the SDR onsite. The amendment should include a revised opinion of counsel describing how, as a matter of law, the SDR will continue to meet its obligations to provide the Commission with prompt access to the SDR's books and records and to be subject to the Commission's onsite inspection and examination under the new regulatory regime. As noted in Section III.A.1.a of this release, if a registered non-resident SDR

[42] Proposed Rule 13n–1(d).

[43] *See* Public Law 111–203, § 774.

becomes unable to comply with this requirement, because of legal or regulatory changes, or otherwise, then this may be a basis for the Commission to revoke the SDR's registration.

In addition to the proposed interim amendments, an SDR would be required to file an annual amendment on Form SDR, including all items subject to interim amendments, within 60 days after the end of its fiscal year.[44] Proposed Rule 13n–1(e) is consistent with the Commission's requirements for other registrants (*e.g.,* national securities exchanges, SIPs, broker-dealers) to file updated and annual amendments with the Commission.[45] The Commission believes that such amendments are important to obtain updated information on each SDR, which would assist the Commission in determining whether each SDR continues to be in compliance with the federal securities laws and the rules and regulations thereunder. Obtaining updated information would also assist the Commission in its inspection and examination of an SDR.

Request for Comment

The Commission requests comment on the following specific issues:

- Is the Commission's proposed rule for interim amendments on Form SDR appropriate and sufficiently clear? If not, why not and what would be a better alternative?
- Is the proposed timeframe to file an amendment on Form SDR appropriate? If not, should the timeframe be shorter or longer?
- Should an SDR be required to file an interim amendment for any other items on Form SDR other than items 1 through 16, 25, and 44? If so, which item(s) and why?
- Should any of the items 1 through 16, 25, and 44 not be required to be amended in the interim? If so, which item(s) and why?
- Should interim amendments be required under any other circumstances not specified?
- Is the Commission's proposed rule requiring SDRs to file annual amendments on Form SDR appropriate and sufficiently clear? If not, why not and what would be a better alternative?
- Is an annual filing requirement redundant, in light of the requirement to update promptly the form, or should the annual filing be sufficient to obviate the need for prompt updates?
- Is the proposed timeframe to file an annual amendment on Form SDR appropriate? If not, should the timeframe be shorter or longer? Should the Commission permit the SDR to request an extension to file an annual amendment on Form SDR (*e.g.,* due to substantial, undue hardship)?

5. Service of Process and Non-Resident SDRs

The Commission is proposing Rule 13n–1(f) to require each SDR to designate and authorize on Form SDR an agent in the United States, other than a Commission member, official, or employee, to accept any notice or service of process, pleadings, or other documents in any action or proceedings against the SDR to enforce the Federal securities laws and the rules and regulations thereunder. If an SDR appoints another agent to accept such notice or service of process, then the SDR would be required to file promptly an amendment on Form SDR updating this information.[46] Proposed Rule 13n–1(f) is intended to conserve the Commission's resources and to minimize any logistical obstacles (*e.g.,* locating defendants or respondents abroad) that the Commission may encounter when attempting to effect service. For instance, by prohibiting an SDR from designating a Commission member, official, or employee as its agent for service of process, the proposed rule would reduce a significant resource burden on the Commission, including resources to locate agents of registrants overseas and keep track of their whereabouts.

Proposed Rule 13n–1(g) would further require any non-resident SDR applying for registration pursuant to this rule to certify on Form SDR and provide an opinion of counsel that the SDR can, as a matter of law, provide the Commission with prompt access to the books and records of such SDR and that the SDR can, as a matter of law, submit to onsite inspection and examination by the Commission. For the reasons stated in Section III.A.1.a above, the Commission preliminarily believes that before granting registration to a non-resident SDR, it is appropriate to obtain assurance and an opinion of counsel that such person has taken the necessary steps to be in the position to provide legally the Commission with prompt access to the SDR's books and records and to be subject to onsite inspection and examination by the Commission.

Request for Comment

The Commission requests comment on the following specific issues:

- Is the Commission's proposed rule regarding service of process appropriate and sufficiently clear? If not, why not and what would be a better alternative?
- Should the Commission impose any minimum requirements on the agent whom a non-resident SDR designates to accept any notice or request for service of process?
- Are there any factors or alternatives that the Commission should take into consideration to ensure that there could be effective service of process on a non-resident SDR applying for registration as an SDR?
- Are there any factors that the Commission should take into consideration to ensure that a non-resident SDR seeking to register as an SDR can, in compliance with applicable foreign laws, provide the Commission with access to the SDR's books and records that are required pursuant to proposed Rule 13n–7(b), as discussed below, and submit to onsite inspection and examination by the Commission?
- Are any other documents or information necessary to establish a non-resident SDR's ability to comply with the federal securities laws and the rules and regulations thereunder?
- What is the likely impact of the Commission's proposed rule on the SBS market? Would the proposed rule potentially promote or impede the establishment of SDRs?

6. Definition of "Report"

Proposed Rule 13n–1(h) would provide that "[a]n application for registration or any amendment thereto that is filed pursuant to this [rule] shall be considered a 'report' filed with the Commission for purposes of Sections 18(a) and 32(a) of the [Exchange] Act and the rules and regulations thereunder and other applicable provisions of the United States Code and the rules and regulations thereunder." Exchange Act Sections 18(a) and 32(a) set forth the potential liability for a person who makes, or causes to be made, any false or misleading statement in any "report" filed with the Commission (*e.g.,* Form SDR).[47]

[44] Proposed Rule 13n–1(e).

[45] *See* Exchange Act Rules 6a–2 and 15b3–1, 17 CFR 240.6a–2 and 240.15b3–1, respectively. *See also* 17 CFR 249.1001, *supra* note 28.

[46] *See* proposed Rule 13n–1(e).

[47] Exchange Act Section 18(a) provides, in part, that "[a]ny person who shall make or cause to be made any statement in any * * * report * * * which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such

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B. Proposed Rule Regarding Withdrawal From Registration

Proposed Rule 13n–2(b) would permit a registered SDR to withdraw from registration by filing a notice of withdrawal with the Commission. An SDR would be required to designate on its notice of withdrawal a person associated with the SDR [48] to serve as the custodian of the SDR's books and records.[49] The purpose of this requirement is to ensure that the books and records of an SDR are maintained and available to the Commission and other regulators after the SDR withdraws from registration, and to assist the Commission in enforcing proposed Rules 13n–5(b)(7) and 13n–7(c), as discussed below.

Prior to filing a notice of withdrawal, an SDR would be required to file an amended Form SDR to update any inaccurate information.[50] If there is no inaccurate information to update, then an SDR should include a confirmation to that effect in its notice of withdrawal. The Commission anticipates developing an online filing system through which an SDR can file its notice of withdrawal. The information filed would be available on the Commission's website. The Commission preliminarily believes that filing a notice of withdrawal in an electronic format would be less burdensome and more efficient for both the SDRs and the Commission.

Proposed Rule 13n–2(c) would provide that a notice of withdrawal from registration filed by an SDR shall become effective for all matters (except as provided in Rule 13n–2(c)) on the 60th day after the filing thereof with the Commission, within such longer period of time as to which such SDR consents or which the Commission, by order, may determine as necessary or appropriate in the public interest or for the protection of investors, or within such shorter period of time as the Commission may determine. Proposed Rule 13n–2(d) would provide that a notice of withdrawal that is filed pursuant to this rule shall be considered a "report" filed with the Commission for purposes of Exchange Act Sections 18(a) and 32(a) and the rules and regulations thereunder and other applicable provisions of the United States Code and the rules and regulations thereunder.

Under proposed Rule 13n–2(e), if the Commission finds, on the record after notice and opportunity for hearing, that any registered SDR has obtained its registration by making any false and misleading statements with respect to any material fact or has violated or failed to comply with any provision of the federal securities laws and the rules and regulations thereunder, the Commission, by order, may revoke the registration. The proposed rule would further provide that pending final determination of whether any registration shall be revoked, the Commission, by order, may suspend such registration, if such suspension appears to the Commission, after notice and opportunity for hearing on the record, to be necessary or appropriate in the public interest or for the protection of investors.[51]

Finally, proposed Rule 13n–2(f) would provide that if the Commission finds that a registered SDR is no longer in existence or has ceased to do business in the capacity specified in its application for registration, the Commission, by order, may cancel the registration.

This proposed rule is similar to Exchange Act Rule 15b6–1, which relates to withdrawal from registration as a broker-dealer. The Commission believes that implicit in its authority to register an SDR is its authority to revoke or cancel such registration.

Request for Comment

The Commission requests comment on the following specific issues:

- Is the Commission's proposed rule regarding withdrawal from registration appropriate and sufficiently clear? If not, why not and what would be a better alternative?
- Are the proposed definitions of "person associated with a security-based swap data repository" and "control" appropriate and sufficiently clear? If not, why not and how should they be defined?
- Should the Commission require an SDR to designate on its notice of withdrawal a custodian of the SDR's books and records? If not, why not and what would be a better alternative?
- Are there any other instances not specified in this proposed rule in which the Commission should have the authority to revoke or cancel an SDR's registration?
- Is the proposed effective date of 60 days from the filing of the notice of withdrawal with the Commission appropriate? If not, would an earlier or later date be more appropriate?
- What is the likely impact of the Commission's proposed rule on the SBS market? Would the proposed rule potentially promote or impede the establishment of SDRs?

C. Proposed Rule Regarding Registration of Successor to Registered SDR

1. Succession by Application

Proposed Rule 13n–3 would govern the registration of a successor to a registered SDR. Because this proposed rule is substantially similar to Exchange Act Rule 15b1–3, which governs the registration of a successor to a registered broker-dealer, the Commission is proposing to incorporate the concepts that the Commission explained when it adopted amendments to Rule 15b1–3.[52]

Specifically, proposed Rule 13n–3(a) would provide that in the event that an SDR succeeds to and continues the business of an SDR registered pursuant to Exchange Act Section 13(n), the registration of the predecessor shall be deemed to remain effective as the registration of the successor if, within 30 days after such succession, the successor files an application for registration on Form SDR, and the predecessor files a notice of withdrawal from registration with the Commission. A successor would not be permitted to "lock in" the 30-day window period by submitting an application that is incomplete in material respects.

The proposed rule would further provide that the registration of the

statement was false or misleading." 15 U.S.C. 78r(a). Exchange Act Section 32(a) provides, in part, that "[a]ny person who willfully and knowingly makes, or causes to be made, any statement in any * * * report * * * which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $5,000,000, or imprisoned not more than 20 years, or both, except that when such person is a person other than a natural person, a fine not exceeding $25,000,000 may be imposed." 15 U.S.C. 78ff(a).

[48] The term "person associated with a security-based swap data repository" would be defined as (i) any partner, officer, or director of such SDR (or any person occupying a similar status or performing similar functions), (ii) any person directly or indirectly controlling, controlled by, or under common control with such SDR, or (iii) any employee of such SDR. Proposed Rule 13n–2(a)(2). The term "control" (including the terms "controlled by" and "under common control with") would be defined as the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise. Under the proposed rules, a person is presumed to control another person if the person: (i) Is a director, general partner, or officer exercising executive responsibility (or having similar status or functions); (ii) directly or indirectly has the right to vote 25 percent or more of a class of voting securities or has the power to sell or direct the sale of 25 percent or more of a class of voting securities; or (iii) in the case of a partnership, has the right to receive, upon dissolution, or has contributed, 25 percent or more of the capital. Proposed Rule 13n–2(a)(1).

[49] Proposed Rule 13n–2(b).

[50] *Id.*

[51] Proposed Rule 13n–2(e).

[52] *See* Registration of Successors to Broker-Dealers and Investment Advisers, Exchange Act Release No. 31661 (Dec. 28, 1992), 58 FR 7 (Jan. 4, 1993).

predecessor SDR shall cease to be effective 90 days after the application for registration on Form SDR is filed by the successor SDR.[53] In other words, the 90-day period would not begin to run until a complete Form SDR has been filed by the successor with the Commission. This 90-day period is consistent with proposed Rule 13n–1, pursuant to which the Commission would have 90 days to grant a registration or institute proceedings to determine if a registration should be denied.

The following are examples of the types of successions that would be required to be completed by filing an application: (1) An acquisition, through which an unregistered entity purchases or assumes substantially all of the assets and liabilities of the SDR and then operates the business of the SDR, (2) a consolidation of two or more registered entities, resulting in their conducting business through a new unregistered entity, which assumes substantially all of the assets and liabilities of the predecessor entities, and (3) dual successions, through which one registered entity subdivides its business into two or more new unregistered entities.

2. Succession by Amendment

Proposed Rule 13n–3(b) would further provide that notwithstanding Rule 13n–3(a), if an SDR succeeds to and continues the business of a registered predecessor SDR, and the succession is based solely on a change in the predecessor's date or state of incorporation, form of organization, or composition of a partnership, the successor may, within 30 days after the succession, amend the registration of the predecessor SDR on Form SDR to reflect these changes. Such amendment shall be deemed an application for registration filed by the predecessor and adopted by the successor. In all three types of successions, the predecessor must cease operating as an SDR. The Commission preliminarily believes that it is appropriate to allow a successor to file an amendment to the predecessor's Form SDR in these types of successions.

3. Scope and Applicability of Proposed Rule 13n–3

The purpose of proposed Rule 13n–3 is to enable a successor SDR to operate without an interruption of business by relying for a limited period of time on the registration of the predecessor SDR until the successor's own registration becomes effective. The proposed rule is intended to facilitate the legitimate transfer of business between two or more SDRs and to be used only where there is a direct and substantial business nexus between the predecessor and the successor SDR. The proposed rule would not allow a registered SDR to sell its registration, eliminate substantial liabilities, spin off personnel, or facilitate the transfer of the registration of a "shell" organization that does not conduct any business. No entity would be permitted to rely on proposed Rule 13n–3 unless it is acquiring or assuming substantially all of the assets and liabilities of the predecessor's SDR business.

Proposed Rule 13n–3 would not apply to reorganizations that involve only registered SDRs. In those situations, the registered SDRs need not use the rule because they can continue to rely on their existing registrations. The proposed rule would also not apply to situations in which the predecessor intends to continue to engage in SDR activities. Otherwise, confusion may result as to the identities and registration statuses of the parties.

Request for Comment

The Commission requests comment on the following specific issues:

- Is there a sufficient likelihood of successors to registered SDRs to warrant a successor rule?
- Is the Commission's proposed successor rule appropriate and sufficiently clear? If not, why not and what would be a better alternative?
- Are the 30-day and 90-day timeframes in the proposed successor rule appropriate? If not, what would be more appropriate timeframes and why?
- Are there any other instances not specified in the proposed rule in which a successor should be permitted to file an amendment to the predecessor's Form SDR for registration?
- Are there any reasons not to allow a successor to rely on its predecessor's registration by filing an amendment to the predecessor's Form SDR in the specified circumstances?
- What is the likely impact of the Commission's proposed rule on the SBS market? Would the proposed rule potentially promote or impede the establishment of SDRs?
- Are there any factors not specified that the Commission should consider with respect to this proposed successor rule?

D. Proposed Rule Regarding Duties and Core Principles of SDRs

Section 763(i) of the Dodd-Frank Act requires an SDR to comply with the requirements and core principles described in Exchange Act Section 13(n) as well as any requirement that the Commission prescribes by rule or regulation in order to be registered and maintain registration as an SDR with the Commission.[54] The Commission is proposing Rule 13n–4, which would implement the enumerated duties and core principles and establish additional requirements by rule.

In May 2010, the Committee on Payment and Settlement Systems ("CPSS") and the Technical Committee of the International Organization of Securities Commissions ("IOSCO") issued a consultative report that presented a set of factors for trade repositories in the OTC derivatives markets to consider in designing and operating their services ("CPSS–IOSCO consultative report").[55] The OTC Derivatives Regulators' Forum [56] ("ODRF") has also made general recommendations relating to the functionality of trade repositories. The Commission's proposed rules draw from recommendations made by CPSS–IOSCO and the ODRF.

1. Enumerated Duties

Under Exchange Act Sections 13(n)(2), 13(n)(5), and 13(n)(6), each SDR is required to:

(1) Subject itself to inspection and examination by the Commission;

(2) Accept data as prescribed by the Commission for each SBS; [57]

[53] Proposed Rule 13n–3(a).

[54] *See* Public Law 111–203, § 763(i). The legislation also authorizes the Commission to establish additional requirements for SDRs by rule or regulation.

[55] *See* Considerations for Trade Repositories in OTC Derivatives Markets, CPSS–IOSCO (May 2010) (*available at http://www.bis.org/press/p100512.htm*). CPSS is a forum for central banks to monitor and analyze developments in payment and settlement arrangements as well as in cross-border and multicurrency settlement schemes. *See* Press Release, CPSS–IOSCO, CPSS and IOSCO Consult on Policy Guidance for Central Counterparties and Trade Repositories in the OTC Derivatives Market (May 12, 2010) (*available at http://www.bis.org/press/p100512.htm*). IOSCO is an international policy forum for securities regulators. The objective of the Technical Committee, a specialized working group established by IOSCO's Executive Committee, is to review major regulatory issues related to international securities and futures transactions and to coordinate practical responses to these concerns. *See id.*

[56] The OTC Derivatives Regulators' Forum is comprised of international financial regulators, including central banks, banking supervisors, and market regulators, resolution authorities, and other governmental authorities that either have direct authority over OTC derivatives market infrastructure providers or major OTC derivatives market participants or that consider OTC derivative market matters more broadly. *See* OTC Derivatives Regulators' Forum Overview, *http://www.otcdrf.org/*.

[57] In a separate proposal, the Commission is proposing rules prescribing the data elements that an SDR is required to accept for each SBS in association with requirements under Section 763(i)

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(3) Confirm with both counterparties to the SBS the accuracy of the data that was submitted, as discussed further in Section III.E.2.a of this release;

(4) Maintain the data in such form, in such manner, and for such period as prescribed by the Commission, as discussed further in Section III.E.2 of this release;

(5) Provide direct electronic access to the Commission (or any designee of the Commission), including another registered entity;

(6) Provide such information in such form and at such frequency as the Commission may require to comply with requirements set forth in Exchange Act Section 13(m) and the rules and regulations thereunder; [58]

(7) At such time and in such manner as may be directed by the Commission, establish automated systems for monitoring, screening, and analyzing data;

(8) Maintain the privacy of any and all SBS transaction information that the SDR receives from an SBS dealer,[59] counterparty, or any registered entity, as discussed further in Section III.I of this release;

(9) On a confidential basis pursuant to Exchange Act Section 24 and the rules and regulations thereunder, upon request, and after notifying the Commission of the request, make available all data obtained by the SDR, including individual counterparty trade and position data, to the following:

(i) Each appropriate prudential regulator; [60]

(ii) The Financial Stability Oversight Council;

(iii) The CFTC;

(iv) The Department of Justice; and

(v) The FDIC [61] and any other person that the Commission determines to be appropriate, including, but not limited to—

(i) Foreign financial supervisors (including foreign futures authorities);

(ii) Foreign central banks; and

(iii) Foreign ministries.

(10) Before sharing information with any entity described in Exchange Act Section 13(n)(5)(G), obtain a written agreement from each entity stating that the entity shall abide by the confidentiality requirements described in Exchange Act Section 24 and the rules and regulations thereunder relating to the information on SBS transactions that is provided, and each entity shall agree to indemnify the SDR and the Commission for any expenses arising from litigation relating to the information provided under Exchange Act Section 24 and the rules and regulations thereunder ("indemnification provision"); and

(11) Designate a CCO who must comply with the duties set forth in Exchange Act Section 13(n)(6).

With respect to the SDR's duty to provide direct electronic access to the Commission or any designee of the Commission, the Commission is proposing to define "direct electronic access" to mean access, which shall be acceptable to the Commission, to data stored by an SDR in an electronic format and updated at the same time as the SDR's data is updated so as to provide the Commission or any of its designees with the ability to query or analyze the data in the same manner that the SDR can query or analyze the data.[62] The Commission may specify the form and manner in which an SDR provides direct electronic access. The Commission is considering different—and possibly multiple—ways in which an SDR may be required or permitted to provide direct electronic access, including, but not limited to, (1) a direct streaming of the data maintained by the SDR to the Commission or any of its designees, (2) a user interface that provides the Commission or any of its designees with direct access to the data maintained by the SDR and that provides the Commission or any of its designees with the ability to query or analyze the data in the same manner that is available to the SDR, or (3) another mechanism that provides a mirror copy of the data maintained by the SDR, which is in an electronic form that is downloadable by the Commission or any of its designees and is in a format that provides the ability to query or analyze the data in the same manner that is available to the SDR.

The Commission is not proposing in this release that an SDR establish automated systems for monitoring, screening, and analyzing SBS data. The Commission believes that a measured approach to addressing this provision of the Dodd-Frank Act is appropriate. The market infrastructure of the SBS market is in its infancy. The Dodd-Frank Act and the rules and regulations that the Commission will promulgate over the next year will direct further development and refinement of this market. As the infrastructure for the SBS market continues to develop and the Commission gains experience in regulating this market, the Commission will consider further steps to implement this statutory provision.[63]

With respect to an SDR's duty to notify the Commission when any entity described in Exchange Act Section 13(n)(5)(G) requests directly from the SDR access to data obtained by the SDR, the SDR must keep such notifications and any related requests confidential.[64] Failure by an SDR to treat such notifications and requests confidential could render ineffective or could have adverse effects on the underlying basis for the requests. If, for example, a regulatory use of the data is improperly disclosed, such disclosure could possibly signal a pending investigation or enforcement action, which could have detrimental effects.

With respect to the indemnification provision, the Commission understands that regulators may be legally prohibited or otherwise restricted from agreeing to indemnify third parties, including SDRs

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of the Dodd-Frank Act (adding Exchange Act Section 13(n)(4)(A) relating to standard setting and data identification). *See* Regulation SBSR Release (proposed Rule 901), *supra* note 9. Any comments regarding the data elements should be submitted in connection with that proposal.

[58] Exchange Act Section 13(m) pertains to the public availability of SBS data. *See* Public Law 111–203, § 763(i). In a separate proposal relating to implementation of Section 763(i) of the Dodd-Frank Act (adding Exchange Act Section 13(m)), the Commission is proposing rules that would impose various duties on SDRs in connection with the reporting and real-time public dissemination of SBS transaction information. *See* Regulation SBSR Release, *supra* note 9. Any comments regarding Exchange Act Section 13(m) should be submitted in connection with that proposal.

[59] Section 761 of the Dodd-Frank Act codified the term "security-based swap dealer" at Exchange Act Section 3(a)(71) to generally mean any person that holds itself out as a dealer in SBSs, makes a market in SBSs, regularly enters into SBSs with counterparties as an ordinary course of business for its own account, or engages in any activity causing it to be commonly known in the trade as a dealer or market maker in SBSs. *See* Public Law 111–203, § 761; *see also* Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act, Exchange Act Release No. 62717 (Aug. 13, 2010), 75 FR 51429 (Aug. 20, 2010).

[60] "Prudential regulator" is defined in Exchange Act Section 3(a)(74) to have the same meaning as in the CEA. See Public Law 111–203, § 761. The CEA identifies the Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation ("FDIC"), the Farm Credit Administration, and the Federal Housing Finance Agency as prudential regulators. *See* Public Law 111–203, § 721(a)(17) (adding Section 1a(39) of the CEA, 7 U.S.C. 1a(39)).

[61] Subject to the statutory requirements of Sections 13(n)(5)(G) and (H), the FDIC, for example, would have access to all data maintained by an SDR, including in connection with its resolution authority under Title II of the Dodd-Frank Act or the Federal Deposit Insurance Act and with respect to SBS data in the SDR related to all counterparties to SBS transactions.

[62] *See* proposed Rule 13n–4(a)(5).

[63] In a separate proposal relating to implementation of Section 763(i) of the Dodd-Frank Act (adding Exchange Act Section 13(n)(5)(E)), the Commission is considering proposing rules that would require SDRs to collect data related to monitoring the compliance and frequency of end-user clearing exemption claims. Any comments regarding the end-user clearing exemption proposed rules should be submitted in connection with that proposal.

[64] *See* Public Law 111–203, § 763(i) (adding Exchange Act Section 13(n)(5)(G)).

as well as the Commission. The indemnification provision could chill requests for access to data obtained by SDRs, thereby hindering the ability of others to fulfill their regulatory mandates and responsibilities. The Commission preliminarily believes that by having access to such data, however, regulators would be in a better position to, among other things, monitor risk exposures of individual counterparties to swap and SBS transactions, monitor concentrations of risk exposures, and evaluate systemic risks.[65] As such, the Commission expects that an SDR would not go beyond the minimum requirements of the statute so as not to preclude entities described in Exchange Act Section 13(n)(5)(G) from obtaining the data maintained by an SDR.

The Commission notes that, pursuant to Exchange Act Section 24 and Rule 24c–1 thereunder, the Commission may share nonpublic information[66] in its possession with, among others, "federal, state, local, or foreign government, or any political subdivision, authority, agency or instrumentality of such government * * * [or] a foreign financial regulatory authority." Pursuant to Exchange Act Section 21(a), the Commission also may assist a foreign securities authority in investigating whether any person has violated, is violating, or is about to violate any laws or rules relating to securities matters that the requesting authority administers or enforces.[67]

Request for Comment

The Commission requests comment on the following specific issues:

- Is the Commission's proposed rule incorporating the enumerated duties appropriate and sufficiently clear? If not, what would be a better alternative?
- Under Exchange Act Section 13(n)(2), an SDR shall be subject to inspection and examination by any representative of the Commission. Should the Commission specify in its rule or clarify when the Commission anticipates inspecting prospective or newly registered SDRs?
- Is the Commission's proposed definition of "direct electronic access" appropriate and sufficiently clear? If not, how can the Commission clarify this definition?
- What are the advantages and disadvantages of requiring SDRs to provide a direct streaming of data to the Commission or its designee? Should the Commission require periodic electronic transfer of data as an alternative? If so, how often should such transfer occur (*e.g.,* hourly, a few times a day, every few days, once a week)?
- What are the advantages and disadvantages of requiring SDRs to provide a user interface that provides the Commission or any of its designees access to the data maintained by the SDR and that provides the Commission or its designee with the ability to query or analyze the data in the same manner that is available to the SDR?
- What are the advantages and disadvantages of requiring SDRs to provide a mirror copy of its data, which is in an electronic form that is downloadable and is in a format that provides the ability to query or analyze the data in the same manner that is available to the SDR?
- What would be the most feasible and cost-effective method for an SDR to provide direct electronic access to the Commission or its designee?
- Are there other methods of providing direct electronic access to the Commission or its designee that the Commission should consider?
- Are there any other factors that the Commission should take into consideration when requiring SDRs to provide the Commission or its designee with direct electronic access?
- What would be the advantages and disadvantages of the Commission appointing as its designee for direct electronic access another registered SDR, to which SDRs would grant direct electronic access and which would consolidate the data that would then be provided to the Commission?
- Are there specific reports or sets of data that the Commission should consider obtaining from SDRs to monitor risk exposures of individual counterparties to SBS transactions, to monitor concentrations of risk exposures, or for other purposes that would help encourage the transparency and open trading of SBSs?
- In addition to the data already subject to the Commission's request,[68] are there additional reports or sets of data that the Commission should consider obtaining from SDRs to evaluate systemic risk or that could be used for prudential supervision?
- Are there any other reports or sets of data that the Commission should consider obtaining from SDRs?
- Should the Commission require SDRs to establish automated systems for monitoring, screening, and analyzing SBS data or provide the data for the Commission to perform these functions? Should the Commission require SDRs to monitor, screen, and analyze all SBS data in their possession in such a manner as the Commission may require, including in connection with *ad hoc* requests by the Commission?
- Besides the FDIC, should the Commission specify in its rules any other appropriate person to have access to all data maintained by an SDR (*e.g.,* the Federal Reserve Bank of New York)?
- Are there alternative ways that the Commission could address the indemnification provision while being consistent with Exchange Act Section 13(n)(5)(H)?
- Should the Commission provide in its rules specific indemnification language that an SDR would be required to use when requesting indemnification from entities described in Exchange Act Section 13(n)(5)(G)? If so, what indemnification language would address the requirements of the statute and the needs of information users?
- Alternatively, should the Commission explicitly require that the indemnification agreement be fair and not unreasonably discriminatory so as not to preclude entities described in Exchange Act Section 13(n)(5)(G) from obtaining the data maintained by an SDR?
- Should the Commission limit the amount of indemnification to an SDR and the Commission? If so, what should the limit be? For example, should it be limited to only reasonable litigation expenses (and not any damages) in order to facilitate the ability of entities

[65] *See* Duffie *et al., supra* note 13 (Regulators can "explore the sizes and depths of the markets, as well as the nature of the products being traded. With this information, regulators are better able to identify and control risky market practices, and are better positioned to anticipate large market movements.").

[66] Under Rule 24c–1, the term "nonpublic information" means "records, as defined in Section 24(a) of the [Exchange] Act, and other information in the Commission's possession, which are not available for public inspection and copying." 17 CFR 240.24c–1.

[67] Exchange Act Section 21(a)(2) provides: "On request from a foreign securities authority, the Commission may provide assistance in accordance with this paragraph if the requesting authority states that the requesting authority is conducting an investigation which it deems necessary to determine whether any person has violated, is violating, or is about to violate any laws or rules relating to securities matters that the requesting authority administers or enforces. The Commission may, in its discretion, conduct such investigation as the Commission deems necessary to collect information and evidence pertinent to the request for assistance. Such assistance may be provided without regard to whether the facts stated in the request would also constitute a violation of the laws of the United States. In deciding whether to provide such assistance, the Commission shall consider whether (A) the requesting authority has agreed to provide reciprocal assistance in securities matters to the Commission; and (B) compliance with the request would prejudice the public interest of the United States." 15 U.S.C. 78u(a)(2). Exchange Act Section 3(a)(50) defines "foreign securities authority" to mean "any foreign government, or any governmental body or regulatory organization empowered by a foreign government to administer or enforce its laws as they relate to securities matter." 15 U.S.C. 78c(a)(50).

[68] *See* Regulation SBSR Release, *supra* note 9.

described in Exchange Act Section 13(n)(5)(G) to obtain data maintained by an SDR?

• Should the Commission impose any additional duties on SDRs? For example, should SDRs be required to provide downstream processing services or ancillary services (*e.g.,* managing life cycle events and asset servicing)?

• Should any additional duties imposed on SDRs depend on the asset class of SBSs that the SDR is collecting and maintaining? If so, clarify.

• What is the likely impact of the Commission's proposed rule on the SBS market? Would the proposed rule potentially promote or impede the establishment of SDRs?

• With respect to entities that currently perform repository services for SBSs or other instruments, how do current practices compare to the practices that the Commission proposes to require in this rule? What are the incremental costs to potential SDRs in connection with adding to or revising their current practices in order to implement the Commission's proposed rule?

• How might the evolution of the SBS market over time affect SDRs or impact the Commission's proposed rule?

2. Implementation of Core Principles

Each SDR is required, under Exchange Act Section 13(n)(7), to comply with core principles relating to (1) market access to services and data, (2) governance arrangements, and (3) conflicts of interest. Specifically, unless necessary or appropriate to achieve the purposes of the Exchange Act and the rules and regulations thereunder, an SDR[69] is prohibited from adopting any policies and procedures or taking any action that results in any unreasonable restraint of trade or imposing any material anticompetitive burden on the trading, clearing, or reporting of transactions. In addition, each SDR must establish governance arrangements that are transparent to fulfill the public interest requirements under the Exchange Act and the rules and regulations thereunder; to carry out functions consistent with the Exchange Act, the rules and regulations thereunder, and the purposes of the Exchange Act; and to support the objectives of the federal government, owners of the SDR, and market participants. Moreover, each SDR must establish and enforce written policies and procedures reasonably designed to minimize conflicts of interest in the SDR's decision-making process and to establish a process for resolving any such conflicts of interest. Proposed Rule 13n–4(c) incorporates and implements these three core principles.

a. First Core Principle: Market Access to Services and Data[70]

In implementing the first core principle, the Commission is proposing rules that are intended to protect investors and to maintain a fair, orderly, and efficient SBS market. These proposed rules would protect investors by, for example, fostering transparency in the services that an SDR provides and its pricing for such services as well as promoting competition in the SBS market. As discussed more fully below, when administering these rules, the Commission would generally expect to apply the principles and procedures it has developed in other areas in which it monitors analogous services, such as clearing agencies.

First, proposed Rule 13n–4(c)(1)(i) would require each SDR to ensure that any dues, fees, or other charges it imposes, and any discounts or rebates it offers, are fair and reasonable and not unreasonably discriminatory.[71] Such dues, fees, other charges, discounts, or rebates shall be applied consistently across all similarly situated users of the SDR's services, including, but not limited to, market participants,[72] market infrastructures (including central counterparties), venues from which data can be submitted to the SDR (including exchanges, SB SEFs, electronic trading venues, and matching and confirmation platforms), and third party service providers.

The terms "fair" and "reasonable" often need standards to guide their application in practice. One factor commonly taken into consideration to evaluate the fairness and reasonableness of fees, particularly those of a monopolistic provider of a service, is the cost incurred to provide the service.[73] The Commission does not, however, intend to establish fees or rates, or to dictate formulas by which fees or rates are determined. Based on our experience with other registrants, the Commission would need to take a flexible approach and evaluate the fairness and reasonableness of an SDR's charges on a case-by-case basis. The Commission recognizes that there may be instances in which an SDR would charge different users different prices for the same or similar services. Such differences, however, cannot be unreasonably discriminatory. For example, if an SDR's policies and procedures provide that it may accept an electronic confirmation as reasonable documentation that the data submitted by both counterparties to an SBS is accurate, then an SDR may charge a smaller fee to a market participant that is expected to send a large volume of data that is all electronically confirmed. If, on the other hand, an SDR requires greater resources to contact a counterparty to reasonably satisfy itself that the data that was submitted to the SDR is accurate, then higher fees may be appropriate. The Commission preliminarily believes that an SDR should make reasonable accommodations, including consideration of any cost burdens, on a non-reporting counterparty of an SBS transaction in connection with any follow-up by the SDR regarding the accuracy of the SBS transaction data.

Second, proposed Rule 13n–4(c)(1)(ii) would require each SDR to permit market participants to access specific services offered by the SDR separately. Although an SDR would be allowed to bundle its services, including any ancillary services, this proposed rule would require the SDR to also provide market participants with the option of using its services separately.[74] For instance, if an SDR or its affiliate

[69] Although Exchange Act Section 13(n)(7)(A) refers to "swap data repository," the Commission believes that the Congress intended it to refer to "security-based swap data repository."

[70] The Dodd-Frank Act refers to the first core principle as "antitrust considerations," which the Commission believes include market access to services offered by and data maintained by SDRs. *See* Public Law 111–203, § 763(i).

[71] The Exchange Act applies a similar standard for other registrants. *See, e.g.,* Exchange Act Section 6(b)(4) ("The rules of the exchange [shall] provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities"); Exchange Act Section 17A(b)(3)(D) ("The rules of the clearing agency [shall] provide for the equitable allocation of reasonable dues, fees and other charges among its participants"); *see also* Exchange Act Sections 11A(c)(1)(C) and (D) (providing that the Commission may prescribe rules to assure that all SIPs may, "for purposes of distribution and publication, obtain on fair and reasonable terms such information" and to assure that "all other persons may obtain on terms which are not unreasonably discriminatory" the transaction information published or distributed by SIPs).

[72] The term "market participant" would be defined as any person participating in the SBS market, including, but not limited to, SBS dealers, major SBS participants, and any other counterparties to an SBS transaction. Proposed Rule 13n–4(a)(7).

[73] *See* Regulation of Market Information Fees and Revenues, Exchange Act Release No. 42208 (Dec. 17, 1999).

[74] *See also* CPSS–IOSCO, *supra* note 55 ("To the extent a [trade repository] provides complementary post-trade processing services, these should be available independently from its recordkeeping function so that users can selectively utilise the services they require from the suite of services a [trade repository] may offer.").

provides an ancillary matching and confirmation service, then the SDR would be prohibited from requiring a market participant to use and pay for that matching and confirmation service as a condition of using the SDR's data collection service. In evaluating the fairness and reasonableness of fees that an SDR charges for bundled and unbundled services, the Commission would take into consideration the cost to the SDR of making those services available on a bundled or unbundled basis, as the case may be.

Third, proposed Rule 13n–4(c)(1)(iii) would require each SDR to establish, monitor on an ongoing basis, and enforce clearly stated objective criteria that would permit fair, open, and not unreasonably discriminatory access to services offered and data maintained by the SDR as well as fair, open, and not unreasonably discriminatory participation by market participants, market infrastructures, venues from which data can be submitted to the SDR, and third party service providers that seek to connect to or link with the SDR. The Commission is concerned, among other things, that an SDR, controlled or influenced by a market participant, may limit the level of access to the services offered or data maintained by the SDR as a means to impede competition from other market participants or third party service providers. To satisfy the requirements of this proposed rule, an SDR should seek to ensure that its practices and procedures do not stifle innovation and competition in the provision of post-trade processing services. The Commission concurs with the CPSS–IOSCO consultative report's recommendation that "[r]equirements that limit access and participation on grounds other than risks should be avoided" and that "[d]enials of access should only be based on risk-related criteria" [75] (*e.g.,* risks related to the security or functioning of the SDR). Moreover, "[m]arket infrastructures and service providers that may or may not offer potentially competing services should not be subject to anti-competitive practices such as product tying, contracts with non-compete and/or exclusivity clauses, overly restrictive terms of use and anti-competitive price discrimination." [76]

Finally, proposed Rule 13n–4(c)(1)(iv) would require each SDR to establish, maintain, and enforce written policies and procedures reasonably designed to review any prohibition or limitation of any person with respect to access to services offered, directly or indirectly, or data maintained by the SDR and to grant such person access to such services or data if such person has been discriminated against unfairly. The Commission preliminarily believes that for any such policies and procedures to be reasonable, at a minimum, those involved in the decision-making process of prohibiting or limiting a person from access to an SDR's services or data cannot be involved in the review of whether the prohibition or limitation was appropriate. Otherwise, the purpose of the review process would be undermined. An SDR should consider whether its internal review process is best delegated to the SDR's board of directors, a body performing a function similar to the board of directors (collectively, "board"), or an executive committee.

Request for Comment

The Commission requests comment on the following specific issues:

- Are the Commission's proposed rules implementing the first core principle appropriate and sufficiently clear? If not, why not and what would be better alternatives?
- Is the Commission's proposed definition of "market participant" appropriate? If not, is it over-inclusive or under-inclusive and how should it be defined?
- Would the proposed rules relating to fees provide sufficient flexibility to SDRs such that they can operate in a commercially viable manner?
- Besides an SDR's costs of providing its services, what other factors should the Commission consider in determining whether the SDR's fees, dues, other charges, rebates, or discounts for such services are fair and reasonable?
- Are there circumstances in which it would be fair or reasonable for an SDR to charge a reporting or non-reporting counterparty to an SBS a fee or require that a counterparty invest in certain technologies to satisfy the SDR that the SBS data submitted to the SDR is accurate? Under what circumstances and for what purposes might allowing SDRs to charge higher fees or requiring counterparties to invest in certain technologies be appropriate?
- Is the Commission's proposed rule requiring an SDR's fees to be fair, reasonable, and non-discriminatory appropriate and sufficiently clear? If not, why not and what would be a better alternative?
- Are there circumstances in which it would be fair and reasonable for an SDR to charge a counterparty to an SBS a fee to satisfy itself that the SBS data submitted to the SDR by the other counterparty to the SBS is accurate?
- In what instances would an SDR differentiate among its users with respect to fees, dues, other charges, discounts, and rebates? Should any of those instances be explicitly prohibited or restricted?
- Are there any other requirements that the Commission should impose on an SDR that would promote competition?
- Is the Commission's proposed rule requiring an SDR to permit market participants to access specific SDR services separately appropriate and sufficiently clear? If not, why not?
- Are there instances in which permitting an SDR to offer bundled services that are not provided separately would be better for market participants or the SBS market as a whole? For example, would bundling certain services improve data quality or promote efficiency? If so, what services should be permitted to be bundled?
- Are there any other factors not mentioned that the Commission should take into consideration with respect to requiring the unbundling of services and fees?
- Should the Commission require an SDR to notify the Commission about the outcome of the SDR's internal review of any prohibition or limitation of access to its services or data? If so, should the Commission specify a timeframe in which an SDR must notify the Commission? What should the timeframe be?
- Are the Commission's proposed rules regarding an SDR's criteria relating to access to services and data and participation appropriate and sufficiently clear? If not, why not and what would be a better alternative?
- Should the Commission prescribe specific criteria for fair, open, and not unreasonably discriminatory access and participation? If so, what should the criteria be?
- In what instances (besides risk-related reasons) would it be reasonable for an SDR to deny access to its services and data?
- Is the Commission's proposed rule requiring an SDR to review its denials of access appropriate and sufficiently clear? If not, why not and what would be a better alternative?
- Are there any measures that the Commission can require that would result in a more meaningful internal review process? For example, should the Commission explicitly require that the board review all denials of access? If so, within what timeframe should the review be completed?

[75] *See* CPSS–IOSCO, *supra* note 55.

[76] *Id.*

• Should the Commission require an SDR to promptly file notice with the Commission if the SDR, in its capacity as an SDR rather than a SIP, prohibits or limits any person's access to services offered or data maintained by the SDR? If not, why not and what would be a better approach?

• What is the likely impact of the Commission's proposed rule on the SBS market? Would the proposed rule potentially promote or impede the establishment of SDRs?

• With respect to entities that currently perform repository services for SBSs or other instruments, how do current practices compare to the practices that the Commission proposes to require in this rule? What are the incremental costs to potential SDRs in connection with adding to or revising their current practices in order to implement the Commission's proposed rule?

• How might the evolution of the SBS market over time affect SDRs or impact the Commission's proposed rule?

• What is the likely impact of the Commission's proposed rule on the development and use of different technologies for reporting SBS transaction information to SDRs and for accessing the services offered and data maintained by SDRs?

b. Second Core Principle: Governance Arrangements

To implement the second core principle, proposed Rule 13n-4(c)(2) would require each SDR to establish governance arrangements that are well defined and include a clear organizational structure with effective internal controls. The proposed rule would also require an SDR's governance arrangements to provide for fair representation of market participants.[77] This requirement is similar to requirements imposed on exchanges.[78] Additionally, an SDR would be required to provide representatives of market participants, including end-users,[79] who are on the board with the opportunity to participate in the process for nominating directors and with the right to petition for alternative candidates.[80] The Commission notes that directors of an SDR owe a fiduciary duty to the SDR and all of its shareholders, and that the board as a whole is ultimately responsible for overseeing the SDR's compliance with the SDR's statutory obligations.

The proposed rule would further require each SDR to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the SDR's senior management and each member of the board or committee that has the authority to act on behalf of the board possess requisite skills and expertise to fulfill their responsibilities in the management and governance of the SDR, to have a clear understanding of their responsibilities, and to exercise sound judgment about the SDR's affairs.[81] This proposed requirement is based on a recommendation in the CPSS–IOSCO consultative report.[82] Given an SDR's unique role in an SBS market, the Commission preliminarily believes that it is particularly important that those who are managing and overseeing an SDR's activities are qualified to do so. An SDR's failure to comply with its statutory obligations, for example, could impact the SBS market as a whole.

As part of its consideration of governance issues as they pertain to SDRs, the Commission is considering whether potential conflicts between commercial incentives of owners of an SDR and statutory objectives would warrant prescriptive rules relating to governance, particularly in light of the Commission's general oversight authority and the other specific rules proposed in this release intended to minimize conflicts and ensure that SDRs meet core principles.[83] As discussed further below, the owners of an SDR may have an interest in maximizing the potential commercial value of the information reported to the SDR, which depends on the extent to which the SDR and its affiliates are permitted to use such information for commercial purposes. The Commission is not at this time proposing to preclude an SDR or its affiliates from making commercial use of the transaction data, *e.g.,* by developing analytical reports or tools that are derived from aggregate transaction reports. This commercial interest may conflict with the statutory objective of protecting data privacy and providing for fair and open access to the data maintained by the SDR. For example, an SDR might attempt to restrict access to parties who would seek to use the data for their own commercial purposes.

In order to address this issue, the Commission could choose to prescribe minimum requirements pertaining to board composition or impose ownership restrictions. For example, the Commission could require each SDR to establish a governance arrangement with a certain percentage of independent directors[84] (*e.g.,* majority of independent directors, 35% independent directors) on its board and any committee that has the delegated authority to act on behalf of the board so as not to undermine the effect of the former requirement. The Commission could also require each SDR to establish a nominating committee that is composed of a certain percentage of independent directors (*e.g.,* majority or solely composed of independent directors). Additionally, the Commission could require each SDR to establish governance arrangements that would restrict any SDR participant and its related persons or any person and its related persons[85] from (1) beneficially owning,[86] directly or indirectly, any

[77] Proposed Rule 13n-4(c)(2)(ii).

[78] Exchange Act Section 6(b)(3) requires that the rules of an exchange assure a fair representation of its members in the selection of its directors and administration of its affairs, and must provide that one or more directors be representative of issuers and investors and not be associated with a member of the exchange, broker, or dealer. *See* 15 U.S.C. 78f(b)(3).

[79] The term "end-user" would be defined as any counterparty that is described in Exchange Act Section 3C(g)(1) and the rules and regulations thereunder. Proposed Rule 13n-4(a)(6).

[80] Proposed Rule 13n–4(c)(2)(iii).

[81] Proposed Rule 13–4(c)(2)(iv).

[82] *See* CPSS–IOSCO, *supra* note 55.

[83] *See, e.g.,* proposed Rule 13n-4(c)(1) (implementing core principle relating to market access to SDRs' services and data), *supra* Section III.D.2.a; proposed Rule 13n-4(c)(3) (implementing core principle relating to conflicts of interest), *infra* Section III.D.2.c; and proposed Rule 13n-5 (requiring an SDR to accept all SBSs in a given asset class if it accepts any SBS in that asset class), *infra* Section III.E.2.a. *See also* Item 32 of proposed Form SDR (requiring disclosure of instances in which an SDR has prohibited or limited a person with respect to access to the SDR's services or data).

[84] The term "independent director" may generally be defined as a director who has no material relationship with the SDR, any affiliate of the SDR, an SDR participant, or any affiliate of an SDR participant. The term "material relationship" may be defined as a relationship, whether compensatory or otherwise, that reasonably could affect the independent judgment or decision-making of the director. The term "participant" when used with respect to an SDR may be defined as any person who uses an SDR's services. Such term would not include a person whose only use of an SDR is through another person who is a participant.

[85] The term "related person" may be defined as (i) any affiliate of an SDR participant; (ii) any person associated with an SDR participant; (iii) any immediate family member of an SDR participant who is a natural person, or any immediate family member of the spouse of such person, who, in each case, has the same home as the SDR participant, or who is a director or officer of the SDR, or any of its parents or subsidiaries; or (iv) any immediate family member of a person associated with an SDR participant who is a natural person, or any immediate family member of the spouse of such person, who, in each case, has the same home as the person associated with the SDR participant or who is a director or officer of the SDR, or any of its parents or subsidiaries. The term "immediate family member" may be defined as a person's spouse, parents, children, and siblings, whether by blood, marriage, or adoption, or anyone residing in such person's home.

[86] The term "beneficial ownership" (including the terms "beneficially owns" or any variation thereof)

interest in the SDR that exceeds a certain percentage (*e.g.,* 20 percent for any SDR participant and its related persons, 40 percent for any person and its related persons) of any class of securities, or other ownership interest, entitled to vote of such SDR, or (2) directly or indirectly voting, causing the voting of, or giving any consent or proxy with respect to the voting of, any interest in the SDR that exceeds a certain percentage (*e.g.,* 20 percent) of the voting power of any class of securities or other ownership interest of such SDR. The Commission recently has proposed similar requirements for SBS clearing agencies and SB SEFs, which pose a different set of competing interests.[87]

Request for Comment

- Should the Commission's proposed rule regarding fair representation of market participants include fair representation of others (*e.g.,* public representation)? What are the advantages and disadvantages of including others?
- What requirements, if any, should be in place with respect to the duties owed by the board to mitigate tensions between commercial interests and statutory goals? What types of tensions might exist and how do they compare in severity and consequences to those that exist in clearing agencies or exchanges?
- Is the proposed definition of "end-user" appropriate and sufficiently clear? If not, why not and how should it be defined?
- Should end-users or any other group be given guaranteed rights of participation in an SDR's governance? Alternatively, should the Commission require an SDR to establish governance arrangements whereby certain market participants, including end-users, may consult with the board on matters of concern?
- Is requiring an SDR's management to meet certain minimum standards appropriate? If not, what would be a better alternative?
- Is requiring the members of an SDR's board or committee(s) to meet certain minimum standards appropriate? Does the answer depend upon whether the Commission requires that a certain percentage of the SDR's board be independent? If so, in what way? Would minimum standards have a significant effect on the experience and efficiency of an SDR's board?
- What is the likely impact of the Commission's proposed rule on the SBS market? Would the proposed rule encourage or impede competition and the establishment of a greater number of SDRs?
- With respect to entities that currently perform repository services for SBSs or other instruments, how do current practices compare with the practices that the Commission proposes to require in this rule? What are the incremental costs to potential SDRs in connection with adding to or revising their current practices in order to implement the Commission's proposed rule?
- How might the evolution of the SBS market over time affect SDRs or impact the Commission's proposed rule?
- Should the Commission require an SDR to have independent directors on its board and board committees? If not, why not and what would be a better alternative to improve governance and mitigate any tensions between commercial interests and statutory goals? If so, what should be the required composition of the board and each board committee? How should the terms "independent director" and "related person" be defined? Should the Commission rely on definitions from existing rules (*e.g.,* Exchange Act Rule 10A–3(b)(1)(ii)(A) or Instruction 1 to Item 404(a) of Regulation S–K)?
- Would requiring the board and each board committee to be composed of at least 35% independent directors improve governance of the SDR or effectively address concerns pertaining to conflicting interests of SDR owners? What potential benefits or drawbacks might result from requiring at least 35% of an SDR's board and each board committee to be independent directors? Would 35% be sufficient to give independent directors a meaningful voice within the board and board committees? If not, would a higher or lower level be appropriate?
- Should the Commission require that a majority of an SDR's board and each board committee be independent directors? What potential benefits or drawbacks might result from such a requirement? Would a majority independent board be likely to enhance an SDR's management of any tensions between commercial interests and statutory goals or to enhance its compliance with the proposed rules? Would a majority independent board be necessary to ensure that an SDR appropriately manages any tensions between commercial interests and statutory goals?
- Should there be a minimum requirement on the number of independent directors on the board or each board committee? If so, what should the minimum requirement be and why? For example, would a minimum requirement of two independent directors be sufficient?
- How are independent directors likely to affect the activities of the SDR? What are their incentives to assure open and fair access to the services offered and data maintained by the SDR? Do independent directors have any conflicts of interest that would affect their ability to facilitate this objective?
- Would participant owners of an SDR be able to exercise undue influence over an SDR even if at least 35% of the board consists of independent directors? Would the requirement of at least 35% independent board effectively insulate an SDR from undue influence by its participant owners?
- Would participant owners of an SDR be able to exercise undue influence over an SDR even if the majority of the board consists of independent directors? Would the requirement of a majority independent board effectively insulate an SDR from undue influence by its participant owners?
- Should the Commission require each SDR to establish a nominating committee? If not, why not and what would be a better approach? If so, what should be the required composition of the nominating committee? Would 51 percent, 100 percent, or some other percentage be sufficient to avoid undue influence by participants? What is the potential impact of requiring the nominating committee to be composed of a majority of independent directors? What is the potential impact of requiring the nominating committee to be solely composed of independent directors? What is the likely impact of requiring the nominating committee to be composed of another percentage of independent directors? Should the Commission require that all or a majority of the nominating committee be independent even if it does not establish requirements for independent directors on an SDR's board? Why or why not? What are the benefits or drawbacks of composition requirements directed specifically to an SDR's nominating committee?
- Should the Commission require an SDR to establish any other committee? If so, what would be the responsibilities of such committee?

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may have the same meaning, with respect to any security or other ownership interest, as set forth in Exchange Act Rule 13d-3(a), as if such security or other ownership interest were a voting equity security registered under Exchange Act Section 12; provided that to the extent any person is a member of a group within the meaning of Exchange Act Section 13(d)(3), such person shall not be deemed to beneficially own such security or other ownership interest for purposes of this section, unless such person has the power to direct the vote of such security or other ownership interest.

[87] *See* Exchange Act Release No. 63107 (Oct. 14, 2010), 75 FR 65882 (Oct. 26, 2010).

• Should the Commission impose any ownership and voting limitations on SDR participants and others? If not, why not and what would be a better alternative to minimize any tensions between commercial interests and statutory goals? If so, what should the required ownership and voting limitations be? For example, would 20% ownership and voting limitations on an SDR participant and its related persons be sufficient to limit the ability of a market participant or a group of participants from exercising undue influence or control over the governance of the SDR? Should the 20% limitations be higher or lower given the existing concentration of the industry in a small number of large dealers? Would a 40% ownership limitation for any person and its related persons be sufficient to limit anyone from exercising undue influence or control over the governance of the SDR? Should the 40% ownership limitation be higher or lower given the existing concentration of the industry in a small number of large dealers?

• Would requirements related to the governance arrangements (*i.e.,* independent directors, nominating committee) of an SDR be more or less effective than ownership or voting limitations at addressing any tensions between commercial interests and statutory goals? Could restrictions regarding the governance arrangements of an SDR, on their own, be sufficient to effectively address concerns pertaining to undue influence (assuming that such restrictions are necessary for this purpose)? Would it be appropriate or necessary to require both governance arrangements and ownership or voting limitations in order to effectively address these concerns?

• If the Commission were to require ownership and voting interest limitations, should the Commission permit an SDR's board to waive the limitations for a person who is not an SDR participant and its related persons provided that certain conditions are met? If so, under what conditions (*e.g.,* waiver is consistent with the SDR's statutory obligations, waiver would not impair the Commission's ability to enforce the Federal securities laws and the rules and regulations thereunder, such person and its related persons can comply with the Federal securities laws and the rules and regulations thereunder, such person and its related persons irrevocably submit to the jurisdiction of the United States federal courts and Commission, such person's books and records related to an SDR's activities would be subject at all times to the Commission's inspection and examination, the Commission would have access to such person's books and records at all times)? Should the waiver be subject to the Commission's review?

• If the Commission were to impose ownership and voting interest limitations, should limitations be phased in for SDRs to provide a grace period for those entities that would not meet the limits at the outset, but that could potentially meet them at a later date, *e.g.,* one year after the registration of an SDR with the Commission?

• If the Commission were to impose ownership and voting interest limitations, should the Commission specifically require remediation by any SDR when any person and its related persons exceed the ownership or voting limitations? For example, should the Commission explicitly require that an SDR's policies and procedures provide a mechanism to divest any interest owned or not give effect to any voting interest held by any person and its related persons in excess of the proposed limitations?

• Are there other methods for mitigating any tensions between commercial interests and statutory goals without placing any voting and ownership limitations?

• Are there potential ways to more narrowly target voting and ownership limitations while effectively mitigating any tensions between commercial interests and statutory goals?

• How do potential tensions between commercial interests and statutory goals for SDRs differ from tensions for clearing agencies and SEFs? Is there a qualitative difference? Are potential tensions more or less attenuated for SDRs?

• How are potential tensions between commercial interests and statutory goals for SDRs similar to potential tensions for clearing agencies and SEFs? Would such similarities warrant similar restrictions regarding their governance arrangements and/or voting and ownership limitations?

• Are there any other restrictions or measures that the Commission should impose on SDRs to improve governance and mitigate any tensions between commercial interests and statutory goals at SDRs?

• Is it important that the Commission and the CFTC adopt compatible provisions regarding governance for SDRs? To what degree are SDRs registered with the Commission also likely to register as swap data repositories with the CFTC? Would incompatible or conflicting governance provisions provide significant difficulties for SDRs?

c. Third Core Principle: Rules and Procedures for Minimizing and Resolving Conflicts of Interest

As mentioned above, each SDR is statutorily required to establish and enforce written policies and procedures reasonably designed to minimize conflicts of interest in the SDR's decisionmaking process and to establish a process for resolving any such conflicts of interest.[88] Based on information provided by industry representatives regarding how SDRs will likely operate, the Commission preliminarily believes that a small number of dealers could control SDRs, which may require SDR owners to balance competing interests.[89] Owners of an SDR could derive greater revenues from their non-repository activities in the SBS market than they would from sharing in the profits of the SDR in which they hold a financial interest. In addition, there may be a tension between an SDR's statutory obligations (*e.g.,* maintaining the privacy of data reported to the SDR) and its own commercial interests or those of its owners.[90]

A few entities that presently provide or anticipate providing repository services have identified conflicts of interest that could arise at an SDR. First, owners of an SDR could have commercial incentives to exert undue influence to control the level of access to the services offered and data maintained by the SDR and to implement policies and procedures that would further their self-interests to the detriment of others.[91] Specifically, owners of an SDR could exert their influence and control to prohibit or limit access to the services offered and data maintained by the SDR in order to

[88] *See* Public Law 111–203, § 763(i) (adding Exchange Act Section 13(n)(7)(C)).

[89] *See* Office of the Comptroller of the Currency, Quarterly Report on Bank Trading and Derivatives Activities, First Quarter 2010 ("Derivatives activity in the U.S. banking system continues to be dominated by a small group of large financial institutions. Five large commercial banks represent 97% of the total banking industry notional amounts * * *.").

[90] *See, e.g.,* CPSS–IOSCO consultative report, *supra* note 55 (noting the conflicts of interest "between the unique public role of the [SDR] and its own commercial interests particularly if the [SDR] offers services other than recordkeeping or between commercial interests relating to different participants and linked market infrastructures and service providers").

[91] *See, e.g.,* Reval, Responses to the CFTC's Questions on the SDR Requirements (*available at http://www.cftc.gov/ucm/groups/public/@swaps/documents/file/derivative9sub100110-reval.pdf*) (stating that an SDR with any ownership or revenue sharing arrangements directly or indirectly with a dealer would be an obvious conflict of interest) ("Reval Response Letter").

impede competition.[92] Second, an SDR could favor certain market participants over others with respect to the SDR's services and pricing for such services.[93] Third, an SDR could require that services be purchased on a "bundled" basis, as discussed above.[94] Finally, an SDR or a person associated with the SDR could misuse or misappropriate data reported to the SDR for financial gain.[95] As one repository noted, "SDR data is extremely valuable and could be sold either stand alone or enhanced with other market data and analysis. The use of this data in this matter would present competitive problems" as well as conflicts of interest issues.[96] Because these conflicts have been identified by only a few potential SDRs, the Commission recognizes that this information may not reflect all business models for SDRs. The Commission invites comment on this issue.

Proposed Rule 13n–4(c)(3) would provide general examples of conflicts of interest that should be considered by an SDR, including, but not limited to: (1) Conflicts between the commercial interests of an SDR and its statutory responsibilities, (2) conflicts in connection with the commercial interests of certain market participants or linked market infrastructures, third party service providers, and others, (3) conflicts between, among, or with persons associated with the SDR, market participants, affiliates of the SDR, and nonaffiliated third parties,[97] and (4) misuse of confidential information, material, nonpublic information, and/or intellectual property. Such conflicts of interest could limit the benefits of an SDR and undermine the mandatory reporting requirement in Exchange Act Section 13(m)(G), thereby impacting efficiency in the SBS market.[98]

Proposed Rule 13n–4(c)(3)(i) would require each SDR to establish, maintain, and enforce written policies and procedures reasonably designed to identify and mitigate potential and existing conflicts of interest in the SDR's decisionmaking process on an ongoing basis. The Commission preliminarily believes that requiring an SDR to conduct ongoing identification and mitigation of conflicts of interest is important because such conflicts can arise gradually over time or unexpectedly. Furthermore, a situation that is acceptable one day may present a conflict of interest the next. In order to identify and address potential conflicts that may arise over time, the Commission believes that, in general, an SDR's procedures should provide a means for regular review of conflicts as they impact the SDR's decisionmaking processes.

Proposed Rule 13n–4(c)(3)(ii) would require an SDR to recuse any person involved in a conflict of interest from the decisionmaking process for resolving any conflicts of interest. The Commission preliminarily believes that such recusal is necessary to eliminate an apparent conflict of interest in an SDR's decisionmaking process. Additionally, recusal would increase confidence in the SDR's decisionmaking process and avoid an appearance of impropriety.

Finally, proposed Rule 13n–4(c)(3)(iii) would require an SDR to establish, maintain, and enforce reasonable written policies and procedures regarding the SDR's non-commercial and/or commercial use of the SBS transaction information that it receives from a market participant, any registered entity, or any other person. The Commission recognizes that an SDR may have commercial incentives to operate as an SDR. To the extent that an SDR uses data that it receives from others for commercial purposes, the Commission preliminarily believes that such uses should be clearly defined and disclosed to market participants. If, for example, a market participant agrees to waive confidentiality of the data that it provides to an SDR, then, at the very least, the market participant should understand how an SDR is going to use that data and the scope of the market participant's waiver.

Request for Comment

The Commission requests comment on the following specific issues:

- Is the Commission's proposed definition of "nonaffiliated third party" appropriate and sufficiently clear? If not, why not and how should it be defined?
- Are the Commission's proposed rules implementing the third core principle appropriate and sufficiently clear? If not, why not and what would be a better alternative?
- Are the Commission's examples of potential conflicts of interest in its proposed rules adequate? If not, are there other examples of conflicts that the Commission should identify in its rule?
- Do commenters agree with the potential conflict concerns that the Commission has identified in this release? How might conflicts of interest change as SDRs become more established? How might competitive forces within the SBS market affect or change current conflicts of interest? What potential new conflicts of interest could arise that the Commission should consider? Will competition potentially create different or additional conflicts of interest that the Commission should consider? Will competition potentially mitigate conflicts of interest?
- What is the likely impact of the Commission's proposed rule on the SBS market? Would the proposed rule potentially promote or impede the establishment of SDRs?
- With respect to entities that currently perform repository services for SBSs or other instruments, how do current practices compare to the practices that the Commission proposes to require in this rule? What are the incremental costs to potential SDRs in connection with adding to or revising their current practices in order to implement the Commission's proposed rule?
- Should the Commission require an SDR to identify and mitigate conflicts of interest in an SDR's governance arrangements periodically rather than on an ongoing basis? Should the proposed requirement extend to any other circumstances?
- Is the Commission's proposed rule requiring recusal of any person involved in a conflict of interest appropriate and sufficiently clear? If not, what would be a better alternative?
- Is the Commission's proposed requirement relating to an SDR's non-commercial and commercial use of data

[92] *See, e.g.,* Warehouse Trust Company, Draft Response to CFTC re: CFTC Request for Information regarding SDR Governance (*available at http://www.cftc.gov/ucm/groups/public/@swaps/documents/file/derivative9sub100510-wt.pdf*) (stating that "ownership of an SDR could lead to access restrictions on non-owners.") ("Warehouse Trust Response Letter").

[93] *See* Reval Response Letter, *supra* note 91 ("Preferential treatment in services provided by an SDR could also occur * * *.").

[94] *See* Warehouse Trust Letter, *supra* note 92 ("The issue of vertical bundling could arise where [SEFs and clearing agencies] have preferred access or servicing arrangements with SDRs primarily due to ownership overlaps.").

[95] *See* Reval Response Letter, *supra* note 91 ("There will always be an underlying conflict to ensure that the position information or client activity does not get into the hands of investors or an SDR business partner who could benefit from that information.").

[96] *See* Warehouse Trust Letter, *supra* note 92; *see also* Reval Response Letter, *supra* note 91 ("[I]f only one SDR is created for an asset class and that SDR is held by a market participant that could gain by having an edge on when the information is received, it could have a trading edge.").

[97] The term "nonaffiliated third party" of an SDR would be defined as any person except (1) the SDR, (2) an SDR's affiliate, or (3) a person employed by an SDR and any entity that is not the SDR's affiliate (and "nonaffiliated third party" includes such entity that jointly employs the person). *See* proposed Rule 13n–4(a)(8).

[98] *See* Public Law 111–203, § 763(i). Exchange Act Section 13(m)(G) imposes a mandatory reporting requirement, which provides that "[e]ach security-based swap (whether cleared or uncleared) shall be reported to a registered security-based swap data repository."

appropriate and sufficiently clear? If not, why not and what would be a better alternative?

- Are there conflicts of interest specific to the commercial use of data by an SDR that the Commission should address? What are these conflicts? Can they be mitigated? If so, by what means?
- Should the Commission restrict or prohibit an SDR's use of data for commercial purposes? If so, in what way? For example, should the Commission prohibit an SDR's use of data for commercial purposes unless an SDR obtains express written consent from the market participants submitting such data? Should the Commission require that an SDR's policies and procedures require it to obtain consent from market participants before the SDR uses the data for any purpose or transmits such data to other parties other than regulators? Should the Commission require that an SDR's policies and procedures require it to obtain consent from market participants before the SDR provides aggregated SBS transaction data to the public without charge?
- If some commercial use of data is permitted, should particular commercial uses of data by an SDR nonetheless be prohibited? If so, which uses should be prohibited and why? Should certain potential uses of data, or the use of particular types of data, pose particular concern to the Commission? Which uses or data types are they, and how should the Commission respond?
- Should an SDR's affiliates be subject to any or all of the restrictions on commercial use that are imposed on an SDR? Should the Commission restrict the ability of an SDR to share data with any of its affiliates? For example, should an SDR be prohibited from sharing data with an affiliate unless the same data is also made available at the same time and on reasonable terms to market participants that are not affiliates? Should an SDR be prohibited from sharing certain types of data with an affiliate that trades SBSs?
- Would full disclosure by an SDR of its commercial use of data provide meaningful protection for market participants? Are market participants likely to have a meaningful choice to preclude the commercial use of their transaction data by choosing to report transactions to an SDR that does not make commercial use of the data? If commercial use of data is permitted, is it likely that any SDR would refrain from such use?
- What are the possible consequences of restricting or prohibiting an SDR's use of the data that it receives for commercial purposes? For example, would it deter persons from registering as SDRs? Would it result in existing SDRs to cease operating as such? Would prohibiting an SDR from making commercial use of data reported to it have positive benefits, such as enhancing the confidence of market participants that their trade or position information will not leak into the market?
- Would an SDR need to use data that it receives for commercial purposes in order to be a viable business? If so, explain.
- Are there any additional requirements that the Commission should impose to implement the third core principle?

E. Proposed Rule Regarding Data Collection and Maintenance

The Commission is proposing Rule 13n–5 under the Exchange Act to specify the data collection and maintenance requirements applicable to SDRs.[99]

1. Definitions

Proposed Rule 13n–5(a) would define terms used in the proposed rule. Proposed Rule 13n–5(a)(1) would define "transaction data" to mean all the information reported to the SDR pursuant to the Exchange Act and the rules and regulations thereunder.[100] This would include all information, including life cycle events, required to be reported to the SDR under Rule 901 of proposed Regulation SBSR.[101]

Proposed Rule 13n–5(a)(2) would define "position" as the gross and net notional amounts of open SBS transactions aggregated by one or more attributes, including, but not limited to, the (i) underlying instrument, index, or reference entity; (ii) counterparty; (iii) asset class; (iv) long risk of the underlying instrument, index, or reference entity; and (v) short risk of the underlying instrument, index, or reference entity.[102] Position data is required to be provided by SDRs to certain entities pursuant to Exchange Act Section 13(n)(5)(G).[103] Therefore, the Commission proposes defining the term, and has designed this definition to reflect the way the term is currently used in the industry.[104] The proposed term is designed to be sufficiently specific so that SDRs are aware of the types of position calculations that regulators may require an SDR to provide, while at the same time, provide enough flexibility to encompass the types of position calculations that regulators and the industry will find important as new types of SBS are developed.

Proposed Rule 13n–5(a)(3) would define "asset class" as "those security-based swaps in a particular broad category, including, but not limited to, credit derivatives, equity derivatives, and loan-based derivatives." The Commission is proposing this definition in order to implement proposed Rule 13n–5(b)(1)(ii), discussed below.

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[99] Proposed Rule 13n–5 is being promulgated under Exchange Act Sections 13(n)(4)(B), 13(n)(7)(D), and 13(n)(9). *See* Public Law 111–203, § 763(i).

[100] In a separate proposal relating to implementation of Section 763(i) of the Dodd-Frank Act (adding Exchange Act Section 13(m)), the Commission is considering rules requiring an SDR to publicly disseminate certain SBS data that has been affirmed by the parties but has not necessarily been confirmed. *See* Regulation SBSR Release (proposed Rule 902), *supra* note 9. Any comments regarding the public dissemination proposed rules should be submitted in connection with that proposal. In another separate proposal relating to implementation of Section 763(i) of the Dodd-Frank Act (adding Exchange Act Section 13(n)(5)(E)), the Commission is considering rules that would require SDRs to collect data related to monitoring the compliance and frequency of end-user clearing exemption claims. Any comments regarding the end-user clearing exemption proposed rules should be submitted in connection with that proposal.

[101] A definition of "life cycle event" is being proposed in proposed Regulation SBSR. *See* Regulation SBSR Release (proposed Rule 900), *supra* note 9.

[102] For purposes of this definition, positions aggregated by long risk would be only for the aggregate notional amount of SBSs in which a market participant has long risk of the underlying instrument, index, or reference entity. Similarly, positions aggregated by short risk would be only for the aggregate notional amount of SBSs in which a market participant has short risk of the underlying instrument, index, or reference entity. For SBSs other than credit default swaps, a counterparty has long risk where the counterparty profits from an increase in the price of the underlying instrument or index, and a counterparty has short risk where the counterparty profits from a decrease in the price of the underlying instrument or index. For credit default swaps, a counterparty has long risk where the counterparty profits from a decrease in the price of the credit risk of the underlying index or reference entity, and a counterparty has short risk where the counterparty profits from an increase in the price of the credit risk of the underlying index or reference entity. As market events require, the Commission may request that an SDR calculate positions in another manner and to provide those positions to the Commission on a confidential basis.

[103] *See* Public Law 111–203, § 763(i) (adding Exchange Act Section 13(n)(5)(G)); *see also* proposed Rule 13n–4(b)(9).

[104] The Commission notes that Section 763(h) of the Dodd-Frank Act adds Exchange Act Section 10B, which provides, among other things, for the establishment of position limits for any person that holds SBSs. Specifically, Section 10B(a) provides that "[a]s a means reasonably designed to prevent fraud and manipulation, the Commission shall, by rule or regulation, as necessary or appropriate in the public interest or for the protection of investors, establish limits (including related hedge exemption provisions) on the size of positions in any security-based swap that may be held by any person." In addition, Exchange Act Section 10B(d) provides that the Commission may establish position reporting requirements for any person that effects transactions in SBSs, whether cleared or uncleared. *See* Public Law 111–203, § 763(h).

Proposed Rule 13n–5(b)(1)(ii) would require an SDR, if it accepts any SBS in a given asset class, to accept all SBSs in that asset class.

Request for Comment

The Commission requests comment on the following specific issues:

- Are these proposed definitions over-inclusive or under-inclusive? Is there some data that is captured by the term "transaction data" that should not be subject to the collection and maintenance requirements described below? Is there data that should be subject to these requirements that is not included in the proposed definition of "transaction data"?
- Is the proposed definition of "position" sufficiently precise?
- Are there other attributes of SBSs for which the Commission should specifically require SDRs to calculate positions?
- Exchange Act Section 10B authorizes the Commission to establish limits on the size of positions in any SBS that may be held by any person. Would the definition of "position" in proposed Rule 13n–5(a)(2) be appropriate for purposes of any rules the Commission might propose with regard to position limits?
- Is the proposed definition of "asset class" sufficiently precise? Is there another definition of "asset class" that better describes the broad categories of SBSs commonly referred to as credit derivatives, equity derivatives, and loan-based derivatives, but excluding those that are not SBSs?
- Should each SDR be allowed to define the "asset class" for which it will accept SBS transaction data under proposed Rule 13n–5(b)(1)(ii)?

2. Requirements

a. Transaction Data

Proposed Rule 13n–5(b)(1)(i) would require every SDR to establish, maintain, and enforce written policies and procedures reasonably designed for the reporting of transaction data to the SDR, and would require the SDR to accept all transaction data that is reported to the SDR in accordance with such policies and procedures. A fundamental goal of Title VII is to have all SBSs reported to SDRs.[105] This proposed requirement would prevent SDRs from rejecting SBSs for arbitrary or anti-competitive reasons, minimize the number of SBSs that are not accepted by an SDR, and to the extent that the SDR's policies and procedures make clear what SBSs the SDR will accept, make it easier for market participants to determine whether there is an SDR that will accept a particular SBS.[106]

Proposed Rule 13n–5(b)(1)(ii) would require an SDR, if it accepts any SBS in a given asset class, to accept all SBSs in that asset class that are reported to it in accordance with its policies and procedures required by paragraph (b)(1) of the proposed rule. This proposed requirement is designed to maximize the number of SBSs that are accepted by an SDR. The Commission preliminarily believes that if certain SBSs are not accepted by any SDR and are reported to the Commission instead, the purpose of the Dodd-Frank Act to have centralized data on SBSs for regulators and others to access could be undermined. Without this requirement, the transaction costs for the Commission and other regulators to gather complete information on the SBS market could be higher. In addition, the Commission preliminarily believes that this proposed requirement would make it easier for market participants to determine whether there is an SDR that will accept a particular SBS.

However, an SDR would be required to accept only those SBSs from the asset class that are reported in accordance with the SDR's policies and procedures required by paragraph (b)(1) of this proposed rule.[107] For example, an SDR's policies and procedures could prescribe the necessary security and connectivity protocols that market participants must have in place prior to transmitting transaction data to the SDR. An SDR would not be required to accept transaction data from market participants that did not comply with these protocols; otherwise the transmission of the transaction data could compromise the SDR's automated systems.

To the extent that an SDR already has systems in place to accept and maintain SBSs in a particular asset class, the Commission preliminarily believes that the requirement of proposed Rule 13n–5(b)(1)(ii) would not add a material incremental financial or regulatory burden to SDRs. The Commission preliminarily believes that SDRs may have commercial incentives to limit SBSs for which they receive reports to those with relatively standardized terms, for operational reasons and because standardized instruments lend themselves more readily to aggregation of information that would have commercial value (to the extent that SDRs are entitled under the rules the Commission adopts to use such information for commercial purposes). Given these incentives, the requirement that, if an SDR accepts any SBS in a given asset class, it must accept all SBSs in that asset class, is meant to facilitate the aggregation of and access to SBS transaction data.

Proposed Rule 13n–5(b)(1)(iii) would require every SDR to establish, maintain, and enforce written policies and procedures reasonably designed to satisfy itself by reasonable means that the transaction data that has been submitted to the SDR is accurate. This proposed rule would also require SDRs to clearly identify the source for each trade side and the pairing method (if any) for each transaction in order to identify the level of quality of that transaction data.

Exchange Act Section 13(n)(5)(B) requires an SDR to "confirm with both counterparties to the security-based swap the accuracy of the data that was submitted."[108] This requirement is based on the premise that an SDR is useful only insofar as the data it retains is accurate.[109] SBS data that is not trusted does not enhance transparency. In order to ensure that the data submitted to an SDR is accurate and agreed to by both counterparties, the SDR must substantiate the accuracy of the data submitted with the counterparties. The Commission understands that with respect to certain asset classes, current market practice is for third party service providers to provide electronic confirmations prior to the SBS data reaching an SDR. The Commission preliminarily believes that an SDR would be able to fulfill its responsibilities under Exchange Act Section 13(n)(5)(B), proposed Rule 13n–4(b)(3),[110] and this proposed rule by

[105] *See* Exchange Act Section 13(m)(1)(G) requiring "[e]ach security-based swap (whether cleared or uncleared)" to be reported to a registered SDR. Public Law 111–203, § 763(i).

[106] In a separate proposal relating to implementation of Section 763(i) of the Dodd-Frank Act, the Commission is considering additional rules requiring an SDR to have policies and procedures relating to the reporting of SBS data to the SDR. *See* Regulation SBSR Release (proposed Rule 907), *supra* note 9. Any comments regarding the proposed reporting rules should be submitted in connection with that proposal.

[107] An SDR would be required to disclose to market participants its criteria for providing others with access to services offered and data maintained by the SDR pursuant to proposed Rule 13n–10(b)(1), as discussed in Section III.J of this release. Therefore, market participants would be aware of an SDR's policies and procedures for reporting data.

[108] *See also* proposed Rule 13n–4(b)(3).

[109] *See, e.g.,* CPSS–IOSCO, *supra* note 55 (the primary public policy benefit of an SDR is facilitated by the integrity of the information maintained by an SDR).

[110] Proposed Rule 13n–4(b)(3) would require SDRs to "[c]onfirm, as prescribed in Rule 13n–5, with both counterparties to the security-based swap the accuracy of the data that was submitted."

developing reasonable policies and procedures that rely on confirmations completed by another entity, such as an SB SEF, clearing agency, or third party vendor, as long as such reliance is reasonable. The SDR would have a continuing responsibility to oversee and supervise the performance of the third party confirmation provider. This could include having policies and procedures in place to monitor the third party confirmation provider's compliance with the terms of any agreements and to assess the third party confirmation provider's continued fitness and ability to perform the confirmations.

For example, if an SBS is traded on an SB SEF, that SB SEF would confirm the accuracy of the transaction data with both counterparties, and the SBS would then be reported to the SDR by the SB SEF. The SDR would not need to further substantiate the accuracy of the transaction data, as long as the SDR had a reasonable belief that the SB SEF had performed an accurate confirmation. However, the SDR would not comply with Exchange Act Section 13(n)(5)(B), proposed Rule 13n–4(b)(3), and this proposed rule if the confirmation proves to be inaccurate and the SDR had reason to know that its reliance on the SB SEF for providing accurate confirmations was unreasonable. If an SBS is transacted by two commercial end-users and is not electronically traded or cleared, and is reported to the SDR by one of those end-users, the SDR may not have any other entity that it can reasonably rely on, and may have to contact each of the counterparties itself to substantiate the accuracy of the transaction data.[111]

Transaction data may vary in terms of reliability. Some transaction data may have been affirmed by counterparties to an SBS, but not confirmed.[112] Some transaction data may have been confirmed informally by the back-offices of the counterparties, but not be considered authoritative. Other transaction data may have gone through an electronic confirmation process and be considered authoritative by the counterparties. In order for regulators to determine whether an SDR has reasonable policies and procedures for satisfying itself that the transaction data that has been submitted to the SDR is accurate, the SDR must document the processes used by third parties to substantiate the accuracy of the transaction data.

Proposed Rule 13n–5(b)(1)(iv) would require SDRs to record promptly the transaction data that it receives.[113] It is important that SDRs keep up-to-date records so that regulators and parties to SBSs will have access to accurate and current information.[114]

Request for Comment

The Commission requests comment on the following specific issues:

- What is the likely impact of these requirements on the SBS market, including the impact on the incentives and behaviors of SDRs, the willingness of persons to register as SDRs, and the technologies used for reporting SBSs to the SDR?
- With respect to entities that currently perform repository services for SBSs or other instruments, how do current practices compare to the practices that the Commission proposes to require in this rule? What are the incremental costs to potential SDRs in connection with adding to or revising their current practices in order to implement the Commission's proposed rule?
- Should the Commission require an SDR to have any particular substantive requirements in its policies and procedures, such as requirements pertaining to robust passwords for persons reporting transaction data?
- Does the definition of "asset class" in proposed Rule 13n–5(a)(3) provide sufficient guidance and clarity to entities that may register as SDRs and to other market participants?
- Should the Commission require an SDR to accept all SBSs of a given asset class? If not, what other mechanism should the Commission use to prevent "orphaned" SBSs? How should the Commission address SBSs that do not clearly belong to a particular asset class or that could arguably belong to more than one asset class? Should the Commission allow an SDR that accepts SBSs in one asset class to accept an SBS that arguably belongs to that asset class, but which could also belong to a second asset class, without requiring the SDR to then accept all SBSs in the second asset class?
- Will the requirement of proposed Rule 13n–5(b)(1)(ii) materially add to the costs of SDRs? How does this proposed requirement affect the possible business models under which an SDR may operate or the commercial viability of SDRs in general? Does it make any particular business model more or less attractive?
- Should the Commission impose other requirements that may increase access to an SDR, including:
  - Any other requirements that may prevent an SDR from rejecting those SBSs that are customized to such a degree that they are not in the SDR's economic interest to accept them because the SDR will not be able to perform downstream processing on the SBSs and may incur costs in obtaining the information to calculate positions; and
  - Requiring an SDR to employ technologies that accommodate a wide range of technological capabilities among persons that desire to report data to the SDR or other requirements that may prevent an SDR from rejecting SBSs from less sophisticated persons that do not engage in the volume of SBSs necessary to make it economically practicable to invest in technologies that are industry standards?
- Should the Commission require an SDR itself to substantiate the accuracy of the transaction data that has been submitted to the SDR?
- Should the Commission require an SDR to have any particular substantive requirements in its policies and procedures relating to these rules?
- Should the Commission give more guidance as to what constitutes reasonable reliance on a third party? For example, would it be reasonable to rely on documents provided by the party to an SBS that reports the SBS to an SDR? What if that party is a clearing agency that became a party to the SBS as the central counterparty?
- Where an SDR relies on a third party to provide confirmations, should the Commission give more guidance as

[111] The Commission preliminarily believes that an SDR should make reasonable accommodations, including consideration of any cost burdens, for a non-reporting counterparty of an SBS transaction in connection with any follow-up by the SDR regarding the accuracy of the counterparty's SBS transaction. These accommodations could, for example, include providing means for non-reporting counterparties to substantiate the accuracy of the transaction data without having to incur significant systems or technology costs.

[112] In a separate proposal relating to implementation of Section 763(i) of the Dodd-Frank Act (adding Exchange Act Section 13(m)), the Commission is considering rules requiring an SDR to publicly disseminate certain SBS data that has been affirmed by the parties but has not necessarily been confirmed. *See* Regulation SBSR Release (proposed Rule 902), *supra* note 9. Any comments regarding the public dissemination proposed rules should be submitted in connection with that proposal.

[113] In a separate proposal, the Commission is proposing rules prescribing the data elements that an SDR is required to accept for each SBS in association with requirements under Section 763(i) of the Dodd-Frank Act, adding Exchange Act Section 13(n)(4)(A), relating to standard setting and data identification. *See* Regulation SBSR Release (proposed Rule 901), *supra* note 9. Any comments regarding the data elements should be submitted in connection with that proposal.

[114] *See, e.g.,* CPSS–IOSCO, *supra* note 55 ("A [trade repository] should promptly record the trade information it receives from its participants. * * * Ideally, a [trade repository] should record to its central registry information it receives from its participants in real-time, and at a minimum, within one business day.").

to the oversight by the SDR of the third party? For example, how often should the SDR review the third party's confirmation procedures? Would annually be sufficient?

• Where an SDR is unable to reasonably satisfy itself that the transaction data is accurate, should the SDR reject the SBS? Should that SBS instead be reported to the Commission pursuant to Exchange Act Section 13A(a)(1)(B) and the rules and regulations promulgated thereunder?

• Should the Commission give more guidance as to whether an SDR (or the entity that it reasonably relies on) needs to get an affirmative response from both counterparties when it attempts to satisfy itself that the transaction data is accurate? Alternatively, should the SDR submit the transaction data to a counterparty, and require a response only if the counterparty disagrees with the transaction data? Would this answer change if the SBS is cleared or if the counterparty is an end-user?

• Should the Commission give more guidance as to whether receipt by an SDR of a confirmation under Exchange Act Section 15F(i)(2) and the rules promulgated thereunder would be sufficient to fulfill the SDR's duties under Exchange Act Section 13(n)(5)(B), proposed Rule 13n–4(b)(3), and this proposed rule?

• Should the term "promptly" be defined or should the Commission use another term such as "as soon as technologically practicable after the time at which the data has been submitted"?

• Should an SDR be required to record transaction data promptly after execution of a transaction or promptly after confirmation of the transaction?

b. Positions

Proposed Rule 13n–5(b)(2) would require every SDR to establish, maintain, and enforce written policies and procedures reasonably designed to calculate positions for all persons with open SBSs for which the SDR maintains records. Position data is required to be provided by an SDR to certain entities pursuant to Exchange Act Section 13(n)(5)(G).[115] Position information is important to regulators for risk, enforcement, and examination purposes. In addition, having a readily available source of position information can be useful to counterparties themselves in evaluating their own risk. While much of the information necessary for an SDR to calculate positions (as defined in subsection (a)(2) of this proposed rule) will be reported to the SDR as transaction data, some information may not. For example, credit events for credit default swaps or events that result in the termination or adjustment to an equity swap may not be reported.[116] In order to meet its obligation to calculate positions, an SDR could require reporting parties to report such events or it could have a system that will monitor for and collect such information. In order for the positions to be calculated accurately, the SDR will need to promptly incorporate recently reported transaction data and collected unreported data. It is important that the SDR keep up-to-date records so that relevant authorities and parties to the SBS will have access to accurate and current information.[117]

Request for Comment

The Commission requests comment on the following specific issues:

• Should the Commission specify particular standards or procedures for calculating positions?

• What information will an SDR need to obtain in order to calculate positions and how difficult will it be to obtain?

• What is the likely impact of this requirement on the SBS market, including the impact on the incentives and behaviors of SDRs, the willingness of persons to register as SDRs, and the technologies used for reporting SBSs to the SDR?

• With respect to entities that currently perform repository services for SBSs or other instruments, how do current practices compare to the practices that the Commission proposes to require in this rule? What are the incremental costs to potential SDRs in connection with adding to or revising their current practices in order to implement the Commission's proposed rule?

• The Commission understands that clearing agencies typically produce market values on cleared SBSs. However, many types of SBSs may not be cleared in the near term. Should the Commission require SDRs to calculate market values of each position at least daily and provide them to the Commission? In your comment, please consider the following:

○ What would be the benefits and burdens of such a requirement?

○ Should the requirement to calculate market values of positions be limited to certain types of SBSs, such as SBSs for which the counterparties have agreed that the transaction information maintained by the SDR is the primary record of the trade to the exclusion of any records held by the counterparties?

○ Should "market value" be defined, and if so, how?

○ Will the information necessary for calculating market values of the positions already be at the SDR? What information besides transaction data and positions will be required for the SDR to calculate the market values of positions? Would SDRs be able to obtain the necessary information to calculate market values? Why or why not? How could the SDR obtain the necessary information?

○ To the extent that other entities, such as SB SEFs, SBS dealers, or clearing agencies, already perform such calculations, would it be sufficient for the SDR to obtain the market values from such entity?

○ How frequently should such valuations be performed? Would daily valuation be too onerous for SDRs? What about weekly or monthly valuation?

○ Would market values be meaningful in assessing risk without knowing the margin calls and collateral posted? Should SDRs also be required to maintain margin call and collateral information?

○ How long should the SDR be required to maintain such market values? Would five years be adequate? What about the same time period as the Commission requires for positions?

c. Maintain Accurate Data

Proposed Rule 13n–5(b)(3) would require every SDR to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the transaction data and positions that it maintains are accurate. Maintaining accurate records is a core

[115] *See also* proposed Rule 13n–4(b)(9).

[116] In a separate proposal, the Commission is proposing rules prescribing the data elements that an SDR is required to accept for each SBS in association with requirements under Section 763(i) of the Dodd-Frank Act, adding Exchange Act Section 13(n)(4)(A), relating to standard setting and data identification. *See* Regulation SBSR Release (proposed Rule 901), *supra* note 9. The proposed definition of "life cycle event" in proposed Regulation SBSR states, "Notwithstanding the above, a life cycle event shall not include the scheduled expiration of the security-based swap, a previously described and anticipated interest rate adjustment (such as a quarterly interest rate adjustment), or other event that does not result in any change to the contractual terms of the security-based swap." *See* Regulation SBSR Release (proposed Rule 900), *supra* note 9. In order to calculate positions, SDRs may need this information, which would not be required to be reported to it. Any comments regarding the data elements should be submitted in connection with that proposal.

[117] *See, e.g.,* CPSS–IOSCO, *supra* note 55 ("Ideally, a [trade repository] should record to its central registry information it receives from its participants in real-time, and at a minimum, within one business day.").

function of an SDR.[118] Maintaining accurate records requires diligence on the part of an SDR; SBSs can be amended, assigned, or terminated and positions change upon the occurrence of new events (such as corporate actions). Therefore, it is important that an SDR has policies and procedures to ensure reasonably the accuracy of the transaction data and positions that it maintains. These policies and procedures could include portfolio reconciliation.[119]

Request for Comment

The Commission requests comment on the following specific issues:

- Should the Commission specify particular standards or procedures for maintaining accurate data, such as portfolio reconciliation and payment reconciliation?
- What is the likely impact of this requirement on the SBS market, including the impact on the incentives and behaviors of SDRs, the willingness of persons to register as SDRs, and the technologies used for maintaining SBSs at the SDR?
- With respect to entities that currently perform repository services for SBSs or other instruments, how do current practices compare to the practices that the Commission proposes to require in this rule? What are the incremental costs to potential SDRs in connection with adding to or revising their current practices in order to implement the Commission's proposed rule?
- If portfolio reconciliation and/or payment reconciliation is required, how often would it be done, and what should it entail? Would the following definition of portfolio reconciliation be sufficient: "a means of ensuring that the SDR's record of security-based swaps are synchronized with those of a person with open security-based swaps maintained by the SDR"? If not, how should the term be defined?

d. Data Retention

Proposed Rule 13n–5(b)(4) would require SDRs to maintain the transaction data for not less than five years after the applicable SBS expires and historical positions for not less than five years (i) in a place and format that is readily accessible to the Commission and other persons with authority to access or view such information; and (ii) in an electronic format that is non-rewriteable and non-erasable. A five-year retention period is the current requirement for the records of clearing agencies and other registered entities, and is the statutory requirement for SB SEFs.[120] Since an SBS transaction is ongoing, the transaction data should be maintained for the duration of the SBS and for five years after it expires. Positions are not tied to any particular SBS transaction; therefore, the Commission proposes to require positions, as required to be calculated pursuant to proposed Rule 13n–5(b)(2), to be maintained for five years, similar to the record retention requirement for clearing agencies.[121]

Alternatively, the Commission is considering requiring SDRs to "maintain transaction data for not less than five years after the applicable security-based swap expires or ten years after the applicable security-based swap is executed, whichever is greater, and historical positions for not less than five years." Some SBSs are, in practice, of very short duration due to various reasons, including being novated upon being submitted for clearing or being terminated through portfolio compression. By requiring SDRs to retain data of all SBSs for at least ten years after execution, regulators would be able to use the data of the SBSs for analytical studies.

The Commission proposes that the transaction data and positions be in a place and format that is readily accessible to the Commission and other persons with authority to access or view such information. The Commission preliminarily believes that this proposed requirement would ensure that SDRs maintain the information in an organized and accessible manner so that users can easily obtain the data that they need. The Commission also preliminarily believes that this proposed requirement would ensure that the information is maintained in a common and easily accessible format, such as a language commonly used in financial markets.[122]

The proposed requirement for information to be in an electronic format that is non-rewriteable and non-erasable is consistent with the record retention format applicable to electronic broker-dealer records.[123] This proposed requirement would prevent the maintained information from being modified or removed without detection.[124]

Request for Comment

The Commission requests comment on the following specific issues:

- Is the appropriate time period for the Commission to require an SDR to maintain transaction data at least five years after the applicable SBS expires and for positions at least five years? For transaction data, would ten years after expiration of the applicable SBS be more appropriate and why? [125] What would be the benefits and burdens associated with each of these time periods? Are there other retention periods that would be more appropriate?
- Should the Commission require SDRs to maintain transaction data for five years after the applicable SBS expires or ten years after the applicable SBS is executed, whichever is greater? What if the Commission required SDRs to maintain transaction data for five years after the applicable SBS expires or eight years after the applicable SBS is executed, whichever is greater? What would be the benefits and burdens associated with each of these time periods?
- Should the Commission instead require an SDR to maintain the transaction data and positions for an indefinite period? What would be the benefits and burdens of requiring an SDR to maintain such information indefinitely?
- Should the Commission have additional requirements regarding access to the transaction data and positions, such as requiring such

[118] *See* Section II, Role, Regulation, and Business Models of SDRs, of this release.

[119] *See, e.g.,* ISDA Operations Committee, Process Working Group, *Recommended Practices for Portfolio Reconciliation,* version 4.7 (Feb. 2006) (describing recommended practices for portfolio reconciliation).

[120] *See* Exchange Act Rule 17a–1, 17 CFR 240.17a–1 (for national securities exchanges, national securities associations, clearing agencies and the MSRB); Exchange Act Section 3D(d)(9), Public Law 111–203, § 763(c) (for SB SEFs).

[121] *See* Exchange Act Rule 17a–1, 17 CFR 240.17a–1 (requiring clearing agencies to retain data for five years).

[122] An example of such a format is Financial products Markup Language ("FpML"). FpML is based on XML (eXtensible Markup Language), the standard meta-language for describing data shared between applications.

[123] *See* Exchange Act Rule 17a–4(f)(2)(ii)(A), 17 CFR 240.17a–4(f)(2)(ii)(A). In Exchange Act Release No. 47806 (May 7, 2003), 68 FR 25281 (May 12, 2003), the Commission stated, among other things, that a broker-dealer would not violate Exchange Act Rule 17a–4(f)(2)(ii)(A) "if it used an electronic storage system that prevents the overwriting, erasing or otherwise altering of a record during its required retention period through the use of integrated hardware and software control codes." The Commission is proposing to incorporate this interpretation into proposed Rule 13n–5(b)(4).

[124] Records made or kept by an SDR, other than transaction data and positions, will be governed by proposed Rule 13n–7, as discussed in Section III.G of this release.

[125] The European Commission has recently proposed that trade repositories maintain reported data "for at least ten years following the termination of the relevant contracts." *See* European Commission, *Proposal for a regulation of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories* (2010) (*available at http://ec.europa.eu/internal_market/financial-markets/docs/derivatives/20100915_proposallowbar;en.pdf*).

information be maintained on a server in the United States?

• What is the likely impact of these requirements on the SBS market, including the impact on the incentives and behaviors of SDRs, the willingness of persons to register as SDRs, and the technologies used for reporting and maintaining transaction data?

• With respect to entities that currently perform repository services for SBSs or other instruments, how do current practices compare to the practices that the Commission proposes to require in this rule? What are the incremental costs to potential SDRs in connection with adding to or revising their current practices in order to implement the Commission's proposed rule?

• Should the Commission require such information be kept in a particular format that is accessible to the Commission, such as in FpML? Alternatively, if the Commission does not want to specify a particular technology, should it require such information be maintained in "a global standard for data modeling" or other standard? Should the Commission require that all SDRs maintain such information in the same format?

• Should the Commission require that SDRs establish and maintain effective interoperability and interconnectivity with other SDRs, market infrastructures, and venues?

• Should the Commission specifically require the SDR to organize and index accurately the transaction data and positions so that the Commission and other users of such information are easily able to obtain the specific information that they require?

• Is the proposed requirement that transaction data and positions be kept in a non-rewriteable and non-erasable format too restrictive? Are there other alternatives for protecting the accuracy of such information over the time period that such information is required to be maintained?

• Should the Commission require SDRs to verify automatically the quality and accuracy of the storage media recording process? Should the Commission require SDRs to serialize the original and, if applicable, duplicate units of storage media, and time-date for the required period of retention the information placed on such electronic storage media? Should the Commission require SDRs to have in place an audit system providing for accountability regarding inputting of records required to be maintained and preserved pursuant to this section and inputting of any changes made to every original and duplicate record maintained and preserved thereby? [126]

e. Controls To Prevent Invalidation

Proposed Rule 13n–5(b)(5) would require every SDR to establish, maintain, and enforce written policies and procedures reasonably designed to prevent any provision in a valid SBS from being invalidated or modified through the procedures or operations of the SDR. Based on staff discussions with market participants, the Commission understands that SDRs, through their process of substantiating the accuracy of the data or in their user agreements, may, and without the knowledge of the counterparties, cause the modification of terms of an SBS. SBSs can be highly negotiated between the counterparties, and the Commission preliminarily believes these terms should not be modified or invalidated without the full consent of the counterparties.

Request for Comment

The Commission requests comment on the following specific issues:

• Should the Commission establish more specific requirements to avoid contract invalidation by an SDR?

• What is the practical effect of this proposed requirement?

• Are such modifications actually occurring?

• What is the likely impact of this requirement on the SBS market, including the impact on the incentives and behaviors of SDRs and the willingness of persons to register as SDRs?

• With respect to entities that currently perform repository services for SBSs or other instruments, how do current practices compare to the practices that the Commission proposes to require in this rule? What are the incremental costs to potential SDRs in connection with adding to or revising their current practices in order to implement the Commission's proposed rule?

f. Dispute Resolution Procedures

Proposed Rule 13n–5(b)(6) would require every SDR to establish procedures and provide facilities reasonably designed to effectively resolve disputes over the accuracy of the transaction data and positions maintained by the SDR.[127] The data maintained by the SDR will be used by regulators to make assessments about counterparties, such as whether the counterparty is a major SBS participant. The counterparties also will use this data, and in some cases the data maintained by the SDR may be considered by the counterparties to be the legal record of the SBS. Counterparties, therefore, should have the ability to dispute the accuracy of the data regarding their SBSs held at the SDR. Providing the means to resolve such disputes should enhance data quality and integrity.

Request for Comment

The Commission requests comment on the following specific issues:

• Should the Commission require an SDR to have any particular requirements in its dispute resolution procedures under this rule?

• Is dispute resolution a necessary service that must be provided by an SDR?

• What is the likely impact of this requirement on the SBS market, including the impact on the incentives and behaviors of SDRs and the willingness of persons to register as SDRs?

• With respect to entities that currently perform repository services for SBSs or other instruments, how do current practices compare to the practices that the Commission proposes to require in this rule? What are the incremental costs to potential SDRs in connection with adding to or revising their current practices in order to implement the Commission's proposed rule?

g. Data Preservation After an SDR Ceases To Do Business

Proposed Rule 13n–5(b)(7) would require an SDR, if it ceases to do business, or ceases to be registered pursuant to Exchange Act Section 13(n) and the rules and regulations thereunder, to continue to preserve, maintain, and make accessible the transaction data and historical positions required to be collected, maintained, and preserved by the rule in the manner required by the Exchange Act and the rules and regulations thereunder (including in a place and format that is readily accessible to the Commission and other persons with authority to access or view such information, in an electronic format that is non-rewriteable and non-erasable, and in a manner that protects confidentiality and accuracy)

[126] These requirements are consistent with the broker-dealer retention requirements. *See* Exchange Act Rule 17a–4(f), 17 CFR 240.17a–4(f).

[127] In a separate proposal, the Commission is proposing rules regarding the correction of errors in SBS information maintained by an SDR in association with requirements under Section 763(i) of the Dodd-Frank Act. *See* Regulation SBSR Release (proposed Rules 905 and 907(a)(3)), *supra* note 9. Any comments regarding those proposed rules should be submitted in connection with that proposal.

for the remainder of the period required by this rule (that is, not less than five years after the applicable SBS expires for transaction data and not less than five years for historical positions).[128] Given the importance of the records maintained by an SDR to the functioning of the SBS market, if an SDR ceases to do business, this could cause serious disruptions in the market should the information it maintains become unavailable.

Request for Comment

The Commission requests comment on the following specific issues:

- Should the Commission propose other requirements that might be necessary or useful in protecting the information maintained by an SDR if the SDR ceases to do business?
- What is the likely impact of this requirement on the SBS market, including the impact on the incentives and behaviors of SDRs, the willingness of persons to register as SDRs, and the technologies used for maintaining SBS data at the SDR?

h. Plan for Data Preservation

Proposed Rule 13n–5(b)(8) would require an SDR to make and keep current a plan to ensure that the transaction data and positions that are recorded in the SDR continue to be maintained in accordance with proposed Rule 13n–5(b)(7), which shall include procedures for transferring the transaction data and positions to the Commission or its designee (including another registered SDR). Given the importance of the records maintained by an SDR to the functioning of the SBS market, if an SDR ceases to do business, the absence of a plan to transfer information could cause serious disruptions. The Commission preliminarily expects that an SDR's plan would establish procedures and mechanisms so that another entity would be in the position to maintain this information after the SDR ceases to do business.

Request for Comment

The Commission requests comment on the following specific issues:

- Should the Commission propose other requirements that might be necessary or useful in protecting the information maintained by an SDR if the SDR ceases to do business?
- To what extent does this requirement provide additional protections beyond those of proposed Rule 13n–5(b)(7)?
- What is the likely impact of this requirement on the SBS market, including the impact on the incentives and behaviors of SDRs, the willingness of persons to register as SDRs, and the technologies used for maintaining SBS data at the SDR?
- With respect to entities that currently perform repository services for SBSs or other instruments, how do current practices compare to the practices that the Commission proposes to require in this rule? What are the incremental costs to potential SDRs in connection with adding to or revising their current practices in order to implement the Commission's proposed rule?

F. Proposed Rule Regarding Automated Systems

The Commission is proposing Rule 13n–6 under the Exchange Act to provide standards for SDRs with regard to their automated systems' capacity, resiliency, and security.[129] The standards being proposed under this rule are comparable to the standards applicable to self-regulatory organizations ("SROs"), including exchanges and clearing agencies,[130] and certain other entities, including significant-volume alternative trading systems ("ATSs") [131] and market information dissemination systems,[132] pursuant to the Commission's Automation Review Policy ("ARP") standards. To promote the maintenance of a stable and orderly SBS market, the Commission preliminarily believes that SDRs should be required to meet the same capacity, resiliency, and security standards applicable to SROs and certain other entities under the Commission's current ARP program.[133]

Systems failures can limit access to data, call into question the integrity of data, and prevent market participants from being able to report transaction data, and thereby have a large impact on market confidence, risk exposure, and market efficiency. Proposed Rule 13n–6 would require an SDR to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its systems provide adequate levels of capacity, resiliency, and security; and submit to the Commission annual reviews of its automated systems, systems outage notices, and prior notices of planned system changes.

These proposed requirements essentially codify and parallel the ARP requirements that have been in place for almost twenty years. The staff has found these standards to be effective in overseeing the capacity, resiliency, and security of major automated systems in use in the securities markets. These proposed requirements as applied to the SBS market are designed to prevent and minimize the impact of systems failures that might negatively impact the stability of the SBS market.

1. Requirements for SDRs' Automated Systems

a. Policies and Procedures

Proposed Rule 13n–6(b)(1) would require an SDR to "establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its systems provide adequate levels of capacity, resiliency, and security. Such policies and procedures shall, at a minimum:

(i) Establish reasonable current and future capacity estimates;

(ii) Conduct periodic capacity stress tests of critical systems to determine such systems' ability to process transactions in an accurate, timely, and efficient manner;

(iii) Develop and implement reasonable procedures to review and keep current its system development and testing methodology;

(iv) Review the vulnerability of its systems and data center computer operations to internal and external threats, physical hazards, and natural disasters; and

(v) Establish adequate contingency and disaster recovery plans."

This list of proposed requirements is based on existing ARP requirements applied to significant-volume ATSs

[128] This proposed requirement is based on Exchange Act Rule 17a–4(g), 17 CFR 240.17a–4(g), which applies to broker-dealer books and records.

[129] Proposed Rule 13n–6 is being promulgated under Exchange Act Sections 13(n)(4)(B), 13(n)(7)(D), and 13(n)(9). *See* Public Law 111–203, § 763(i).

[130] *See* Exchange Act Release No. 27445 (Nov. 16, 1989), 54 FR 48703 (Nov. 24, 1989) ("ARP I Release"); Exchange Act Release No. 29185 (May 9, 1991), 56 FR 22490 (May 15, 1991) ("ARP II Release").

[131] *See* Rule 301(b)(6) of Regulation ATS, 17 CFR 242.301(b)(6); Exchange Act Release No. 40760 (Dec. 8, 1998), 63 FR 70844 (Dec. 22, 1998).

[132] *See* ARP II Release, 56 FR 22490, *supra* note 130 (the Commission's ARP policies "encompass SRO systems that disseminate transaction and quotation information"); *See also* ARP I Release, 54 FR 48703, *supra* note 130 (discussing that "the SROs have developed and continue to enhance automated systems for the dissemination of transaction and quotation information").

[133] Clearing agencies are SROs and are therefore subject to the Commission's Automation Review Policies. The Dodd-Frank Act requires that the data maintenance standards of SDRs "shall be comparable to the data standards imposed by the Commission on clearing agencies in connection with their clearing of security-based swaps." Exchange Act Section 13(n)(4)(C), Public Law 111–203, § 763(i). Proposed Rule 13n–6 will impose data maintenance standards on SDRs that are comparable to those imposed by the Commission on clearing agencies by applying the ARP standards to them.

under Rule 301(b)(6) of Regulation ATS.[134] In addition, the Commission has applied these requirements to SROs and other entities in the securities markets for a number of years in the context of its ARP inspection program.

As a general matter, the Commission preliminarily believes that, if an SDR's policies and procedures satisfy industry best practices standards, then these policies and procedures would be adequate for purposes of proposed Rule 13n–6(b)(1). However, in the unlikely event that industry best practices standards of widely recognized professional organizations are not consistent with the public interest, protection of investors, or the maintenance of fair and orderly markets, the Commission staff would have flexibility to establish such standards.[135]

The proposed rule would require an SDR to quantify, in appropriate units of measure the limits of the SDR's capacity to receive (or collect), process, store, or display the data elements included within each function, and identify the factors (mechanical, electronic, or other) that account for the current limitations.[136] This will make it easier for the Commission to detect any potential capacity constraints of an SDR, which, if left unaddressed, could compromise the ability of an SDR to collect and maintain SBS data. An SDR's failure to clearly understand and have procedures to address its capacity limits would increase the likelihood that it would experience a loss or disruption of system operations.

b. Objective Review of Automated Systems

Proposed Rule 13n–6(b)(2) would require an SDR to submit an objective review of its systems that support or are integrally related to the performance of its activities to the Commission, on an annual basis, within thirty calendar days of completion. This proposed requirement is drawn from the ARP II Release.[137] This proposed requirement is critical to help ensure that SDRs have adequate capacity, resiliency, and security and that their automated systems are not subject to critical vulnerabilities. Proposed Rule 13n–6(a)(3) would define "objective review" as "an internal or external review, performed by competent, objective personnel following established procedures and standards, and containing a risk assessment conducted pursuant to a review schedule."[138] The proposed definition of "objective review" in proposed Rule 13n–6(a)(3) is based on the standard for the review of automated systems set forth in the ARP II Release.[139]

As in the current ARP program, the Commission staff preliminarily believes that a reasonable basis for determining that a review is objective for purposes of proposed Rule 13n–6 is if the level of objectivity of an SDR's reviewers complied with standards set by widely recognized professional organizations.[140] However, in the unlikely event that industry best practices standards of widely recognized professional organizations are not consistent with the public interest, protection of investors, or the maintenance of fair and orderly markets, the Commission staff would have flexibility to establish such standards.

The decision on which type of reviewer, an internal department or an external firm, should perform the review is a decision for each SDR to make. The Commission preliminarily believes that, as long as the reviewer has the competence, knowledge, consistency, and objectivity sufficient to perform the role, the review can be performed by either recognized information technology firms or by a qualified internal department knowledgeable of information technology systems.

Proposed Rule 13n–6(b)(2) would further require that, where the objective review is performed by an internal department, an objective, external firm must assess the internal department's objectivity, competency, and work performance with respect to the review performed by the internal department. Proposed Rule 13n–6(b)(2) would require that the external firm issue a report of that review, which the SDR must submit to the Commission on an annual basis, within thirty calendar days of completion of the review.

The proposed requirement in proposed Rule 13n–6(b)(2) that an SDR submit an annual objective review to the Commission is drawn from the ARP II Release.[141] In addition, the proposed requirement in proposed Rule 13n–6(b)(2) that, where the objective review is performed by an internal department, an objective, external firm must assess the internal department's objectivity, competency, and work performance, is similarly drawn from the ARP II Release.[142]

The proposed annual review would not be required to address each element contained in proposed subsections (i)–(v) of Rule 13n–6(b)(1) every year. Rather, using its own risk assessment, an SDR's reviewer would review each element on a "review schedule," as defined in proposed Rule 13n–6(a)(5), in which each element would be assessed at specific, regular intervals, thus facilitating systematic and timely review of each element. This should provide a reasonable and cost-effective level of assurance that automated systems of SDRs are being adequately developed and managed with respect to capacity, security, development, and contingency planning concerns.

The proposed requirement to submit an objective review within thirty days of completion assures the Commission will have timely notice of the information required. The Commission has found through its experience with the current ARP program for SROs and other entities in the securities market that an entity generally requires approximately thirty calendar days after completion of the review to complete the internal review process necessary to submit an annual review to the Commission. A shorter timeframe might not provide an SDR with sufficient time to complete its internal review of the document; a longer timeframe might serve to encourage unnecessary delays.

c. Material Systems Outages

Under proposed subsection (3) of Rule 13n–6(b), an SDR would be required to promptly notify the Commission of material systems outages and any remedial measures that have been implemented or are contemplated,

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[134] *See* 17 CFR 242.301(b)(6).

[135] Industry best practices standards currently are established by organizations such as: The Information Systems Audit and Control Foundation ("ISACF"); the Federal Financial Institutions Examination Council's ("FFIEC"); the Institute of Internal Auditors ("IIA"); and the SANS Institute.

[136] Use of such appropriate units of measure is required in proposed Form SDR Item 31. *See also* Form SIP, Item #27 for SIPs. 17 CFR 249.1001.

[137] *See* ARP II Release, 56 FR 22490, *supra* note 130.

[138] Proposed Rule 13n–6(a)(4) would define "competent, objective personnel" as "a recognized information technology firm or a qualified internal department knowledgeable of information technology systems." This proposed definition is based on the standard for reviewers of automated systems set forth in the ARP II Release. *See* ARP II Release, 56 FR 22490, *supra* note 130. Proposed Rule 13n–6(a)(5) would define "review schedule" as "a schedule in which each element contained in subsection (b)(1) of this Rule 13n–6 would be assessed at specific, regular intervals." This proposed definition codifies the Commission's policy set forth in the ARP II Release. *See* ARP II Release, 56 FR 22490, *supra* note 130.

[139] *See* ARP II Release, 56 FR 22490, *supra* note 130.

[140] Such standards are currently established by organizations such as the IIA, the Information Systems Audit and Control Association ("ISACA") (formerly the Electronic Data Processing Auditors Association ("EDPAA")), and the American Institute of Certified Public Accountants ("AICPA").

[141] *See* ARP II Release, 56 FR 22490, *supra* note 130.

[142] *See id.*

including (i) immediately notifying the Commission when a material systems outage is detected; (ii) immediately notifying the Commission when remedial measures are selected to address the material systems outage; (iii) immediately notifying the Commission when the material systems outage is addressed; and (iv) submitting to the Commission within five business days of when the material systems outage occurred a detailed written description and analysis of the outage and any remedial measures that have been implemented or are contemplated.

This subsection would codify the procedures followed by SROs and certain other entities under the Commission's current ARP program in providing the staff with notification of material system outages. In particular, proposed subsection (3) would clarify that the Commission expects to receive immediate notification that an outage has been detected, that remedial measures have been selected to address the outage, and that the outage has been addressed. Proposed subsection (3) would also clarify that an SDR should submit a detailed written description and analysis of the outage within five business days of the occurrence of the outage.

The Commission preliminarily believes that the proposed rule would assist the Commission in assuring that an SDR has diagnosed and is taking steps to correct system disruptions, so that systems of the SDR are reasonably equipped to accept and securely maintain transaction data. The Commission preliminarily believes that requiring an SDR to submit notifications of material system outages to the Commission is essential to help ensure that the Commission can continue to effectively oversee the SDR.

Proposed Rule 13n–6(a)(1) would define "material systems outage" as an unauthorized intrusion into any system, or an event at an SDR involving systems or procedures that results in (i) a failure to maintain service level agreements or constraints;[143] (ii) a disruption of normal operations, including switchover to back-up equipment with no possibility of near-term recovery of primary hardware; (iii) a loss of use of any system; (iv) a loss of transactions; (v) excessive back-ups or delays in processing; (vi) a loss of ability to disseminate transaction data, or positions;[144] (vii) a communication of an outage situation to other external entities; (viii) a report or referral of an event to the SDR's board or senior management; (ix) a serious threat to systems operations even though systems operations were not disrupted; (x) a queuing of data between system components or queuing of messages to or from customers of such duration that a customer's normal service delivery is affected; or (xi) a failure to maintain the integrity of systems that results in the entry of erroneous or inaccurate transaction data or other information in the SDR or the securities markets.

Based on its experience in requiring SROs and other entities to report material systems outages in the context of the current ARP program, the Commission preliminarily believes that this definition is appropriate for SDRs. The Commission preliminarily believes that each of the events listed in paragraphs (i) through (xii) of proposed Rule 13n–6(a)(1) are significant events that warrant reporting to the Commission because such material systems outages could negatively impact the stability of the SBS market. The application of the proposed definition is relatively straightforward, and it focuses on the types of events that the Commission preliminarily believes should require notification to the Commission under proposed Rule 13n–6(b)(3), so that the Commission can respond appropriately to the event that caused the loss or disruption.

Specifically, the Commission preliminarily believes that proposed subsections (i), (ii), (iii), (iv), and (v) address events that cause a significant loss or disruption of normal system operations sufficient to warrant notification to the Commission. In addition, the Commission preliminarily believes that proposed subsection (vi) addresses a type of event that impairs transparency or accurate and timely regulatory reporting.

The Commission also preliminarily believes that proposed subsections (vii) and (viii) are appropriate because communications of an outage to entities outside of the SDR, the board, or senior management are indicia of a significant system outage sufficient to warrant notification to the Commission. Specifically, proposed subsection (viii)'s reference to "a report or referral of an event * * *" seeks to address situations in which an SDR might seek to apply an overly narrow definition of an "outage situation" in proposed subsection (vii), in order to avoid reporting a problem that nevertheless has a significant impact on the performance of the SDR's systems and therefore warrants reporting to the Commission. For example, where an SDR experiences a slowing, but not a stoppage, of its ability to accept transaction data, and that slowing of data acceptance is sufficiently significant to have been reported or referred to the SDR's board or senior management, the Commission preliminarily believes that this situation would constitute a material system outage under proposed subsection (viii) that must be reported to the Commission. By including proposed subsection (viii) in the definition of "material system outage," the Commission seeks to ensure that it is informed of events that most entities subject to current ARP standards would already understand should be covered under the current program. This should permit the Commission to effectively monitor the operation of SDRs' automated systems. The Commission preliminarily believes that proposed subsections (ix) and (x) are appropriate because threats to system operations and queuing of data are events that may result in a significant disruption of normal system operations warranting notification to the Commission.

Subsection (xi) covers a failure to maintain the integrity of systems that results in the entry of erroneous or inaccurate transaction data or other information in an SDR or to market participants. This subsection is designed to address the unique role of SDRs in the SBS market. In particular, it is intended to cover such events as breakdowns in an SDR's internal controls that result in the entry of erroneous orders into the market. For example, it is possible that an SDR could, while in the process of testing its systems, inadvertently retain "test" data in its database. This, in turn, could result in erroneous reporting of SBSs to the Commission, other regulators, and counterparties. Counterparties may become uncertain of their positions, leading to market disruptions. This, in turn, could erode investor confidence in the integrity of the SBS market, damaging liquidity and impeding the capital formation process. Accordingly, the Commission preliminarily believes that this type of breakdown in an SDR's

[143] A service level agreement is a contract between a third party that manages and distributes software-based services and a customer, which commits the third party to a required level of service. A service level agreement should contain a specified level of service, support options, enforcement or penalty provisions for services not provided, a guaranteed level of system performance regarding downtime or uptime, a specified level of customer support, and indicate what software or hardware will be provided and for what fee.

[144] Proposed Rule 13n–6(a)(6) would give the term "transaction data" the same meaning as in proposed Rule 13n–5(a)(1). Proposed Rule 13n–6(a)(7) would give the term "position" the same meaning as in proposed Rule 13n–5(a)(2). *See* Section III.E.1 of this release for the discussion of these definitions.

systems controls should be reported to the Commission.

By including proposed subsection (xi) in the definition of "material system outage," the Commission is seeking to ensure that it is informed of events that could negatively impact the integrity of systems that result in the entry of erroneous or inaccurate transaction data or other information in an SDR or the securities markets. This should permit the Commission to monitor effectively the operation of each SDR's automated systems.

The definition of material systems outage also includes an unauthorized intrusion by outside persons, insiders, or unknown persons, into any system. The Commission preliminarily believes that this provision would permit the Commission to effectively monitor the operation of SDR's automated systems by requiring SDRs to notify the Commission of unauthorized intrusions into systems or networks. SDRs would need to immediately report unauthorized intrusions regardless of whether the intrusions were part of a cyber attack; potential criminal activity; other unauthorized attempts to retrieve, manipulate, or destroy data or to disrupt or destroy systems or networks; or any other malicious activity affecting data, systems, or networks. If unauthorized intrusions were successful in breaching systems or networks, SDRs would need to report these intrusions even if the parties conducting the unauthorized intrusion were unsuccessful in achieving their apparent goals (such as the introduction of malware or other means of disrupting or manipulating data, systems, or networks). SDRs would need to supplement their initial reports by sending the Commission updates on any harm to data, systems, or networks as well as any remedial measures that the SDRs are contemplating or undertaking to address the unauthorized intrusions. SDRs, however, would not need to report unsuccessful attempts at unauthorized intrusions that did not breach systems or networks.

The Commission preliminarily believes that the proposed five business day requirement regarding submission of a written description of material system outages is an appropriate time period. In the Commission's experience with the current ARP program for SROs and other entities in the securities market, an entity generally requires approximately five business days after the occurrence of a material system outage to gather all the relevant details regarding the scope and cause of the outage. A shorter timeframe might not provide sufficient time for the SDR to gather all relevant details surrounding the outage and describe them in a written submission; a longer timeframe might encourage unnecessary delays.

d. Material Systems Changes

Under proposed subsection (4) of Rule 13n–6(b), an SDR would be required to notify the Commission in writing at least thirty calendar days before implementation of any planned material systems changes. This proposed requirement is drawn from the ARP II Release.[145]

Proposed Rule 13n–6(a)(2) would define "material systems change" as "a change to automated systems that: (i) Significantly affects existing capacity or security; (ii) in itself, raises significant capacity or security issues, even if it does not affect other existing systems; (iii) relies upon substantially new or different technology; (iv) is designed to provide a new service or function; or (v) otherwise significantly affects the operations of the security-based swap data repository." Based on its experience in requiring SROs and other entities to report material systems changes in the context of the current ARP program, the Commission preliminarily believes that this definition is appropriate for SDRs. Each of the events listed in paragraphs (i) through (v) are significant events that warrant reporting to the Commission because any of those events can lead to a material systems outage that could negatively affect the stability of the SBS market. The application of the proposed definition is relatively straightforward, and it focuses on the types of events that should require notification to the Commission under proposed Rule 13n–6(b)(2). Specifically, the proposed subsections (i)—(iv) are events that concern the adequacy of capacity estimates, testing, and security measures taken by an SDR, and thus are sufficiently significant to warrant notification to the Commission. Proposed subsection (v) covering a change that "otherwise significantly affects the operations of the security-based swap data repository" is more open-ended in order to require notification of other major systems changes. Examples of changes that fall within proposed subsection (v) include, but are not limited to: major systems architectural changes; reconfigurations of systems that cause a variance greater than five percent in throughput or storage;[146] introduction of new business functions or services; material changes in systems; changes to external interfaces; changes that could increase susceptibility to major outages; changes that could increase risks to data security; changes that were, or will be, reported to or referred to an SDR's board or senior management; and changes that may require allocation or use of significant resources.

The Commission preliminarily believes that the proposed thirty calendar day requirement regarding pre-implementation written notification to the Commission of planned material systems changes is an appropriate time period. The Commission has found through its experience with the current ARP program that this amount of time is necessary for the Commission staff to evaluate the issues raised by a planned material systems change. A shorter timeframe might not provide sufficient time for the Commission staff to analyze the issues raised by the systems change; a longer timeframe might unnecessarily delay the covered entity in implementing the change.

Request for Comment

The Commission requests comment on the following specific issues:

- Should the Commission consider imposing other requirements or standards? Should any of the proposed requirements be eliminated or refined? If so, please explain your reasoning.
- Are there factors specific to SBS transactions that would make applying a system that is traditionally used in the equity markets inappropriate?
- What is the likely impact of these requirements on the SBS market, including the impact on the incentives and behaviors of SDRs, the willingness of persons to register as SDRs, and the technologies used for maintaining SBS data at the SDR?
- With respect to entities that currently perform repository services for SBSs or other instruments, how do current practices compare to the practices that the Commission proposes to require in this rule? What are the incremental costs to potential SDRs in connection with adding to or revising their current practices in order to implement the Commission's proposed rule?
- Should the Commission expressly require by rule:
  - An SDR's contingency and disaster recovery plans (required in proposed paragraph (b)(1)(v)) to be tested

[145] *See* ARP II Release, 56 FR 22490, *supra* note 130.

[146] The Commission has identified the five percent threshold as triggering the definition of "material systems change" in proposed Rule 13n–6(a)(2) because, based on experience in administrating the ARP program in the equities markets for almost twenty years, it believes that reconfigurations that exceed five percent in throughput or storage typically have the greatest potential to cause significant disruptions to automated systems.

periodically to assure their effectiveness and adequacy? [147]

○ An SDR's contingency and disaster recovery plans (required in proposed paragraph (b)(1)(v)) to cover at a minimum:

• Preparation for contingencies through such devices as appropriate remote and on-site hardware back-up and periodic duplication and off-site storage of data files?

• Off-site storage of up-to-date, duplicative software, files and critical forms and supplies need for processing operations, including a geographically diverse back-up site that does not rely on same infrastructure components (*e.g.,* transportation, telecommunications, water supply, and electric power) as the SDR primary operations center?

• Immediate availability of software modifications, detailed procedures, organizational charts, job descriptions, and personnel for the conduct of operations under a variety of possible contingencies?

• Emergency mechanisms for establishing and maintaining communications with participants, regulators and other entities involved? [148]

○ An SDR's contingency and disaster recovery plans (required in proposed paragraph (b)(1)(v)) to include resources, emergency procedures, and backup facilities sufficient to enable timely recovery and resumption of its operations and resumption of its ongoing fulfillment of its duties and obligations as an SDR, including, without limitation, the duties set forth in Rule 13n–4, following any disruption of its operations? [149] If so, what should the recovery time objective be? Should the SDR's contingency and disaster plans (required in proposed paragraph (b)(1)(v)) and resources generally enable resumption of the SDR's operations and resumption of ongoing fulfillment of the SDR's duties and obligations during the next business day following the disruption?

○ An SDR, to the extent practicable, to coordinate its contingency and disaster recovery plans (required in proposed paragraph (b)(1)(v)) with those of the SB SEFs, SBS markets, clearing agencies, SBS dealers, and major SBS participants who report transaction data to the SDR, and with those of regulators identified in Exchange Act Section 13(n)(5)(G), with a view to enabling effective resumption of the SDR's operations, including programs for periodic, synchronized testing of these plans?

○ An SDR, in developing its contingency and disaster recovery plans, to take into account the business continuity-disaster recovery plans of its telecommunications, power, water, and other essential service providers?

○ An SDR, if it offers services in addition to acting as a SDR, to establish, maintain, and enforce written policies and procedures reasonably designed to assure that the additional services do not adversely impact the operational reliability of its core function as an SDR? [150]

○ An SDR to identify the potential risks that can arise as a result of interoperability and/or interconnectivity with other market infrastructures and venues from which data can be submitted to the SDR (such as exchanges, SB SEFs, clearing agencies, SBS dealers, and major SBS participants) and service providers and how the SDR mitigates such risks? [151]

○ An SDR to abide by substantive requirements (in addition to, or in place of, the policies and procedures approach of proposed Rule 13n–6(b)(1)), such as (i) having robust system controls and safeguards to protect the data from loss and information leakage, (ii) having high-quality safeguards and controls regarding the transmission, handling, and protection of data to ensure the accuracy, integrity, and confidentiality of the trade information recorded in the SDR, or (iii) having reliable and secure systems and having adequate, scalable capacity? and

○ An SDR to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the transaction data that it accepts is from the entity it purports to be from, such as requiring robust passwords?

• Are the time periods specified in proposed Rule 13n–6(b)(2)–(4) with respect to submission of annual reviews and written notices of material system outages and material systems changes the correct time periods to use? Should any of the proposed time periods be shortened or lengthened? Should the time periods be replaced with less specific requirements, such as "promptly" or "timely"? If so, please explain your reasoning.

• Should the Commission require the notification required by proposed Rule 13n–6(b)(4) to be sufficiently detailed to explain the new system development process, the new configuration of the system, its relationship to other systems, the timeframes or schedule for installation, any testing performed or planned, and an explanation on the impact of the change on the SDR's capacity estimates, contingency protocols and vulnerability estimates? [152]

• Are there specific provisions in the proposed definitions that should be eliminated or refined? Are there some events which should be included in the definitions of "material systems outage" and "material systems change" that are not, or events that should not be included in these definitions but are? If so, please explain your reasoning.

• Should the Commission require the use of a specific framework by outside or inside parties for evaluating whether SDRs have adequate capacity, resiliency, and security and that their automated systems are not subject to critical vulnerabilities? If so, what would the critical components of the framework include? Are existing frameworks available that are suitable for this purpose and, if so, which ones would be considered appropriate?

• Are the definitions "objective review" and "competent, objective personnel" parallel to the requirements for SROs and other entities in the securities markets in the context of the current ARP program?

• Should the objective review required in proposed Rule 13n–6(b)(2) be done on a regular, periodic basis, rather than on an annual basis?

• Is the requirement in proposed Rule 13n–6(b)(2) for an objective, external firm to assess the objectivity, competency, and work performance of an internal department that performed an objective review necessary or appropriate? If the objective review is done by an internal department, should the Commission require that it be done by a department or persons other than

[147] This requirement would be similar to what is required of clearing agencies. *See* Exchange Act Release No. 16900 (June 17, 1980), 45 FR 41920 (June 20, 1980).

[148] These requirements are similar to requirements related to disaster recovery plans of clearing agencies. *See id.* The requirement for geographical diversity is currently applicable to securities firms. *See* Exchange Act Release No. 47638 (April 7, 2003), 68 FR 17809 (April 11, 2003) (the "BCP Whitepaper").

[149] For example, the BCP Whitepaper requires clearing and settlement organizations to have a recovery time objective of "within the business day on which the disruption occurs with the overall goal of achieving recovery and resumption with two hours after an event."

[150] *See, e.g.,* CPSS–IOSCO, *supra* note 55 ("Where a [trade repository] offers services in addition to its record keeping function, or considers doing so, it should ensure that it has adequate resources to do so effectively and that the additional service will not adversely impact the operational reliability of its core function of record keeping").

[151] *See, e.g., id.* (Trade repositories "should evaluate the potential sources of risks that can arise, and ensure that the risks that can arise in the design and operation of [domestic or cross-border links with other trade repositories, market infrastructures or service providers] are managed prudently on an ongoing basis.").

[152] *See* ARP II Release, 56 FR 22490, *supra* note 130.

those responsible for the development or operation of the systems being tested?

2. Electronic Filing

Proposed Rule 13n–6(c) would require that every notification, review, or description and analysis required to be submitted to the Commission under proposed Rule 13n–6 (other than those required under proposed Rule 13n–6(b)(3)(i), (ii), and (iii), which can be verbal) be submitted in an appropriate electronic format to the Office of Market Operations at the Division of Trading and Markets at the Commission's principal office in Washington, DC. This proposed requirement is intended to make proposed Rule 13n–6 consistent with electronic-reporting standards set forth in other Commission rules under the Exchange Act, such as Rule 17a–25 (Electronic Submission of Securities Transaction Information by Exchange Members, Brokers, and Dealers) [153] and Rule 19b–4 (Filings with respect to Proposed Rule Changes by Self-regulatory Organizations).[154]

The Commission preliminarily believes that the proposed provision would benefit SDRs by automating the process by which they submit notifications, reviews, and descriptions and analyses under proposed Rule 13n–6 to the Commission. The Commission currently receives this type of information from SROs and other entities in the securities market in electronic format. Moreover, as noted above, this provision is intended to be consistent with other Commission rules.

Proposed Rule 13n–6(c) would require submission of notifications, reviews, and descriptions and analyses in an "appropriate electronic format." The Commission anticipates that, if the provision is adopted, the staff would work with SDRs to determine appropriate electronic formats that could be used.

Request for Comment

The Commission requests comment on the following specific issues:

- Are there specific provisions in proposed Rule 13n–6(c) that should be eliminated or refined? If so, please explain your reasoning.
- What is the likely impact of this requirement on the SBS market, including the impact on the incentives and behaviors of SDRs, the willingness of persons to register as SDRs, and the technologies used for reporting information to the Commission?

3. Confidential Treatment

Proposed Rule 13n–6(d) would provide that a person who submits a notification, review, or description and analysis pursuant to this rule for which he or she seeks confidential treatment should clearly mark each page or segregable portion of each page with the words "Confidential Treatment Requested." Proposed Rule 13n–6(d) would state that "[a] notification, review, or description and analysis submitted pursuant to this [rule] will be accorded confidential treatment to the extent permitted by law."

The Commission would use the information collected under proposed Rule13n–6 to evaluate whether SDRs are reasonably equipped to handle market demand. For this reason, requiring SDRs to submit this information would be critical to the Commission's ability to effectively oversee SDRs.

Much of the information that the Commission expects to receive from SDRs is, by its nature, competitively sensitive. If the Commission were unable to afford confidential protection to the information that it expects to receive, then the SDRs may hesitate to submit the required information to the Commission. This result could potentially undermine the Commission's ability effectively to oversee SDRs, which, in turn, could undermine investor confidence in the SBS market.

The Freedom of Information Act ("FOIA") provides at least two exemptions under which the Commission has authority to grant confidential treatment for the information submitted under proposed Rule 13n–6. First, FOIA Exemption 4 provides an exemption for "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[155] As specified in proposed Rule 13n–6(d), "a notification, review, or description and analysis submitted pursuant to this [rule] will be accorded confidential treatment to the extent permitted by law." The information required to be submitted to the Commission under proposed Rule 13n–6 may contain proprietary information regarding automated systems that is privileged or confidential and thus subject to protection from disclosure under Exemption 4 of the FOIA.

Second, FOIA Exemption 8 provides an exemption for matters that are "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions."[156] Similarly, Commission Rule 80(b)(8), Commission Records and Information, implementing Exemption 8, states that the Commission generally will not publish or make available to any person matters that are "[c]ontained in, or related to, any examination, operating, or condition report prepared by, on behalf of, or for the use of, the Commission, any other Federal, state, local, or foreign governmental authority or foreign securities authority, or any securities industry self-regulatory organization, responsible for the regulation or supervision of financial institutions."[157]

Request for Comment

The Commission requests comment on the following specific issues:

- Are there specific provisions in proposed Rule 13n–6(d) that should be eliminated or refined? If so, please explain your reasoning.
- What is the likely impact of this requirement on the SBS market, including the impact on the incentives and behaviors of SDRs and the willingness of persons to register as SDRs?

G. Proposed Rule Regarding SDR Recordkeeping

The Commission is proposing Rule 13n–7 under the Exchange Act to specify the books and records requirements applicable to SDRs. Proposed Rule 13n–7's requirements are discussed below.

1. Records to be Made by SDRs

Proposed Rule 13n–7(a) would require SDRs to make and keep current certain books and records relating to its business. Proposed Rule 13n–7(a)(1) would require SDRs to make and keep current "a record for each office listing, by name or title, each person at that office who, without delay, can explain the types of records the security-based swap data repository maintains at that office and the information contained in those records." SDR recordkeeping practices may vary in ways ranging from format and presentation to the name of a record. Therefore, each SDR must be able to promptly explain how it makes, keeps, and titles its records. To comply with this proposed rule, an SDR may identify more than one person and list which records each person is able to explain. Because it may be burdensome for an SDR to keep this record current if it lists each person by name, a firm

[153] 17 CFR 240.17a–25.

[154] 17 CFR 240.19b–4.

[155] 5 U.S.C. 552(b)(4).

[156] 5 U.S.C. 552(b)(8).

[157] 17 CFR 200.80(b)(8).

may satisfy this proposed requirement by recording the persons capable of explaining the firm's records by either name or title.

Proposed Rule 13n–7(a)(2) would require SDRs to make and keep current "a record listing each officer, manager, or person performing similar functions of the security-based swap data repository responsible for establishing policies and procedures that are reasonably designed to ensure compliance with the [Exchange] Act and the rules and regulations thereunder." This proposed rule is intended to assist securities regulators by identifying individuals responsible for designing an SDR's compliance procedures and managing the SDR.

These two proposed requirements are based on Exchange Act Rules 17a–3(a)(21) and (22), respectively, which are applicable to broker-dealers.[158] The purpose of these rules is to assist the Commission in its inspection and examination function.[159] It is important for the Commission's examiners to have the ability to find quickly what records are maintained in a particular office and who is responsible for establishing particular policies and procedures of the SDR. These proposed requirements are designed to assist in obtaining this information. Based on the Commission's experience in conducting examinations of broker-dealers, we believe that requiring SDRs to comply with these two rules will facilitate the Commission's inspections and examinations of SDRs.

2. Records To Be Preserved by SDRs

Proposed Rule 13n–7(b)(1) would require SDRs to "keep and preserve at least one copy of all documents, including all documents and policies and procedures required by the [Exchange] Act and the rules and regulations thereunder, correspondence, memoranda, papers, books, notices, accounts, and other such records as shall be made or received by it in the course of its business as such." This proposed rule is designed to include all electronic documents and correspondence such as emails and instant messages. Proposed Rule 13n–7(b)(2) would require SDRs to "keep all such documents for a period of not less than five years, the first two years in a place that is immediately available to the staff of the Commission for inspection." Proposed Rule 13n–7(b)(3) would require SDRs to, "upon request of any representative of the Commission, promptly furnish to the possession of such representative copies of any documents required to be kept and preserved by it pursuant to sections (a) and (b) of this Rule."

Proposed Rule 13n–7(b) is based on Exchange Act Rule 17a–1, which is the recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies, and the Municipal Securities Rulemaking Board ("MSRB").[160] Proposed Rule 13n–7(b) is intended to set forth the recordkeeping obligation of SDRs and thereby facilitate implementation of the broad inspection authority given to the Commission in Exchange Act Section 13(n)(2).[161] The Commission believes that Exchange Act Rule 17a–1 is better suited as a basis for SDR recordkeeping than the broker-dealer recordkeeping rules because the broker-dealer recordkeeping rules are specifically tailored for the business of broker-dealers.

3. Recordkeeping After an SDR Ceases To Do Business

Proposed Rule 13n–7(c) would require an SDR, if the SDR ceases doing business, or ceases to be registered pursuant to Exchange Act Section 13(n) and the rules and regulations thereunder, to continue to preserve, maintain, and make accessible the records/data required to be collected, maintained, and preserved by Rule 13n–7 in the manner required by this rule and for the remainder of the period required by this rule.[162] This proposed requirement is intended to allow the Commission to perform effective inspections and examinations of the SDRs pursuant to Exchange Act Section 13(n)(2).[163] The Commission preliminarily expects that an SDR would need to establish contingency plans so that another entity would be in the position to maintain this information after the SDR ceases to do business.

4. Applicability

Proposed Rule 13n–7(d) states that "this section does not apply to data collected and maintained pursuant to Rule 13n–5." This is to clarify that the requirements under proposed Rule 13n–7 are designed to capture those records of an SDR other than the transaction data, positions, and market data that would be required to be maintained in accordance with proposed Rule 13n–5, as discussed in Section III.E of this release.

Request for Comment

The Commission requests comment on the following specific issues:

- Should the Commission recommend a rule similar to Exchange Act Rule 17a–6 for SDRs? [164]
- Should the Commission recommend other requirements that might be necessary or useful in protecting the records of an SDR upon the failure of such entity?
- Should the Commission require records retained under this section to be retained electronically or furnished to the Commission electronically?
- What is the likely impact of these requirements on the SBS market, including the impact on the incentives and behaviors of SDRs, the willingness of persons to register as SDRs, and the technologies used for maintaining records at the SDR?
- With respect to entities that currently perform repository services for SBSs or other instruments, how do current practices compare to the practices that the Commission proposes to require in this rule? What are the incremental costs to potential SDRs in connection with adding to or revising their current practices in order to implement the Commission's proposed rule?

H. Proposed Rule Regarding Reports To Be Provided to the Commission

The Commission is proposing Rule 13n–8 under the Exchange Act to specify certain reports that the SDR would have to provide to the Commission. Proposed Rule 13n–8 would require an SDR to "promptly 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 [Exchange] Act and the rules and regulations thereunder." While the Commission has "direct electronic access" to the SBS transaction information maintained by the

[158] 17 CFR 240.17a–3(a)(21) and (22).

[159] Exchange Act Section 13(n)(2), Public Law 111–203, § 763(i), states that "[e]ach registered security-based swap data repository shall be subject to inspection and examination by any representative of the Commission." *See also* proposed Rule 13n–4(b)(1).

[160] 17 CFR 240.17a–1.

[161] *See also* proposed Rule 13n–4(b)(1).

[162] This proposed requirement is based on Exchange Act Rule 17a–4(g), 17 CFR 240.17a–4(g), which applies to broker-dealer books and records.

[163] *See also* proposed Rule 13n–4(b)(1).

[164] 17 CFR 240.17a–6. Exchange Act Rule 17a–6 applies to national securities exchanges, national securities associations, registered clearing agencies, and the MSRB. Exchange Act Rule 17a–6 allows for the destruction or disposal of records by these entities prior to the 5-year retention period of Exchange Act Rule 17a–1 if done according to a plan for destruction or disposal that is filed with and approved by the Commission.

there may be times when a report may be more useful to Commission staff in fulfilling their duties. For example, the Commission may request a report on the number of complaints the SDR has received pertaining to data integrity.

Request for Comment

The Commission requests comment on the following specific issues:

- What are the benefits and burdens of this requirement? Should any limitations be put on the types or frequency of reports requested by the Commission?
- Should the term "promptly" be defined or should the Commission use another term such as "as soon as technologically practicable after the time at which the request has been submitted"?
- What is the likely impact of this requirement on the SBS market, including the impact on the incentives and behaviors of SDRs, the willingness of persons to register as SDRs, and the technologies used for maintaining SBS data at the SDR?
- With respect to entities that currently perform repository services for SBSs or other instruments, how do current practices compare to the practices that the Commission proposes to require in this rule? What are the incremental costs to potential SDRs in connection with adding to or revising their current practices in order to implement the Commission's proposed rule?

I. Proposed Rule Regarding Privacy of SBS Transaction Information

The Commission is proposing Rule 13n–9 to require each SDR to establish, maintain, and enforce written policies and procedures reasonably designed to protect the privacy of any and all SBS transaction information that the SDR receives from an SBS dealer, counterparty, or any registered entity. As mentioned above, this requirement is specifically enumerated in the Dodd-Frank Act.[166] The proposed rule would further provide that such policies and procedures shall include, but are not limited to, policies and procedures to protect the privacy of any and all SBS transaction information that the SDR shares with affiliates and nonaffiliated third parties.[167]

The proposed rule would also require each SDR to establish and maintain safeguards, policies, and procedures reasonably designed to prevent the misappropriation or misuse, directly or indirectly, of: (1) Any confidential information received by the SDR, including, but not limited to, trade data, position data, and any nonpublic personal information about a market participant or any of its customers;[168] (2) material, nonpublic information; and/or (3) intellectual property, such as trading strategies or portfolio positions, by the SDR or any person associated with the SDR for their personal benefit or the benefit of others.[169] Such safeguards, policies, and procedures shall address, without limitation, (1) limiting access to such confidential information, material, nonpublic information, and intellectual property, (2) standards pertaining to the trading by persons associated with the SDR for their personal benefit or the benefit of others, and (3) adequate oversight to ensure compliance of this provision.[170] This particular requirement incorporates current requirements regarding the treatment of proprietary information of clearing members, which are contained in exemptive orders issued to SBS clearing agencies,[171] and draws from Exchange Act Section 15(g), which requires broker-dealers to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse of material, nonpublic information by such broker or dealer or any person associated with such broker or dealer.[172]

The Commission anticipates that as a central recordkeeper of SBS transactions, each SDR will receive proprietary and highly sensitive information, which could disclose, for instance, a market participant's trade information, trading strategy, or nonpublic personal information. Proposed Rule 13n–9 is designed to ensure that an SDR has reasonable safeguards, policies, and procedures in place to protect such information from being misappropriated or misused by the SDR or any person associated with the SDR. The Commission preliminarily believes that an SDR's governance arrangements should have adequate internal controls to protect against such misappropriation or misuse. For instance, an SDR should limit access to the proprietary and sensitive information by creating informational, technological, and physical barriers. The Commission also preliminarily believes that an SDR should limit access to the data that it maintains to only those officers, directors, employees, and agents who need to know the data to perform their job responsibilities; such access should not necessarily be granted on an all-or-nothing basis. An SDR should also have controls to prevent unauthorized or unintentional access to its data.

Additionally, an SDR should consider restricting the trading activities of individuals who have access to proprietary or sensitive information maintained by the SDR or implementing

[166] *See* Public Law 111–203, § 763(i) (adding Exchange Act Section 13(n)(5)).

[167] Proposed Rule 13n–9(b)(1).

[168] Under the proposed rule, the term "nonpublic personal information" would be defined as (1) personally identifiable information and (2) any list, description, or other grouping of market participants (and publicly available information pertaining to them) that is derived using personally identifiable information that is not publicly available information. Proposed Rule 13n–9(a)(5). The term "personally identifiable information" would be defined as any information (i) a market participant provides to an SDR to obtain service from the SDR, (ii) about a market participant resulting from any transaction involving a service between the SDR and the market participant, or (iii) the SDR obtains about a market participant in connection with providing a service to that market participant. Proposed Rule 13n–9(a)(6).

[169] Proposed Rule 13n–9(b)(2).

[170] *Id.*

[171] *See, e.g.,* ICE Trust Order stating "ICE Trust shall establish and maintain adequate safeguards and procedures to protect clearing members' confidential trading information. Such safeguards and procedures shall include: (A) limiting access to the confidential trading information of clearing members to those employees of ICE Trust who are operating the system or responsible for its compliance with this exemption or any other applicable rules; and (B) establishing and maintaining standards controlling employees of ICE Trust trading for their own accounts. ICE Trust must establish and maintain adequate oversight procedures to ensure that the safeguards and procedures established pursuant to this condition are followed." Exchange Act Release No. 59527 (Mar. 6, 2009), 74 FR 10791 (Mar. 12, 2009), Exchange Act Release No. 61119 (Dec. 4, 2009), 74 FR 65554 (Dec. 10, 2009), and Exchange Act Release No. 61662 (Mar. 5, 2010), 75 FR 11589 (Mar. 11, 2010) (temporary exemptions in connection with CDS clearing by ICE Trust US LLC). *See also* Exchange Act Release No. 60372 (July 23, 2009), 74 FR 37748 (July 29, 2009) and Exchange Act Release No. 61973 (Apr. 23, 2010), 75 FR 22656 (Apr. 29, 2010) (temporary exemptions in connection with CDS clearing by ICE Clear Europe Limited); Exchange Act Release No. 60373 (July 23, 2009), 74 FR 37740 (July 29, 2009) and Exchange Act Release No. 61975 (Apr. 23, 2010), 75 FR 22641 (Apr. 29, 2010) (temporary exemptions in connection with CDS clearing by Eurex Clearing AG); Exchange Act Release No. 59578 (Mar. 13, 2009), 74 FR 11781 (Mar. 19, 2009), Exchange Act Release No. 61164 (Dec. 14, 2009), 74 FR 67258 (Dec. 18, 2009) and Exchange Act Release No. 61803 (Mar. 30, 2010), 75 FR 17181 (Apr. 5, 2010) (temporary exemptions in connection with CDS clearing by Chicago Mercantile Exchange Inc.).

[172] *See* 15 U.S.C. 78o(g). *See also* Public Law 111–203 (adding Exchange Act Section 15F(j)(5) (requiring SBS dealers and major SBS participants to "establish structural and institutional safeguards to ensure that the activities of any person within the firm relating to research or analysis of the price or market for any security-based swap or acting in a role of providing clearing activities or making determinations as to accepting clearing customers are separated by appropriate informational partitions with the firm from the review, pressure, or oversight of persons whose involvement in pricing, trading, or clearing activities might potentially bias their judgment or supervision and contravene the [enumerated] core principles of open access and the business conduct standards * * * ").

firm-wide restrictions on trading certain SBSs, as well as underlying or related investment instruments. Such restrictions could include, for example, a pre-trade clearance requirement. An SDR should also have systems in place to prevent and detect insider trading by the SDR or persons associated with the SDR. Such systems could include a mechanism to monitor such persons' access to the SDR's data, their trading activities, and their e-mails.

The Commission preliminarily believes that to the extent that an SDR or any person associated with the SDR shares information with a nonaffiliated third party, an SDR's policies and procedures should ensure the privacy of the information shared. For instance, an SDR should consider requiring the nonaffiliated party to consent to being subject to the SDR's privacy policies and procedures as a condition of receiving any sensitive information from the SDR.

Request for Comment

The Commission requests comment on the following specific issues:

- Are the Commission's proposed definitions of "nonpublic personal information" and "personally identifiable information" appropriate and sufficiently clear? If not, what specific modifications are appropriate or necessary?
- Are the Commission's privacy requirements appropriate and sufficiently clear? If not, why not and what would be a better alternative?
- Should the proposed SDR's protection of privacy extend to any other person (*e.g.,* third party service providers, market infrastructures, or venues from which data can be submitted to the SDR)?
- What other examples of confidential information, material, nonpublic information, and intellectual property should be protected by an SDR?
- Should the Commission require anything else to be protected in an SDR's privacy policies and procedures?
- Should the Commission prescribe any other preventive measures that an SDR must include in its privacy policies and procedures?
- With respect to entities that currently perform repository services for SBSs or other entities, how do current practices compare to the practices that the Commission proposes to require in this rule? What are the incremental costs to potential SDRs in connection with adding to or revising their current practices in order to implement the Commission's proposed rule?

J. Proposed Rule Regarding Disclosure to Market Participants

Pursuant to the Commission's authority under Exchange Act Sections 13(n)(3), 13(n)(7)(D)(i), and 13(n)(9),[173] the Commission is proposing Rule 13n–10 to enhance transparency in the SBS market, bolster market efficiency, promote standardization, and foster competition. Specifically, the proposed rule would provide that before accepting any SBS data from a market participant or upon a market participant's request, each SDR shall furnish to the market participant a disclosure document that contains the following written information, which must reasonably enable the market participant to identify and evaluate accurately the risks and costs associated with using the SDR's services: (1) The SDR's criteria for providing others with access to services offered and data maintained by the SDR, (2) the SDR's criteria for those seeking to connect to or link with the SDR, (3) a description of the SDR's policies and procedures regarding its safeguarding of data and operational reliability to protect the confidentiality and security of such data, (4) a description of the SDR's policies and procedures reasonably designed to protect the privacy of any and all SBS transaction information that the SDR receives from an SBS dealer, counterparty, or any registered entity, (5) a description of the SDR's policies and procedures regarding its non-commercial and/or commercial use of the SBS transaction information that it receives from a market participant, any registered entity, or any other person, (6) a description of the SDR's dispute resolution procedures involving market participants, (7) a description of all the SDR's services, including any ancillary services, (8) the SDR's updated schedule of any dues; unbundled prices, rates, or other fees for all of its services, including any ancillary services; any discounts or rebates offered; and the criteria to benefit from such discounts or rebates, and (9) a description of the SDR's governance arrangements.[174]

These proposed disclosure requirements are intended to promote competition and foster service transparency by enabling market participants to identify the range of services that each SDR offers and to evaluate the risks and costs associated with using such services. The Commission also preliminarily believes that service transparency is particularly important in light of the complexity of OTC derivatives products and their markets, and that greater service transparency could improve market participants' confidence in an SDR and result in greater use of the SDR, which would ultimately increase market efficiency.

Request for Comment

The Commission requests comment on the following specific issues:

- Are the proposed disclosure requirements to market participants appropriate and sufficiently clear? If not, why not and what would be a better alternative?
- Should the Commission require SDRs to make the proposed disclosure to market participants in any other instances?
- Should the Commission not require disclosure of any of the information specified in this proposed rule? If so, what and why?
- Should the Commission require disclosure of the specified information only upon request and not necessarily before an SDR accepts SBS data from a market participant?
- Should the Commission require disclosure of any other information? If so, what and why?
- Should the Commission require SDRs to provide market participants with updated disclosure documents? If so, how often (*e.g.,* annually, when there are material changes to an SDR's disclosed policies and procedures)?
- Should the Commission require disclosure of the proposed information to anyone else besides market participants? If so, to whom and why? Should the disclosure be the same or vary depending on the recipient?
- Should the Commission permit disclosure of the proposed information on an SDR's Web site? If so, would such disclosure be as meaningful? How should the Commission address the problem of the disclosure possibly being embedded in an SDR's Web site so as to make it difficult for market participates to navigate their way to find the disclosure? Would a disclosure on an SDR's Web site be equally effective, less effective, or more effective than a disclosure document furnished to market participants? Should the Commission prescribe any restrictions regarding disclosure on an SDR's Web site?
- With respect to entities that currently perform repository services for SBSs or other instruments, how do current practices compare to the practices that the Commission proposes to require in this rule? What are the incremental costs to potential SDRs in connection with adding to or revising

[173] *See* Public Law 111–203, § 763(i).

[174] *See* proposed Rule 13n–10(b).

their current practices in order to implement the Commission's proposed rule?

K. Proposed Rule Regarding Chief Compliance Officer of Each SDR

The Commission is proposing Rule 13n–11, which would incorporate the duties of an SDR's CCO that are enumerated in Exchange Act Section 13(n)(6) [175] and impose additional requirements.

1. Enumerated Duties of Chief Compliance Officer

Specifically, proposed Rule 13n–11(a) would require each SDR to identify on Form SDR a person who has been designated by the board to serve as a CCO of the SDR. The proposed rule would also provide that the compensation and removal of the CCO shall require the approval of a majority of the SDR's board.[176] This proposed requirement is intended to promote the independence and effectiveness of the CCO.

Under proposed Rule 13n–11(c), each CCO shall: (1) Report directly to the board or to the chief executive officer of the SDR, (2) review the compliance of the SDR with respect to the requirements and core principles described in Exchange Act Section 13(n) and the rules and regulations thereunder, (3) in consultation with the board or the SDR's chief executive officer, resolve any conflicts of interest that may arise, (4) be responsible for administering each policy and procedure that is required to be established pursuant to Exchange Act Section 13 and the rules and regulations thereunder, (5) ensure compliance with the Exchange Act and the rules and regulations thereunder relating to SBSs, including each rule prescribed by the Commission under Exchange Act Section 13, (6) establish procedures for the remediation of noncompliance issues identified by the CCO through any (a) compliance office review, (b) look-back, (c) internal or external audit finding, (d) self-reported error, or (e) validated complaint, and (7) establish and follow appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.

The Commission notes that an SDR would not be required to hire an additional person to serve as its CCO. Instead, an SDR can designate an individual already employed with the SDR as its CCO. The CCO would be responsible for, among other things, keeping the board or the SDR's chief executive officer apprised of significant compliance issues and advising the board or chief executive officer of needed changes in the SDR's policies and procedures. Given the critical role that a CCO is intended to play in ensuring an SDR's compliance with the Exchange Act and the rules and regulations thereunder, the Commission believes that an SDR's CCO should be competent and knowledgeable regarding the federal securities laws and should be empowered with full responsibility and authority to develop and enforce appropriate policies and procedures for the SDR. To meet his statutory obligations, a CCO should also have a position of sufficient seniority and authority within the SDR to compel others to adhere to the SDR's policies and procedures.

The Commission is concerned that an SDR's commercial interests might discourage its CCO from making forthright disclosure to the board or chief executive officer about any compliance failures. To mitigate this potential conflict of interest, the Commission preliminarily believes that an SDR's CCO should be independent from its management so as not to be conflicted in reporting or addressing any compliance failures. As mentioned, each CCO of an SDR is statutorily required to report directly to the board or its chief executive officer, but only the board would be able to discharge the CCO from his or her responsibilities and would be able to approve the CCO's compensation.

Request for Comment

The Commission requests comment on the following specific issues:

- Are there any terms in the proposed rule incorporating the duties of a CCO that need to be clarified or modified (*e.g.,* "look-back," "self-reported error," "validated complaint")? If so, which terms and how should they be defined?
- Should the Commission require a CCO of an SDR to report to any other senior officer besides its chief executive officer? If so, to whom and why?
- Is the Commission's proposed requirement regarding an SDR's board approval of a CCO's compensation and a CCO's removal appropriate? If not, why and what would be a better alternative to promote the independence and effectiveness of the CCO? Should the required percentage of board approval be lower or higher?
- Should the Commission prohibit a CCO of an SDR from being a member of the SDR's legal department or the SDR's general counsel?
- Should the Commission prohibit any officers, directors, or employees of an SDR from, directly or indirectly, taking any action to coerce, manipulate, mislead, or fraudulently influence the SDR's CCO in the performance of his responsibilities?
- Should the Commission prohibit an SDR's board from requiring its CCO to make any changes to his annual compliance report? Would such a prohibition be necessary in light of the CCO's statutory requirement to certify that the compliance report is accurate and complete?
- Are there other measures that would further enhance the independence and effectiveness of a CCO and that should be prescribed in a rule?
- Should the Commission impose any additional duties on a CCO of an SDR that are not already enumerated in the legislation and incorporated in the proposed rule?
- Should the Commission provide guidance in its proposed rules about the CCO's procedures for the remediation of noncompliance issues?
- Should the Commission provide guidance in its proposed rules on what would be considered "appropriate procedures" for the handling, management response, remediation, retesting, and closing of noncompliance issues? If so, what factors should the Commission take into consideration?
- What is the likely impact of the Commission's proposed rule on the SBS market? Would the proposed rule potentially promote or impede the establishment of SDRs?
- With respect to entities that currently perform repository services for SBSs or other instruments, how do current practices compare to the practices that the Commission proposes to require in this rule? What are the incremental costs to potential SDRs in connection with adding to or revising their current practices in order to implement the Commission's proposed rule?
- How might the evolution of the SBS market over time affect SDRs or impact the Commission's proposed rule?

2. Annual Reports

A CCO of an SDR is required, under Exchange Act Section 13(n)(6)(C)(i), to annually prepare and sign a report that contains a description of the compliance of the SDR with respect to the Exchange Act and the rules and regulations thereunder and each policy and procedure of the SDR (including the code of ethics and conflicts of interest

[175] *See* Public Law 111–203, § 763(i) (adding Exchange Act Section 13(n)(6)).

[176] Proposed Rule 13n–11(a).

policies of the SDR).[177] The Commission is proposing Rule 13n–11(d) to require each annual compliance report to contain, at a minimum, a description of: (1) The SDR's enforcement of its policies and procedures, (2) any material changes [178] to the policies and procedures since the date of the preceding compliance report, (3) any recommendation for material changes to the policies and procedures as a result of the annual review, the rationale for such recommendation, and whether such policies and procedures were or will be modified by the SDR to incorporate such recommendation, and (4) any material compliance matters[179] identified since the date of the preceding compliance report. The Commission notes that individual compliance matters may not be material when viewed in isolation, but may collectively suggest a material compliance matter.

Although the proposed rule would require only annual reviews, CCOs should consider the need for interim reviews in response to significant compliance events, changes in business arrangements, and regulatory developments. For example, if there is an organizational restructuring of an SDR, then its CCO should evaluate whether its policies and procedures are adequate to guard against potential conflicts of interest. Additionally, if a new rule regarding SDRs is adopted by the Commission, then a CCO should review its policies and procedures to ensure compliance with the rule. Furthermore, a CCO should review, on an ongoing basis, the SDR's service levels, costs, pricing, and operational reliability, with the view to preventing anticompetitive practices and discrimination, and encouraging innovation and the use of the SDR.

Under the proposed rule, an SDR would be required to file with the Commission a financial report, as discussed further in Section III.K.3 below, along with a compliance report, which must include a certification that, under penalty of law, the compliance report is accurate and complete.[180] The compliance report would also be required to be filed in a tagged data format in accordance with instructions contained in the EDGAR Filer Manual, as described in Rule 301 of Regulation S–T.[181]

In addition, a CCO would be required to submit the annual compliance report to the board for its review prior to the submission of the report to the Commission under proposed Rule 13n–11(d)(2).[182] The Commission notes that a CCO should promptly bring serious compliance issues to the board's attention rather than wait until an annual report is prepared.

Request for Comment

The Commission requests comment on the following specific issues:

- Are the Commission's proposed rules regarding annual compliance reports appropriate and sufficiently clear? If not, why not and what would be a better approach?
- Are the proposed definitions of "material change" and "material compliance matter" appropriate? If not, are they over-inclusive or under-inclusive and how should they be defined?
- Is the Commission's proposed timeframe for a CCO to submit his annual report to the board appropriate? If not, should the timeframe be shorter or longer? Should the Commission permit the SDR to request an extension to file an annual report (*e.g.,* due to substantial, undue hardship)?
- If a CCO reports to the chief executive officer of the SDR rather than its board, should the Commission permit the CCO to submit his annual report to the chief executive officer rather than the board, in addition to the board, or only when an SDR does not have a board? Would any of these alternatives lessen the independence of the CCO in any way?
- If the Commission were to require an SDR to have independent directors, should the Commission require a CCO to meet separately with the independent directors at least annually? If not, why not and what would be a better alternative?
- Are the Commission's proposed minimum disclosure requirements in the CCO's annual report appropriate? If not, why not and what would be a better alternative?
- Should the Commission require any other disclosure in the CCO's annual report?
- Should the CCO's compliance reports be deemed confidential, by rule, or should an SDR simply rely on the FOIA exemptions discussed in Section III.F.3 of this release?
- Would keeping the compliance reports confidential encourage the CCO to be more forthcoming about sensitive compliance issues or would it likely not have any impact on the disclosure of such issues?
- Are there any disadvantages to keeping the CCO's compliance report confidential? How could the Commission address any such disadvantage?
- Would making the CCO's compliance report public be useful to the public or other regulators?
- What is the likely impact of the Commission's proposed rule on the SBS market? Would the proposed rule potentially promote or impede the establishment of SDRs?
- With respect to entities that currently perform repository services for SBSs or other instruments, how do current practices compare to the practices that the Commission proposes to require in this rule? What are the incremental costs to potential SDRs in connection with adding to or revising their current practices in order to implement the Commission's proposed rule?
- How might the evolution of the SBS market impact the SDRs or the Commission's proposed rule?

3. Financial Reports

The Commission is proposing Rule 13n–11(f) to require each financial report to be a complete set of financial statements of the SDR that are prepared in conformity with U.S. generally accepted accounting principles ("GAAP") for the most recent two fiscal years of the SDR.[183] Additionally, the proposed rule would provide that each financial report shall be audited in accordance with the standards of the Public Company Accounting Oversight Board ("PCAOB") by a registered public accounting firm [184] that is qualified and independent in accordance with Rule 2–01 of Regulation S–X.[185]Each financial report would be required to include a

[177] *See* Public Law 111–203, § 763(i).

[178] The term "material change" would be defined as a change that a CCO would reasonably need to know in order to oversee compliance of the SDR. *See* proposed Rule 13n–11(b)(5).

[179] The term "material compliance matter" would be defined as any compliance matter that the board would reasonably need to know to oversee the compliance of the SDR and that involves, without limitation: (1) A violation of the federal securities laws by the SDR, its officers, directors, employees, or agents; (2) a violation of the policies and procedures of the SDR, its officers, directors, employees, or agents; or (3) a weakness in the design or implementation of the SDR's policies and procedures. *See* proposed Rule 13n–11(b)(6).

[180] *See* proposed Rule 13n 11(d)(2).

[181] *See id.; see also* 17 CFR 232.301. The information in each compliance report would be tagged using an appropriate machine-readable, data tagging format to enable the efficient analysis and review of the information contained in the report.

[182] Proposed Rule 13n 11(e).

[183] Proposed Rule 13n–11(f)(1).

[184] The term "registered public accounting firm" is defined in Exchange Act Section 3(a)(59) to have the same meaning as in Section 2 of the Sarbanes-Oxley Act of 2002. *See* 15 U.S.C. 78c(a)(59). Section 2 of the Sarbanes-Oxley Act defines "registered public accounting firm" as a public accounting firm registered with the PCAOB in accordance with the Sarbanes-Oxley Act.

[185] Proposed Rule 13n–11(f)(2).

report of the registered accounting firm that complies with paragraphs (a) through (d) of Rule 2–01 of Regulation S–X.[186] This proposed rule is drawn from Exchange Act Rule 17a–5.[187]

If an SDR's financial statements contain consolidated information of a subsidiary of the SDR, then the SDR's financial statements must provide condensed financial information, in a financial statement footnote, as to the financial position, changes in financial position and results of operations of the SDR, as of the same dates and for the same periods for which audited consolidated financial statements are required.[188] Such financial information need not be presented in greater detail than is required for condensed statements by Rules 10–01(a)(2), (3), and (4) of Regulation S–X.[189] Detailed footnote disclosure that would normally be included with complete financial statements may be omitted with the exception of disclosures regarding material contingencies, long-term obligations, and guarantees.[190] Descriptions of significant provisions of the SDR's long-term obligations, mandatory dividend or redemption requirements of redeemable stocks, and guarantees of the SDR shall be provided along with a five-year schedule of maturities of debt.[191] If the material contingencies, long-term obligations, redeemable stock requirements, and guarantees of the SDR have been separately disclosed in the consolidated statements, then they need not be repeated in this schedule.[192] This proposed requirement is substantially similar to Rule 12–04 of Regulation S–X, which pertains to condensed financial information of registrants.[193]

Proposed Rule 13n–11(f) would also require an SDR's financial reports to be provided in XBRL consistent with Rules 405(a)(1), (a)(3), (b), (c), (d), and (e) of Regulation S–T.[194] Specifically, information in an SDR's financial report would be required to be tagged using XBRL to allow the Commission to assess and analyze effectively the SDR's financial and operational condition.

Finally, annual compliance reports and financial reports filed pursuant to proposed Rule 13n–11 would be required to be filed within 60 days after the end of the fiscal year covered by such reports.[195]

The Commission notes that with respect to its other registrants, the Commission has required, at a minimum, the proposed financial information and, in some instances, significantly more information.[196] The Commission believes that it is necessary to obtain an audited annual financial report from each registered SDR to understand the SDR's financial and operational condition, particularly because SDRs are intended to play a pivotal role in improving the transparency and efficiency of the SBS market and because SBSs (whether cleared or uncleared) are required to be reported to a registered SDR.[197] Among other things, the Commission would need to know whether an SDR has adequate financial resources to comply with its statutory obligations or is having financial difficulties. If an SDR ultimately ceases doing business, it could create a significant disruption in the OTC derivatives market.

Request for Comment

The Commission requests comment on the following specific issues:

- Is the Commission's proposed rule regarding an SDR's financial report appropriate and sufficiently clear? If not, why not and what would be a better alternative?
- Should the Commission permit a financial report to be in compliance with International Financial Reporting Standards as an alternative to GAAP? If so, are there any disadvantages to permitting this?
- Is the Commission's proposed rule requiring financial reports to cover the most recent two fiscal years of an SDR appropriate? If not, should the timeframe be shorter or longer (*e.g.,* the most recent three fiscal years)?
- Is the Commission's proposed requirement regarding an SDR's condensed financial information appropriate and sufficiently clear? If not, why not and what would be a better alternative?
- Is the Commission's proposed 60-day timeframe for an SDR to file the financial report appropriate? If not, should the timeframe be shorter or longer (*e.g.,* 90 days)?
- Would an SDR's financial report be useful to the public or other regulators? If so, explain.
- Are there any terms in the Commission's proposed rule regarding an SDR's financial report that need to be defined or clarified? If so, which terms?
- What is the likely impact of the Commission's proposed rule on the SBS market? Would the proposed rule potentially promote or impede the establishment of SDRs?
- How might the evolution of the SBS market over time impact the SDRs or affect the Commission's proposed rule?

IV. General Request for Comment

The Commission is requesting comment from all members of the public. The Commission particularly requests comments from the point of view of entities that plan to register as SDRs; entities operating platforms that currently trade or clear SBSs; SBS dealers, broker-dealers, financial institutions, major SBS participants, and other persons that trade SBSs; and investors generally. The Commission will carefully consider the comments that it receives. The Commission seeks comment generally on all aspects of the proposed rules. In addition, the Commission seeks comment on the following:

1. Should the Commission clarify or modify any of the definitions included in the proposed rules? If so, which definitions and what specific modifications are appropriate or necessary?
2. Are the obligations in the proposed rules sufficiently clear? Is additional guidance from the Commission necessary?
3. What documents and data are typically and currently kept by entities that may register as SDRs? In what format? How long are such records currently maintained by SDRs?
4. What types of documents and data should be retained by SDRs pursuant to the proposed rules? What burdens or costs would the retention of such information entail?
5. What are the technological or administrative burdens of maintaining the information specified in the proposed rules?
6. Is there an industry standard format for information and records regarding SBSs? Are there different standard formats depending on the type or class of SBS? Please answer with specificity.
7. Are the burdens of any of the requirements in the proposed rules greater than the benefits that would be attained by such requirement?
8. Should the Commission implement substantive requirements in addition to, or in place of, the policies and procedures required in the proposed rules?

[186] Proposed Rules 13n–11(f)(3).

[187] 17 CFR 240.17a–5.

[188] Proposed Rule 13n–11(f)(4).

[189] *Id.*

[190] *Id.*

[191] *Id.*

[192] *Id.*

[193] *See* 17 CFR 210.9–06.

[194] *See* 17 CFR 232.405 (imposing content, format, submission, and Web site posting requirements for an interactive data file, as defined in Rule 11 of Regulation S–T).

[195] Proposed Rule 13n–11(g).

[196] *See, e.g.,* Exchange Act Rule 17a–5(d), 17 CFR 240.17a–5(d).

[197] *See* Public Law 111–203, § 763(i) (adding Exchange Act Section 13(m)(1)(G)).

9. The role of SDRs is still developing and may change significantly as the SBS market develops. In particular, the new provisions in the Dodd-Frank Act relating to SDRs are not yet effective. Once they become effective, SDRs will be subject to substantially more regulation. How will the incentives and behavior of market participants be likely to change as the reporting of SBSs to SDRs becomes more established? How will potential changes in the trading of SBSs affect SDRs? How might competition issues affect or change existing SDRs and new SDRs?

10. With respect to entities that currently perform repository services for SBSs or other instruments, how do current practices compare to the practices that the Commission proposes to require in these rules? What are the incremental costs to potential SDRs in connection with adding to or revising their current practices in order to implement the Commission's proposed rules?

In addition, the Commission seeks commenters' views regarding any potential impact of the proposals on users of any SDRs, other market participants, and the public generally. The Commission seeks comment on the proposal as a whole, including its interaction with the other provisions of the Dodd-Frank Act. The Commission seeks comment on whether the proposal would help achieve the broader goals of increasing transparency and accountability in the SBS market.

The Commission requests comment generally on whether the rules proposed today to govern the SDR registration process, duties, and core principles are necessary or appropriate for those purposes. If commenters do not believe one or all such rules are necessary and appropriate, why not? What would be the preferred action?

Title VII requires the SEC to consult and coordinate, to the extent possible, with the CFTC for the purposes of assuring regulatory consistency and comparability, to the extent possible, and states that in adopting rules, the CFTC and SEC shall treat functionally or economically similar products or entities in a similar manner.

The CFTC is adopting rules related to swap data repositories as required under Section 728 of the Dodd-Frank Act. Understanding that the Commission and the CFTC regulate different products and markets, and as such, may appropriately be proposing alternative regulatory requirements, we request comment on the impact of any differences between the Commission and CFTC's approaches to the regulation of SDRs and swap data repositories, respectively. Specifically, do the regulatory approaches under the Commission's proposed rulemaking pursuant to Section 763(i) of the Dodd-Frank Act and the CFTC's proposed rulemaking pursuant to Section 728 of the Dodd-Frank Act result in duplicative or inconsistent efforts on the part of market participants subject to both regulatory regimes or result in gaps between those regimes? If so, in what ways do commenters believe that such duplication, inconsistencies, or gaps should be minimized? Do commenters believe that the approaches proposed by the Commission and the CFTC to regulate SDRs and swap data repositories, respectively, are comparable? If not, why? Do commenters believe there are approaches that would make the regulation of swap data repositories and SDRs more comparable? If so, what? Do commenters believe that it would be appropriate for us to adopt an approach proposed by the CFTC that differs from our proposal? If so, which one?

Commenters should, when possible, provide the Commission with empirical data to support their views. Commenters suggesting alternative approaches should provide comprehensive proposals, including any conditions or limitations that they believe should apply, the reasons for their suggested approaches, and their analysis regarding why their suggested approaches would satisfy the statutory mandate contained in Section 763(i) of the Dodd-Frank Act governing SDRs.

V. Paperwork Reduction Act

Certain provisions of the proposed rules would impose new "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[198] The Commission has submitted them to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507 and 5 CFR 1320.11. The title of the new collection of information is "Form SDR and Security-Based Swap Data Repository Registration, Duties, and Core Principles." 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. OMB has not yet assigned a control number to the new collection of information.

[198] 44 U.S.C. 3501 *et seq.*

A. Summary of Collection of Information

1. Registration Requirements and Form SDR

Proposed Rule 13n–1(b) would require an SDR to apply for registration with the Commission by filing electronically in tagged data format on Form SDR in accordance with the instructions contained therein. Under Proposed Rule 13n–1(f), SDRs would be required to both designate and authorize on Form SDR an agent in the United States, other than a Commission member, official, or employee, to accept notice or service of process, pleadings, or other documents in any action or proceedings brought against the SDR to enforce the federal securities laws and the rules and regulations thereunder. Under proposed Rule 13n–1(g) a non-resident SDR must certify on Form SDR and provide an opinion of counsel that the SDR can, as a matter of law, provide the Commission with prompt access to the books and records of such SDR and can, as a matter of law, submit to onsite inspection and examination by the Commission. Under proposed Rule 13n–3(a), in the event that an SDR succeeds to and continues the business of a registered SDR, the successor SDR would be required to file an application for registration on Form SDR within 30 days after such succession in order for the registration of the predecessor to be deemed to remain effective as the registration of the successor. Also, under proposed Rule 13n–11(a), SDRs would be required to identify on Form SDR a person who has been designated by the board to serve as CCO of the SDR.

Proposed Rule 13n–1(e) would require SDRs to file an amendment on Form SDR annually as well as when updating any information provided in items 1 through 16, 25, and 44 on Form SDR if any information contained in those items is or becomes inaccurate for any reason. Under proposed Rule 13n–3(b), if an SDR succeeds to and continues the business of a registered SDR and the succession is based solely on a change in the predecessor's date or state of incorporation, form of organization, or composition of a partnership, the successor SDR would be permitted, within 30 days after such succession, to amend the registration of the predecessor SDR to reflect these changes.

2. SDR Duties, Data Collection and Maintenance, Automated Systems, and Direct Electronic Access

Proposed Rule 13n–4(b) sets out a number of duties for SDRs. Under proposed Rule 13n–4(b)(2) and (4),

SDRs would be required to accept data as prescribed in proposed Regulation SBSR,[199] and maintain such data as required in proposed Rule 13n–5 for each SBS reported to the SDRs. SDRs would be required, pursuant to proposed Rule 13n–4(b)(5), to provide direct electronic access to the Commission or its designees.[200] The Commission has reserved the ability to specify the form and manner in which an SDR provides this direct electronic access. SDRs would be required, pursuant to Rule 13n–4(b)(6), to provide this data in such form and at such frequency as required by proposed Regulation SBSR.

SDRs would have an obligation under proposed Rule 13n–4(b)(3) to confirm with both counterparties the accuracy of the information submitted to the SDR. Under proposed Rule 13n–4(b)(7), at such time and in such manner as may be directed by the Commission, an SDR would be required to establish automated systems for monitoring, screening, and analyzing SBS data.[201] Under proposed Rule 13n–4(b)(9), SDRs would be required to, on a confidential basis and after notification to the Commission, make available all data obtained by the SDR upon the request of certain government bodies such as the CFTC and the Department of Justice.[202] Under proposed Rule 13n–4(b)(10), before sharing information with any entity described in proposed Rule 13n–4(b)(9), the SDR must obtain a written agreement from each entity stating that the entity shall abide by the confidentiality requirements of Exchange Act Section 24 as well as indemnify the SDR and the Commission for any expenses arising from litigation relating to the information provided.

Proposed Rule 13n–5 would establish rules regarding SDR data collection and maintenance. Proposed Rule 13n–5(b)(1) would require that SDRs establish, maintain, and enforce written policies and procedures reasonably designed for the reporting of transaction data to the SDR,[203] to accept all transaction data reported to it in accordance with these policies and procedures, to accept all data provided to it regarding all SBSs in an asset class if the SDR accepts data on any SBS in that particular asset class, and to satisfy itself by reasonable means that the transaction data that has been submitted to the SDR is accurate, including clearly identifying the source for each trade side, and the pairing method (if any) for each transaction in order to identify the level of quality of the transaction data. An SDR would also be required under proposed Rule 13n–5(b)(1)(iv) to promptly record transaction data it receives.

Proposed Rule 13n–5(b) would also require that SDRs establish, maintain, and enforce written policies and procedures reasonably designed (1) to calculate positions for all persons with open SBSs for which the SDR maintains records; (2) to ensure that the transaction data and positions that it maintains are accurate; and (3) to prevent any provision in a valid SBS from being invalidated or modified through the procedures or operations of the SDR.

Proposed Rule 13n–5(b)(4) would require that SDRs maintain the transaction data for not less than five years after the applicable SBS expires and historical positions for not less than five years. This data would be required to be maintained in a place and format that is readily accessible to the Commission and other persons with authority to access or view the information and would also be required to be maintained in an electronic format that is non-rewritable and non-erasable. Under proposed Rule 13n–5(b)(7), the SDR's recordkeeping obligation would extend to the periods required under these rules even if the SDR ceases to do business or to be registered pursuant to Section 13(n) of the Act. Proposed Rule 15n–5(b)(8) would require SDRs to make and keep current a plan to ensure that the transaction data and positions that are recorded in the SDR continue to be maintained in accordance with Rule 13n–5(b)(7), including procedures for transferring the transaction data and positions to the Commission or its designee (including another registered SDR).

Proposed Rule 13n–6 would establish rules regarding SDR automated systems. As detailed above, proposed Rule 13n–6(b)(1) would require that SDRs establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the SDR's systems provide adequate levels of capacity, resiliency, and security and such policies and procedures shall include, among other elements, reasonable capacity limits, periodic capacity stress testing, and review of vulnerabilities of the SDR's systems.

Proposed Rule 13n–6(b)(3) would require that the SDR promptly notify the Commission of any material systems outages and submit to the Commission within five business days of when the outage occurred a written description and analysis of the outage and any remedial measures implemented or contemplated. The definition of "material system outage" in proposed Rule 13n–6(a)(1) refers to a number of documents that would trigger such an event, such as a communication of an outage situation to other external entities and a report or referral of an event to the SDR's board or senior management. Proposed Rule 13n–6(b)(4) would require that the SDR notify the Commission in writing at least thirty days before implementation of a planned material systems change. Pursuant to proposed Rule 13n–6(c), these notifications and description and analysis would be required to be submitted to the Division of Trading and Markets in an appropriate electronic format. Pursuant to proposed Rule 13n–6(d), these notifications and description and analysis can be afforded confidential treatment, to the extent permitted by law, if the requestor marks each page or segregable portion of each page with a notation.

3. Recordkeeping

Proposed Rule 13n–7(d) would require that the SDR keep records, in addition to those required under proposed Rule 13n–5. SDRs would be required, under proposed Rule 13n–7(a)(1), to make and keep current a record for each office listing, by name or title, each person at that office who, without delay, can explain the types of records the SDR maintains at that office and the information contained in those records. SDRs would also be required, under proposed Rule 13n–7(a)(2), to make and keep current a record listing each officer, manager, or person performing similar functions of the SDR responsible for establishing policies and procedures that are reasonably designed to ensure compliance with the Exchange Act and the rules and regulations thereunder. Proposed Rule 13n–7(b) would require every SDR to keep and preserve at least one copy of all documents as shall be made or received by it in the course of its business as such. These records would be required to be kept for a period of not less than five years, the first two years in a place immediately available to Commission staff for inspection and examination. Upon the request of any representative of the Commission, an SDR would be

[199] *See* Regulation SBSR Release, *supra* note 9.

[200] *See also* proposed Rule 13n–4(a)(6) (defining "direct electronic access").

[201] The Commission is not making any such direction in this release. *See supra* Section III.D.I. Should the Commission do so, the collection of information would be amended to reflect the change.

[202] SDRs would also be required under proposed Rule 13n–4(b)(9) to make all data available to "any other person that the Commission determines to be appropriate," including such entities as foreign financial supervisors, provided that the SDR obtains a written agreement as set forth in proposed Rule 13n–4(b)(10).

[203] Transaction data is defined in proposed Rule 13n–5(a)(1).

required to furnish promptly to such representative copies of any documents required to be kept and preserved by the SDR pursuant to proposed Rule 13n–7(a) or (b). Under proposed Rule 13n–7(c), the SDR's recordkeeping obligation would extend to the periods required under these rules even if the SDR ceases to do business or to be registered pursuant to Section 13(n) of the Act.

SDRs would also be required to make available the books and records required by proposed Rules 13n–1 through 13n–11 upon request by representatives from the Commission for examination and inspection.[204]

4. Reports and Reviews

The proposed rules would require that a number of reports or reviews be submitted to the Commission. Under proposed Rule 13n–6(b)(2), SDRs would be required to submit to the Commission an annual objective review with respect to those systems that support or are integrally related to the performance of the SDR's activities. If the objective review is performed by an internal department, an objective external firm would be required to assess the internal department's objectivity, competency, and work performance.

Under proposed Rule 13n–8, SDRs would be required to promptly report to the Commission, in a form and manner acceptable to the Commission, such information as the Commission determines necessary or appropriate for the Commission to perform the duties of the Commission.

5. Disclosure

Proposed Rule 13n–10 describes disclosures that SDRs would be required to provide to a market participant before accepting any SBS data from that market participant or upon a market participant's request. The information required in the disclosure document would be (1) the SDR's criteria for providing others with access to services offered and data maintained by the SDR; (2) the SDR's criteria for those seeking to connect to or link with the SDR; (3) a description of the SDR's policies and procedures regarding its safeguarding of data and operational reliability to protect the confidentiality and security of such data (as described in proposed Rule 13n–6); (4) the SDR's policies and procedures required by proposed Rule 13n–9(b)(1); (5) the SDR's policies and procedures regarding its non-commercial and commercial use of the transaction information that it receives; (6) the SDR's dispute resolution procedures required by proposed Rule 13n–5(b)(6); (7) a description of all of the SDR's services, including any ancillary services; (8) an updated schedule of the SDR's dues, unbundled prices, rates or other fees of all its services, as well as any discounts or rebates offered and the criteria to benefit from those discounts or rebates; and (9) a description of the SDR's governance arrangements.

6. Chief Compliance Officer

Proposed Rules 13n–4(b)(11) and 13n–11(a) would require the board of an SDR to designate a CCO to perform the duties identified in proposed Rule 13n–11. Under proposed Rule 13n–11(c)(6) and (7), the CCO would be responsible for, among other things, establishing procedures for the remediation of noncompliance issues identified by the CCO and establishing and following appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.

The CCO would also be required under proposed Rule 13n–11(d) and (g) to prepare and submit annual compliance reports to the Commission and the SDR's board containing, at a minimum, the SDR's enforcement of its policies, any material changes to the policies and procedures since the date of the preceding compliance report, any recommendation for material changes to the policies and procedures, and any material compliance matters identified since the date of the preceding compliance report. This report must be filed in a tagged data format in accordance with the instructions contained in the EDGAR Filer Manual.[205]

Proposed Rule 13n–11(f) and (g) would require that annual financial reports be prepared and submitted to the Commission. These financial reports must, among other things, be prepared in conformity with GAAP for the most recent two fiscal years of the SDR, audited by a registered public accounting firm that is qualified and independent in accordance with Rule 2–01 of Regulation S–X, and are in accordance with standards of the Public Company Accounting Oversight Board. This report must be provided in XBRL as required in Rules 405(a)(1), (a)(3), (b), (c), (d), and (e) of Regulation S–T.[206]

7. Other Provisions Relevant to the Collection of Information

Proposed Rule 13n–4(c)(1) sets forth the proposed requirements related to market access to services and data. Among these are requirements that the SDR (1) establish, monitor on an ongoing basis, and enforce clearly stated objective criteria that would permit fair, open, and not unreasonably discriminatory access to services offered and data maintained by the SDR, as well as fair, open, and not unreasonably discriminatory participation by those seeking to connect or link with the SDR and (2) establish, maintain, and enforce written policies and procedures reasonably designed to review any prohibition or limitation of any person with respect to services offered or data maintained by the SDR and to grant such person access to such services or data if such person has been discriminated against unfairly.

Proposed Rule 13n–4(c)(2)(iv) would require that SDRs establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the SDR's senior management and each member of the board or committee that has the authority to act on behalf of the board possess requisite skills and expertise to fulfill their responsibilities in the management and governance of the SDR, to have a clear understanding of their responsibilities, and to exercise sound judgment about the SDR's affairs.

Proposed Rule 13n–4(c)(3) sets forth the proposed conflicts of interest controls that would be required of SDRs. SDRs would be required to establish and enforce written policies and procedures reasonably designed to minimize conflicts of interest, including establishing, maintaining, and enforcing written policies and procedures reasonably designed to identify and mitigate potential and existing conflicts of interest in the SDR's decision-making process on an on-going basis and regarding the SDR's non-commercial and commercial use of the SBS transaction information that it receives.

Proposed Rule 13n–5(b)(6) would require that SDRs establish procedures and provide facilities reasonably designed to effectively resolve disputes over the accuracy of the transaction data and positions that are recorded in the SDR.

Proposed Rule 13n–9 relates to the privacy requirements that would be required of SDRs. Proposed Rule 13n–9(b)(1) would require SDRs to establish, maintain, and enforce written policies and procedures reasonably designed to protect the privacy of any and all SBS

[204] *See, e.g.,* proposed Rules 13n–4(b)(1) and 13n–7(b)(3).

[205] *See* 17 CFR 232.301.

[206] *See* 17 CFR 232.405.

transaction information that the SDR receives from any SBS dealer, counterparty, or any registered entity. Proposed Rule 13n–9(b)(2) would require SDRs to establish and maintain safeguards, policies, and procedures reasonably designed to prevent the misappropriation or misuse of any confidential information received by the SDR, material, nonpublic information, or intellectual property. At a minimum, such policies and procedures must limit access to such information, include standards that control persons associated with the SDR in trading for their personal benefit or the benefit of others, and adequate oversight.

B. Proposed Use of Information

1. Registration Requirements and Form SDR

As discussed above, proposed Rules 13n–1 and 13n–3 would require SDRs to register on Form SDR and make amendments to Form SDR. Certain additional information would be required on Form SDR, including agent for service of process and identification of the SDR's CCO pursuant to proposed Rule 13n–11(a). The information collected in these provisions would be used to enhance the ability of the Commission to monitor SDRs and ensure compliance with the Exchange Act and the rules and regulations thereunder by helping the Commission identify SDRs, as well as understand their operations and organizational structure.

2. SDR Duties, Data Collection and Maintenance, Automated Systems, and Direct Electronic Access

As discussed above, proposed Rules 13n–4(b), 13n–5, and 13n–6 would require that SDRs comply with specified duties, collect specific data that is provided to certain entities in specific ways as well as maintain that data in specific ways, and establish certain oversight programs over its automated systems. The information that would be collected under these provisions would help ensure an orderly and transparent SBS market as well as provide the Commission and other parties with tools to help oversee this market.

3. Recordkeeping

As discussed above, proposed Rule 13n–7 would require an SDR to make and keep records associated with all the proposed rules except for the data collected and maintained pursuant to proposed Rule 13n–5 for a prescribed period. The information that would be collected under these provisions would be necessary for the Commission to conduct its inspection and examination programs regarding SDRs.

4. Reports and Reviews

As discussed above, proposed Rules 13n–6(b)(2) and 13n–8 would require certain reports or reviews be provided to the Commission. The information that would be collected under these provisions would be used by the Commission to assist in its oversight of SDRs, including ensuring an orderly and transparent SBS market.

5. Disclosure

As discussed above, proposed Rule 13n–10 would require that SDRs provide certain specific disclosures to a market participant before accepting any data from that market participant. These disclosures would help market participants understand the risks and protections available to them.

6. Chief Compliance Officer

As discussed above, proposed Rule 13n–11 would require that an SDR's CCO establish certain policies relating to noncompliance issues as well as prepare and submit to the Commission an annual compliance report. Proposed Rule 13n–11 would also require that an annual financial report be prepared and filed with the Commission. The information that would be collected under this rule would help ensure compliance by SDRs of the provisions of the Exchange Act and the rules and regulations thereunder as well as assist the Commission in ensuring such compliance.

7. Other Provisions Relevant to the Collection of Information

As discussed above, (1) proposed Rule 13n–4(c)(1) would require SDRs to comply with certain requirements relating to market access to services and data including establishment of certain policies and procedures or clearly stated objective criteria; (2) proposed Rule 13n–4(c)(2)(iv) would require SDRs to establish policies and procedures regarding the skills and expertise of an SDR's senior management and members of the board or committee that has the authority to act on behalf of the board; (3) proposed Rule 13n–4(c)(3) would require SDRs to establish and enforce written conflict of interest policies and procedures as well as require ongoing identification and mitigation of conflicts and to establish written policies and procedures regarding their noncommercial and commercial use of transaction information; (4) proposed Rule 13n–5(b)(6) would require that SDRs establish dispute resolution procedures and facilities reasonably designed to effectively resolve disputes regarding the accuracy of the transaction data and positions that are recorded in the SDR; and (5) proposed Rule 13n–9 would require SDRs to establish policies, procedures, and safeguards regarding privacy and misappropriation or misuse of certain information. The information that would be collected pursuant to these provisions would help ensure a transparent and orderly marketplace for SBSs, protect users' privacy, and enable Commission oversight of these programs.

C. Respondents

1. Registration Requirements and Form SDR

The registration requirements of proposed Rules 13n–1, 13n–3, 13n–11(a), and Form SDR would apply to every SDR. The Dodd-Frank Act does not limit the number of persons that may register as SDRs. Commission staff is aware of five persons that have indicated the ability and/or interest in providing SDR services for SBS. For PRA purposes, the Commission believes that it is reasonable to expect that, at most, ten persons may register with the Commission as SDRs.[207] Furthermore, for PRA purposes, the Commission preliminarily estimates that three such persons may be "non-resident" SDRs subject to the additional requirements of proposed Rule 13n–1(g).

2. SDR Duties, Data Collection and Maintenance, Automated Systems, and Direct Electronic Access

The duties, data collection and maintenance, and automated systems requirements of proposed Rules 13n–4(b), 13n–5, and 13n–6 would, as a general matter, apply to all SDRs. Thus, for these provisions, the Commission estimates that there will be 10 respondents.

3. Recordkeeping

The recordkeeping requirements of proposed Rule 13n–7 would apply to all SDRs. Thus, for these provisions, the Commission estimates that there will be 10 respondents.

4. Reports and Reviews

The reports and review requirements of proposed Rules 13n–6(b)(2) and 13n–

[207] In order to withdraw from registration, SDRs would be required to file a notice of withdrawal with the Commission and update any inaccurate information by filing an amended Form SDR with the Commission prior to the withdrawal. However, since the Commission expects a total of only 10 SDRs to register, we estimate that there would be fewer than 10 potential respondents for this requirement and therefore this requirement also would not constitute part of the collection of information.

8 would apply to all SDRs. Thus, for these provisions, the Commission estimates that there will be 10 respondents.

5. Disclosure

The disclosure requirements of proposed Rule 13n–10 would apply to all SDRs. Thus, for these provisions, the Commission estimates that there will be 10 respondents.

6. Chief Compliance Officer

The provisions regarding CCOs set forth in proposed Rule 13n–11 would apply to all SDRs. Thus, for these provisions, the Commission estimates that there will be 10 respondents.

7. Other Provisions Relevant to the Collection of Information

The remaining requirements of the proposed rules relevant to the collection of information, specifically proposed Rules 13n–4(c), 13n–5(b)(6) and 13n–9, would apply to all SDRs. Thus, for these provisions, the Commission estimates that there will be 10 respondents.

The Commission seeks comment regarding the accuracy of any of the above figures.

D. Total Annual Reporting and Recordkeeping Burden

1. Registration Requirements and Form SDR

Proposed Rules 13n–1(b) and 13n–3(a), relating to successor SDRs as described above, would require SDRs to apply for registration using Form SDR and file such form electronically in tagged data format with the Commission in accordance with the instructions contained therein. Further, proposed Rule 13n–1(f) would require SDRs to designate an agent for service of process on Form SDR, and proposed Rule 13n–11(a) would require SDRs to identify its CCO on Form SDR. For purposes of the PRA, the Commission estimates that it would take an SDR approximately 400 hours to complete the initial Form SDR with the information required and in compliance with these proposals. The Commission bases this estimate on the number of hours necessary to complete Form SIP.[208] As noted above, the Commission currently estimates that 10 entities will be subject to this burden. Accordingly, the Commission estimates that the one-time initial registration burden for all SDRs would be approximately 4000 burden hours. The Commission believes that SDRs will prepare Form SDR internally, but the Commission solicits comment as to whether SDRs will do so or outsource this requirement.

Under proposed Rule 13n–1(g) a non-resident SDR must certify on Form SDR and provide an opinion of counsel that the SDR can, as a matter of law, provide the Commission with access to the books and records of such SDR and can, as a matter of law, submit to onsite inspection and examination by the Commission. This creates additional burdens for non-resident SDRs. We estimate, based on the similar requirements of Form 20–F, that this additional burden will add 3 hours and $900 in outside legal costs per respondent.[209] As stated above, the Commission believes that there will be three respondents to this collection, for a total additional burden for non-resident SDRs to comply with proposed Rule 13n–1(g) of 9 hours and $2700.[210]

SDRs would also be required to amend Form SDR pursuant to proposed Rule 13n–1(e) annually as well as when information in certain enumerated items is or becomes inaccurate. Amendments are also required in certain situations involving successor SDRs outlined above pursuant to proposed Rule 13n–3(b). For purposes of Form SIP, the Commission considered amendments to be part of the 400 hours of the annual burden.[211] However, the Commission believes that Form SDR will have different initial burden as compared to the ongoing annual amendments. When amendments to Form ADV were proposed in 2008, the Commission estimated that the hours burden for amendments to be roughly 3% of the initial burden.[212] The Commission believes that this ratio would be the same for filers of Form SDR. Thus, the Commission estimates that the ongoing annualized burden for complying with these registration amendment requirements would be approximately 12 burden hours for each SDR per amendment and approximately 120 burden hours for all SDRs per amendment. Proposed Rule 13n–1(e) would require one annual compulsory amendment on Form SDR as well as interim amendments on Form SDR when reported information thereto is or becomes inaccurate or, under proposed Rule 13n–3(b), in certain circumstances involving successor SDRs detailed above. When Form ADV was amended earlier this year, the Commission estimated that there were 2 amendments per year for that form.[213] The Commission believes that would be a reasonable estimate for the number of amendments per year to correct inaccurate information or in situations involving successor SDRs. Including the required annual amendment, the Commission estimates that respondents will be required to file on average 3 amendments per year. Therefore, the Commission estimates that each respondent will have an average annual burden of 36 hours for a total estimated average annual burden of 360 hours.[214] The Commission believes, based on discussions with industry participants, that this work will be conducted internally. The Commission solicits comment as to the accuracy of this information.

2. SDR Duties, Data Collection and Maintenance, Automated Systems, and Direct Electronic Access

As outlined above, under proposed Rules 13n–4(b)(2) and (4) and 13n–5, SDRs would be required to accept and maintain data received from third parties including transaction data and to calculate and maintain position information. SDRs would be required, pursuant to proposed Rule 13n–4(b)(5), to provide direct electronic access to the Commission or its designees and, pursuant to proposed Rule 13n–4(b)(9), make available data obtained by the SDR to other parties, including certain government bodies. SDRs would also have an obligation under proposed Rules 13n–4(b)(3) and 13n–5(b)(1)(iii) to

[208] The Commission calculated in 2008 that Form SIP takes 400 hours to complete. 73 FR 34060 (June 16, 2008) (outlining the most recent Commission calculations regarding the PRA burdens for Form SIP). While the requirements of Form SIP and Form SDR are not identical, the Commission believes that there is sufficient similarity for PRA purposes that the burden would be roughly equivalent.

[209] Exchange Act Release No. 49616 (Apr. 26, 2004); 69 FR 24016 (Apr. 30, 2004). The $900 figure is based on an estimate of $400 an hour for legal services.

[210] The base burden of 4000 hours includes resident and non-resident SDRs. The 9 hour and $2700 figures are the additional costs as a result of proposed 13n–1(g) for non-resident SDRs not already accounted for in the 4000 hour figure.

[211] "This annual reporting and recordkeeping burden does not include the burden hours or cost of amending a Form SIP because the Commission has already overstated the compliance burdens by assuming that the Commission will receive one initial registration pursuant to Rule 609 on Form SIP a year." *Id.*

[212] Investment Advisors Act Release No. 2711 (Mar. 3, 2008); 73 FR 13958 (Mar. 14, 2008). In that proposal, the initial burden was calculated to be 22.25 hours per respondent and 0.75 hours per respondent for amendments.

[213] Investment Advisors Act Release No. 3060 (July 28, 2010); 75 FR 49234 (Aug. 12, 2010). Although this information is based upon investment advisor statistics, the Commission believes that for these purposes the differences between investment advisors and SDRs are minimal.

[214] The 36 hours figure is the result of the estimated burden per SDR per amendment (12) times the estimated number of amendments per year (3). The 360 hour figure is the result of the estimated burden per SDR (36) times the number of SDRs (10).

establish and maintain written policies and procedures reasonably designed to confirm and to satisfy itself by reasonable means that the transaction data that has been submitted to the SDR is accurate. Also, proposed Rule 13n–5(b)(4) would require that SDRs maintain the transaction data for not less than five years after the applicable SBS expires and historical positions for not less than five years.[215] Under the proposal, this obligation would continue even if an SDR withdraws from registration or ceases doing business.[216] SDRs would be required to make and keep current a plan to ensure compliance with this requirement.[217]

The Commission estimates that the average one-time start-up burden per SDR of establishing systems compliant with all of these requirements, including the recordkeeping requirements of proposed Rules 13n–5(b)(4), (7), and (8), would be 42,000 hours and $10 million in information technology costs. This estimate is based on the Commission's discussions with market participants. Based on the expected number of respondents, the Commission estimates a total start-up cost of 420,000 hours and $100 million in information technology costs. Based on discussions with potential respondents, the Commission further estimates that the average ongoing annual costs of these systems to be 25,200 hours and $6 million per respondent or a total of 252,000 hours and $60 million for a total ongoing annual burden. The Commission solicits comment as to the accuracy of this information.

Under proposed Rule 13n–4(b)(10), before sharing information with any entity described in new Exchange Act Section 13(n)(5)(G), an SDR must obtain written confidentiality and indemnification agreements. The Commission estimates that these agreements will require four hours per respondent in outside legal costs to create for an initial outside cost of $1600 per respondent.[218] As outlined above, the Commission estimates a total of 10 respondents to this requirement. Therefore, the Commission estimates the initial burden for this requirement would be $16,000. The Commission estimates, for PRA purposes only, that SDRs will need to enter into these agreements on an average of at most 1 time per year.[219] The Commission further estimates that each such agreement, subsequent to the initial one, will require an average of 3 hours to draft. Thus, the Commission estimates an average annual burden of 30 hours. The Commission believes that in light of the nature of the parties involved, these agreements will be created internally at the parties entering into them after the initial agreement is drafted or reviewed by outside counsel. The Commission solicits comment as to the accuracy of this information.

Each SDR would also be required to establish, maintain, and enforce written policies and procedures, specifically (1) under proposed Rule 13n–5(b)(1), reasonably designed for the reporting of transaction data to the SDR and to satisfy itself of the accuracy of such information; (2) under proposed Rule 13n–5(b)(2), reasonably designed to calculate positions for all persons with open SBSs for which the SDR maintains records; (3) under proposed Rule 13n–5(b)(3), reasonably designed to ensure data and calculations are accurate; (4) under proposed Rule 13n–5(b)(5), reasonably designed to prevent any provision in an SBS from being invalidated; and (5) under proposed Rule 13n–6(b)(1), reasonably designed to ensure that the SDR's systems provide adequate levels of capacity, resiliency, and security. While these policies and procedures will vary in exact cost, the Commission estimates that such policies and procedures would require an average of 210 hours per respondent per policy and procedure to prepare and implement. The Commission further estimates that these policies and procedures would require $100,000 for outside legal costs.[220] In sum, the Commission estimates the initial burden for all respondents to be 10,500 hours and $1,000,000 for outside legal costs.[221] The Commission based these estimates upon those estimates we used with regards to establishing policies and procedures regarding Regulation NMS.[222] Once these policies and procedures are established, the Commission estimates that it will take on average 60 hours annually to maintain each of these policies and procedures per respondent, with a total estimated average annual burden of 3,000 hours.[223] The Commission believes that this maintenance work will be conducted internally. The Commission solicits comment as to the accuracy of this information.

For each material systems outage, SDRs would be required under proposed Rule 13n–6(b)(3) to promptly notify the Commission and submit to the Commission, after the outage, a written description and analysis of the outage and any remedial measures implemented or contemplated. Also, the definition of "material system outage" refers to a number of documents that would trigger such an event, such as a communication of an outage situation to other external entities and a report or referral of an event to the SDR's board or senior management. The Commission estimates, based on our experience with the ARP program,[224] that the burden imposed by these requirements would be 15.4 hours on average per respondent per year, for a total estimated burden of 154 hours per year.[225] The Commission believes that this work will be conducted internally. The Commission solicits comment as to the accuracy of this information.

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[215] This data would be required to be maintained in a place and format that is readily accessible to the Commission and other persons with authority to access or view the information and would also be required to be maintained in an electronic format that is non-rewritable and non-erasable.

[216] Proposed Rule 13n–5(b)(7).

[217] Proposed Rule 13n–5(b)(8).

[218] This is based on an estimated $400 an hour cost for outside legal services. This is the same estimate used by the Commission for these services in the proposed consolidated audit trail rule. Exchange Act Release No. 62174 (May 26, 2010); 75 FR 32556 (June 8, 2010).

[219] As noted above, there are other avenues available to the Commission to share this information with appropriate entities. As a result, for PRA purposes, the Commission believes that SDRs will enter into only a few confidentiality and indemnification agreements.

[220] This figure is the result of an estimated $400 an hour cost for outside legal services (as noted above) times 50 hours of outside legal consulting per policy and procedure, times 5 policies and procedures.

[221] The 10,500 hour figure is the result of the number of hours per policy and procedure (210) times the number of policies and procedures required by these provisions (5), times the number of respondents (10). The $1,000,000 figure is the result of the outside dollar cost per respondent ($100,000) times the number of respondents (10).

[222] Exchange Act Release No. 51808 (June 9, 2005); 70 FR 37496 (June 29, 2005). The Commission based these estimates on those for non-SRO trading centers rather than for SRO trading centers because we believe that for these purposes non-SRO trading center burdens are more like those that SDRs would face under the proposals.

[223] The 3,000 hour figure is the result of the estimated average hourly burden to maintain each policy and procedure (60), times the total number of policies and procedures required under this requirement (5), times the total number of SDRs (10).

[224] Under the Commission's ARP inspection program of SROs and certain alternative trading systems ("ATS"), the Commission staff conducts on-site inspections and attends periodic technology briefings presented by SRO and ATS staff to the Commission staff, generally covering systems capacity and testing, review of system vulnerability, review of planned system development, and business continuity planning. Under the ARP inspection program, the Commission staff also monitors system failures and planned system changes on a daily basis.

[225] Included in this burden is the time to mark these documents confidential under proposed Rule 13n–6(d), as the Commission believes it is likely that an SDR will mark all documents in this manner.

Proposed Rule 13n–6(b)(4) would require an SDR to notify the Commission in writing at least thirty days before implementation of a planned material systems change. Based on our discussions with market participants, the Commission estimates that there would be an average of 60 such events per respondent per year.[226] Based on the Commission's experience with the ARP program, we estimate that each of these notices would require an average of 2 hours for a total burden for all respondents of 1200 hours annually.[227] The Commission believes that this work will be conducted internally. The Commission solicits comment as to the accuracy of this information.

3. Recordkeeping

SDRs would be required, under proposed Rule 13n–7(a)(1), to make and keep current a record of persons at each office of the SDR that can assist with explaining the SDR's records as well as, under proposed Rule 13n–7(a)(2), to make and keep current a record listing officers, managers, or persons performing similar functions with responsibility for the policies and procedures of the SDR to ensure compliance with the Exchange Act and the rules and regulations thereunder. The Commission estimates that these records would create an initial burden, at a maximum, of 1 hour per respondent, for a total initial burden of 10 hours. The Commission estimates that the ongoing annual burden would be 0.17 hours (10 minutes) per respondent to keep these records current and to store these documents based on our estimates for similar requirements for broker-dealers.[228] This results in a total ongoing annual burden of 1.7 hours. The Commission believes that this work will be conducted internally. The Commission solicits comment as to the accuracy of this information.

Proposed Rule 13n–7(b) would require each SDR to keep and preserve at least one copy of all documents as shall be made or received by it in the course of its business as such, other than the data collected and maintained pursuant to proposed Rule 13n–5. These records would be required to be kept for a period of not less than five years, the first two years in a place immediately available to Commission staff for inspection and examination.[229] Upon the request of any representative of the Commission, an SDR would be required to furnish promptly documents kept and preserved by it pursuant to proposed Rule 13n–7(a) or (b) to such a representative. Based on the Commission's experience with recordkeeping costs and consistent with prior burden estimates for similar provisions,[230] the Commission estimates that this storage requirement would create an initial burden of 345 hours and $1800 in information technology costs per respondent, for a total initial burden of 3450 hours and $18,000. The Commission further estimates that the ongoing annual burden would be 279 hours per respondent and per respondent for a total ongoing annual burden of 2790 hours. The Commission solicits comment as to the accuracy of this information.

4. Reports and Reviews

Proposed Rule 13n–6(b)(2) would require SDRs to submit to the Commission an annual objective review with respect to those systems that support or are integrally related to the performance of the SDR's activities. If the objective review is performed by an internal department, an objective, external firm would be required to assess the internal department's objectivity, competency, and work performance. Based on its experience with the ARP program, the Commission believes that the annual burden per respondent of conducting an internal audit is approximately 625 hours.[231] As a result, the Commission estimates the total average annual burden to be 8250 hours for all respondents in total for the collection.[232] In addition, based on its experience with the ARP program, the Commission estimates that the annual cost to hire an objective, external firm to be approximately $90,000 per respondent annually. For this reason, the Commission estimates that the average annual cost of complying with proposed Rule 13n–6(b)(2) for all respondents is approximately $900,000.

Under proposed Rule 13n–8, SDRs would be required to report promptly to the Commission, in a form and manner acceptable to the Commission, such information as the Commission determines necessary or appropriate for the Commission to perform the duties of the Commission. For PRA purposes only, the Commission estimates that it will request these reports at a maximum of once per year, per respondent. For PRA purposes only, the Commission estimates that these reports would be limited to information already compiled under these proposed rules and thus would require only 1 hour per response to compile and transmit. Thus, the Commission estimates, for PRA purposes only, that the total annual burden for these reports to be 10 hours. The Commission believes that this work, should it be required, will be conducted internally. The Commission solicits comment as to the accuracy of this information.

5. Disclosure

As detailed above, pursuant to proposed Rule 13n–10, SDRs would be required to provide certain disclosures to a market participant. The Commission estimates that the average one-time start-up burden per SDR of preparing this disclosure document is 97.5 hours and $4,400 of external legal costs and $5,000 of external compliance consulting costs, resulting in a total initial burden of 975 hours and $94,000. This estimate reflects the Commission's experience with and burden estimates for similar disclosure document requirements imposed on entities with 1000 or fewer employees and as a result of our discussions with market participants.[233] The Commission expects that this requirement will result in an average annual burden, after the initial creation of the disclosure document, of 1 hour per respondent, with a total annual burden of 10 hours. The Commission believes that this ongoing annual work will be conducted internally. The Commission solicits comment as to the accuracy of this information.

[226] This would account for weekly maintenance that would rise to the standard of a "material systems change" as well as possible planned software upgrades, throughout the year, that would also rise to this level.

[227] Included in this burden is the time to mark these documents confidential under proposed Rule 13n–6(d), as the Commission believes it is likely that an SDR will mark all documents in this manner. The 1200 hour figure is the result of the number of events per year (60), times the estimated average burden hours per notice (2), times the number of SDRs (10).

[228] *See* Exchange Act Release No. 44992 (Oct. 26, 2001); 66 FR 55818 (Nov. 2, 2001) (regarding the collection of information pursuant to Rule 17a–3(a)(21) and (22)).

[229] Under the proposal, this obligation would continue even if the SDR withdraws from registration or ceases doing business. Proposed Rule 13n–7(c).

[230] *See* Exchange Act Release No. 59342 (Feb. 2, 2009); 74 FR 6456 (Feb. 9, 2009).

[231] Further, the Commission's experience with the ARP program has indicated that an additional 200 hours per respondent per year would be required on average to oversee and establish the independent review of these audits.

[232] The 8250 hour figure is the result of the estimate of annual burden per respondent to conduct the internal audit (625), plus the estimate of the annual burden per respondent to oversee and establish the independent review of these audits (200), times the number of SDRs (10).

[233] *See* Investment Advisers Act Release No. 3060 (Aug. 12, 2010); 75 FR 49234 (Aug. 12, 2010).

6. Chief Compliance Officer

Under proposed Rule 13n–11(c)(6) and (7), an SDR's CCO would be responsible for, among other things, establishing procedures for the remediation of noncompliance issues identified by the CCO, and establishing and following appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues. As outlined above, the Commission estimates a total of 10 respondents for this requirement. Based on the Commission's estimates regarding Regulation NMS,[234] it estimates that on average these two requirements will require 420 hours to create and 120 hours to administer per year per respondent, for a total burden of 4200 hours initially and 1200 hours on average, annually.[235] Also based on the estimates regarding Regulation NMS, the Commission estimates that a total of $40,000 in initial outside legal costs will be incurred as a result of this burden per respondent, for a total outside cost burden of $400,000.[236] The Commission solicits comment regarding the accuracy of this information.

A CCO would also be required under proposed Rule 13n–11(d) and (h) to prepare and submit annual compliance reports to the Commission and the SDR's board. Based upon the Commission's estimates for similar annual reviews by CCOs of investment companies,[237] the Commission estimates that these reports will require on average 5 hours per respondent per year. Thus, the Commission estimates a total annual burden of 50 hours. Because the report will be submitted by an internal CCO, the Commission does not expect any external costs. The Commission solicits comment as to the accuracy of this information.

Proposed Rule 13n–11(f) and (g) would require that annual financial reports be prepared and filed with the Commission. The Commission estimates, based on its experience with entities of similar size to the respondents to this collection, that these reports will generally require on average 500 hours per respondent and cost $500,000 for independent public accounting services. Thus, the Commission estimates a total annual burden of 5000 hours and $5,000,000. The Commission solicits comment as to the accuracy of this information.

The compliance and financial reports submitted to the Commission would be required to be "tagged" pursuant to the requirements of proposed Rule 13n–11. The compliance reports must be filed in a tagged data format in accordance with the instructions contained in the EDGAR Filer Manual,[238] and the financial reports must be provided in XBRL as required in Rules 405(a)(1), (a)(3), (b), (c), (d), and (e) of Regulation S–T.[239] These requirements would create an additional burden on respondents beyond the preparation of these reports. The Commission preliminarily estimates, based on our experience with other data tagging initiatives, that these requirements would add an additional burden of an average of 54 hours and $22,772 in outside software and other costs per respondent per year, creating an estimated total annual burden of 540 hours and $227,720 to tag the data for both the compliance and financial reports that would be required under proposed Rule 13n–11. The Commission solicits comment as to the accuracy of this information.

7. Other Provisions Relevant to the Collection of Information

Proposed Rule 13n–4(c)(1)(v) would require SDRs to establish, maintain, and enforce certain policies and procedures reasonably designed to review any prohibition or limitation of any person with respect to access to services offered or data maintained by the SDR and to grant such person access to such services or data if such person has been discriminated against unfairly. As outlined above, the Commission estimates a total of 10 respondents for this requirement. Based on the Commission's estimates regarding Regulation NMS,[240] it estimates that, on average, this requirement will require 210 hours to create and 60 hours to administer per year per respondent, for a total burden of 2100 hours initially and 600 hours on average, annually. The Commission also estimates, based on this earlier estimate, that a total of $20,000 in initial outside legal costs will be incurred as a result of this burden per respondent for a total outside cost burden of $200,000.[241] The Commission solicits comment as to the accuracy of this information.

Proposed Rule 13n–4(c)(1) also would require SDRs to establish, monitor on an ongoing basis, and enforce clearly stated objective criteria that would permit fair, open, and not unreasonably discriminatory access to services offered and data maintained by the SDR. For PRA purposes only, the Commission believes that this should be a lesser burden than for written policies and procedures. Thus, the Commission estimates that this requirement will require 157.5 hours to create, with an associated outside legal cost of $15,000.[242] This would result in an estimate of an initial burden for this requirement for all respondents of 1575 hours and $150,000. The Commission estimates that the average annual burden would be 45 hours each, for a total estimated average annual burden of 450 hours.[243] The Commission believes that this work will be conducted internally. The Commission solicits comment as to the accuracy of this information.

Proposed Rule 13n–4(c)(2)(iv) would require SDRs to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the SDR's senior management and each member of the board or committee that has the authority to act on behalf of the board possess requisite skills and expertise to fulfill their responsibilities in the management and governance of the SDR, to have a clear understanding of their responsibilities, and to exercise sound judgment about the SDR's affairs. As outlined above, the Commission estimates a total of 10 respondents for

[234] *See* Exchange Act Release No. 51808 (June 9, 2005); 70 FR 37496 (June 29, 2005).

[235] The 420 hour figure is the result of the estimated average hour burden to create one policy and procedure (210) times the 2 policies and procedures required by these provisions. The 120 hour figure is the result of the estimated average hour burden to administer one policy and procedure (60) times the 2 policies and procedures required by these provisions. The 4200 hour figure is the result of the estimated average hour burden per respondent to create these policies and procedures (420) times the number of SDRs (10). The 1200 hour figure is the result of the estimated average hour burden per respondent to maintain these policies and procedures (120) times the number of SDRs (10).

[236] $400,000 figure is the result of an estimated $400 an hour cost for outside legal services (as noted above) times 50 hours, times 2 policies and procedures, times the number of SDRs (10).

[237] *See* Investment Company Act Release No. 25925 (Feb. 5, 2003); 68 FR 7038 (Feb. 11, 2003).

[238] *See* 17 CFR 232.301.

[239] *See* 17 CFR 232.405.

[240] *See* Exchange Act Release No. 51808 (June 9, 2005); 70 FR 37496 (June 29, 2005).

[241] This figure is the result of an estimated $400 an hour cost for outside legal services (as noted above) times 50 hours, for 10 respondents.

[242] These numbers are based on 75% of the 210 hour and $20,000 (50 hours of outside legal costs at $400 an hour) estimates to create one set of written policies and procedures under Regulation NMS for non-SRO trading centers. *See* Exchange Act Release No. 51808 (June 9, 2005); 70 FR 37496 (June 29, 2005). This is based on an estimate that this requirement will create 75% of the burden of creating written policies and procedures under Regulation NMS.

[243] These numbers are 75% of the 60 hour estimates of the ongoing burden regarding one set of written policies and procedures under Regulation NMS for non-SRO trading centers. *See* Exchange Act Release No. 51808 (June 9, 2005); 70 FR 37496 (June 29, 2005). This is based on an estimate that this requirement will create 75% of the ongoing burden of written policies and procedures under Regulation NMS.

this requirement. Based on the Commission's estimates regarding similar requirements in Regulation NMS,[244] it estimates that, on average, this requirement will require 210 hours to create and 60 hours to administer per year per respondent, for a total burden of 2100 hours initially and 600 hours on average, annually. The Commission also estimates, based on this earlier estimate, that a total of $20,000 in outside legal costs will be incurred as a result of this burden per respondent for a total outside cost burden of $200,000.[245] The Commission solicits comment as to the accuracy of this information.

Proposed Rule 13n–4(c)(3) outlines the proposed conflicts of interest controls that would be required of SDRs. SDRs would be required to establish and enforce written policies and procedures reasonably designed to minimize conflicts of interest, including establishing, maintaining, and enforcing written policies and procedures reasonably designed to identify and mitigate potential and existing conflicts of interest in the SDR's decision-making process on an on-going basis and regarding the SDR's non-commercial and commercial use of the SBS transaction information that it receives. As outlined above, the Commission estimates a total of 10 respondents for this requirement. Based on the Commission's estimates regarding Regulation NMS,[246] it estimates that on average these two requirements will require 420 hours to create and 120 hours to administer per year per respondent, for a total burden of 4200 hours initially and 1200 hours on average annually.[247] Also based on the Regulation NMS estimates, the Commission estimates that a total of $40,000 in initial outside legal costs will be incurred as a result of this burden per respondent for a total outside cost burden of $400,000.[248]

Proposed Rule 13n–5(b)(6) would require that SDRs establish procedures and provide facilities reasonably designed to effectively resolve disputes over the accuracy of the transaction data and positions that are recorded in the SDR. For PRA purposes only, the Commission believes that this would be a greater burden than that for written policies and procedures alone. Thus, the Commission estimates that this requirement will require 315 hours to create.[249] There would likely be a need for a respondent to consult with outside legal counsel which the Commission estimates to cost $30,000 per respondent.[250] In total, the Commission estimates an initial burden for all respondents of 3150 hours and $300,000 in outside costs. The Commission estimates the ongoing average annual burden of this requirement to be 90 hours per respondent for a total of 900 hours for the estimated total annual burden for all respondents.[251] The Commission believes that this ongoing work will be conducted internally. The Commission solicits comment as to the accuracy of this information.

Proposed Rule 13n–9 relates to the privacy requirements that would be required of SDRs. Proposed Rule 13n–9(b)(1) would require SDRs to establish, maintain, and enforce written policies and procedures reasonably designed to protect the privacy of any and all SBS transaction information that the SDR receives from any SBS dealer, counterparty, or any registered entity. As outlined above, the Commission estimates a total of 10 respondents for this requirement. Based on the Commission's estimates regarding Regulation NMS,[252] it estimates that on average these two requirements will require 420 hours to create and 120 hours to administer per year per respondent, for a total burden of 4200 hours initially and 1200 hours on average, annually.[253] Also based on the Regulation NMS estimates, the Commission estimates that a total of $40,000 in initial outside legal costs will be incurred as a result of this burden per respondent for a total outside cost burden of $400,000.[254]

Proposed Rule 13n–9(b)(2) would require SDRs to establish and maintain safeguards, policies, and procedures reasonably designed to prevent the misappropriation or misuse of any confidential data received by the SDR, material, nonpublic information, or intellectual property. At a minimum, this program must limit access to such information, include standards that control persons associated with the SDR in trading for their personal benefit or the benefit of others, and adequate oversight. As outlined above, the Commission estimates a total of 10 respondents for this requirement. Based on the Commission's estimates regarding Regulation NMS,[255] it estimates that on average this requirement will require 210 hours to create and 60 hours to administer per year per respondent, for a total burden of 2100 hours initially and 600 hours on average, annually. Also based on the Regulation NMS estimates, the Commission estimates that a total of $20,000 in initial outside legal costs will be incurred as a result of this burden per respondent for a total outside cost burden of $200,000.[256]

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[244] *See* Exchange Act Release No. 51808 (June 9, 2005); 70 FR 37496 (June 29, 2005).

[245] This figure is the result of an estimated $400 an hour cost for outside legal services (as noted above) times 50 hours, for 10 respondents.

[246] *See* Exchange Act Release No. 51808 (June 9, 2005); 70 FR 37496 (June 29, 2005).

[247] The 420 hour figure is the result of the estimated average hour burden to create one policy and procedure (210) times the 2 policies and procedures required by these provisions. The 120 hour figure is the result of the estimated average hour burden to administer one policy and procedure (60) times the 2 policies and procedures required by these provisions. The 4200 hour figure is the result of the estimated average hour burden per respondent to create these policies and procedures (420) times the number of SDRs (10). The 1200 hour figure is the result of the estimated average hour burden per respondent to maintain these policies and procedures (120) times the number of SDRs (10).

[248] This $400,000 figure is the result of an estimated $400 an hour cost for outside legal services (as noted above) times 50 hours, times 2 policies and procedures, times the number of SDRs (10).

[249] This number is 150% of the 210 hour estimate to create one set of written policies and procedures under Regulation NMS for non-SRO trading centers. *See* Exchange Act Release No. 51808 (June 9, 2005); 70 FR 37496 (June 29, 2005). This is based on an estimate that this requirement will create 150% of the burden of creating written policies and procedures under Regulation NMS.

[250] This number is 150% of the estimate of outside legal costs (50 hours) to create one set of written policies and procedures under Regulation NMS for non-SRO trading centers, at an estimate of $400 per hour. *See* Exchange Act Release No. 51808 (June 9, 2005); 70 FR 37496 (June 29, 2005). This is based on an estimate that this requirement will create 150% of the burden of creating written policies and procedures under Regulation NMS.

[251] These numbers are based on 150% of the 60 hour estimate of the ongoing burden regarding one set of written policies and procedures under Regulation NMS for non-SRO trading centers. *See* Exchange Act Release No. 51808 (June 9, 2005); 70 FR 37496 (June 29, 2005). This is based on an estimate that this requirement will create 150% of the ongoing burden of written policies and procedures under Regulation NMS.

[252] *See* Exchange Act Release No. 51808 (June 9, 2005); 70 FR 37496 (June 29, 2005).

[253] The 420 hour figure is the result of the estimated average hour burden to create one policy and procedure (210) times the 2 policies and procedures required by these provisions. The 120 hour figure is the result of the estimated average hour burden to administer one policy and procedure (60) times the 2 policies and procedures required by these provisions. The 4200 hour figure is the result of the estimated average hour burden per respondent to create these policies and procedures (420) times the number of SDRs (10). The 1200 hour figure is the result of the estimated average hour burden per respondent to maintain these policies and procedures (120) times the number of SDRs (10).

[254] This $400,000 figure is the result of an estimated $400 an hour cost for outside legal services (as noted above) times 50 hours, times 2 policies and procedures, times the number of SDRs (10).

[255] *See* Exchange Act Release No. 51808 (June 9, 2005); 70 FR 37496 (June 29, 2005).

[256] This figure is the result of an estimated $400 an hour cost for outside legal services (as noted above) times 50 hours, for 10 respondents.

E. Collection of Information Is Mandatory

1. Registration Requirements and Form SDR

The collection of information relating to registration requirements and Form SDR is mandatory for all SDRs when registering with the Commission or amending their registration.

2. SDR Duties, Data Collection and Maintenance, Automated Systems, and Direct Electronic Access

The collection of information relating to SDR duties, data collection and maintenance, automated systems, and direct electronic access is mandatory for all SDRs.

3. Recordkeeping

The collection of information relating to recordkeeping is mandatory for all SDRs.

4. Reports and Reviews

The collection of information relating to reports and reviews is mandatory for all SDRs.

5. Disclosure

The collection of information relating to disclosure is mandatory for all SDRs.

6. Chief Compliance Officers

The collection of information relating to CCOs is mandatory for all SDRs.

7. Other Provisions Relevant to the Collection of Information

The collection of information relating to other relevant provisions is mandatory for all SDRs.

F. Confidentiality

1. Registration Requirements and Form SDR

The collection of information relating to registration requirements and Form SDR, including attachments thereto, would generally not be kept confidential. However, confidential treatment can be requested by the applicant pursuant to the FOIA and the rules of the Commission thereunder.[257]

[257] "The information will be used for the principal purpose of determining whether the Commission should grant or deny registration to an applicant. 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 will be included routinely in the public files of the Commission and will be available for inspection by any interested person." General instruction 5 of Form SDR.

2. SDR Duties, Data Collection and Maintenance, Automated Systems, and Direct Electronic Access

Under the Commission's proposed rules, SDRs would provide participants access to their own SBS data submitted to SDRs. The policies and procedures required under proposed Rules 13n–5(b)(1), (2), (3), and (5) would be made publicly available, as attachments to Form SDR, unless confidential treatment is requested, as explained above. A description of the SDR's policies and procedures regarding its safeguarding of data and operational reliability to protect the confidentiality and security of such data, as described in proposed Rule 13n–6, would be required to be disclosed to a market participant by the SDR pursuant to proposed Rule 13n–10(b)(3) and would be made publicly available, as exhibits to Form SDR, unless confidential treatment is requested, as explained above.

Upon the request of certain entities described in Exchange Act Section 13(n)(5)(G), information would be made available upon request if the entity making the request agrees to keep that information confidential. Pursuant to proposed Rule 13n–6(d), SDRs may request confidential treatment in connection with the documents provided to the Commission pursuant to proposed Rule 13n–6, and the Commission will accord confidential treatment to those documents to the extent permitted by law. Other than these items, all elements to the collection of data identified above relating to SDR duties, data collection and maintenance, automated systems, and direct electronic access may be provided to Commission staff, but would not be subject to public availability.

3. Recordkeeping

The collection of information relating to recordkeeping would be provided to Commission staff, but not subject to public availability.

4. Reports and Reviews

The collection of information relating to reports and reviews would be provided to Commission staff, but not subject to public availability.

5. Disclosure

The collection of information relating to disclosure would be provided to the party entitled to the disclosure and to Commission staff, but not subject to public availability.

6. Chief Compliance Officer

The financial report required to be provided to the Commission pursuant to proposed Rules 13n–11(f) and (g) may be provided as an exhibit to Form SDR. If this is done, that report would be made publicly available, as an attachment to Form SDR, unless confidential treatment is requested, as explained above. Regarding all other elements of the collection of information relating to the CCO, the collection of information would not be confidential and would be made publicly available.

7. Other Provisions Relevant to the Collection of Information

A list of instances of prohibiting or limiting access to the services of the SDR or the data maintained by an SDR would be required as an exhibit to Form SDR and, as such, would be made publicly available unless confidential treatment is requested as explained above. The policies and procedures that must be reasonably designed to review any prohibition or limitation of any person with respect to access to services offered or data maintained by the SDR as would be required in proposed Rule 13n–4(c)(1)(vi) would be made publicly available, as attachments to Form SDR, unless confidential treatment is requested, as explained above.

The policies and procedures regarding skills and expertise of senior management and certain board or committee members that would be required under proposed Rule 13n–4(c)(2)(iv), conflicts of interest that would be required under proposed Rule 13n–4(c)(3), and privacy under proposed Rule 13n–9(b)(1) would be made publicly available as attachments to Form SDR unless confidential treatment is requested, as explained above. The procedures and a description of the facilities of the SDR for resolving disputes, which would be required pursuant to proposed Rule 13n–5(b)(6), would be made publicly available, as exhibits to Form SDR, unless confidential treatment is requested, as explained above. A description of the SDR's policies relating to misuse of information, which would be required pursuant to proposed Rule 13n–9(b)(2), would be made publicly available, as an exhibit to Form SDR, unless confidential treatment is requested, as explained above. Pursuant to proposed Rule 13n–10(b), the SDR would disclose to market participants its policies and procedures described in proposed Rules 13n–5(b)(6) and 13n–9(b)(1).

Regarding all other elements of the collection of information relating to

other relevant provisions, the collection of information would be provided to Commission staff, but not subject to public availability.

G. Retention Period of Recordkeeping Requirements

With regards to proposed Rule 13n–5, proposed Rule 13n–5(b)(4) would require that SDRs maintain the transaction data for not less than five years after the applicable SBS expires and historical positions for not less than five years. This data would be required to be maintained in a place and format that is readily accessible to the Commission and other persons with authority to access or view the information and would also be required to be maintained in an electronic format that is non-rewritable and non-erasable.

Pursuant to proposed Rule 13n–7(b) an SDR would be required to preserve at least one copy of all documents as shall be made by it in the course of its business as such, including all records that would be required under the Exchange Act and the rules and regulations thereunder. These records would be required to be kept for a period of not less than five years, the first two years in a place immediately available to Commission staff for inspection and examination.

H. Request for Comment

The Commission invites comment on these estimates. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission requests comment in order to: (a) Evaluate whether the collection of information is necessary for the proper performance of our functions, including whether the information will have practical utility; (b) evaluate the accuracy of our estimate of the burden of the collection of information; (c) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (d) evaluate whether there are ways to minimize the burden of the collection of information on those who respond, including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also send a copy of their comments to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090, with reference to File No. S7–35–10. Requests for materials submitted to OMB by the Commission with regard to this collection of information should be in writing, with reference to File No. S7–35–10, and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services, 100 F Street, NE., Washington, DC 20549–1090. As OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

VI. Consideration of Costs and Benefits

Earlier this year, Congress passed the Dodd-Frank Act in response to the recent financial crisis. Among other things, the Dodd-Frank Act is designed to strengthen oversight, improve consumer protections, and reduce systemic risks throughout the financial system. Title VII of the Dodd-Frank Act specifically addresses the OTC derivatives markets, including the market for SBSs. Pursuant to Subtitle B of Title VII, the Commission is the designated regulator for SBSs.

The swap markets have been described as being opaque [258] and transaction-level data is not publicly available. One of the purposes of the Dodd-Frank Act is to improve the transparency of the OTC derivatives market.[259] In order to shed light on the SBS market, Title VII requires the Commission to undertake a number of rulemakings to implement the regulatory framework for SBSs that is set forth in the legislation, including the reporting of SBS transactions.

The Commission views the process of implementing SBS data reporting as incremental. On October 13, 2010, the Commission adopted an interim final temporary rule that requires certain SBS dealers and other parties to report any SBSs entered into prior to the July 21 passage of the Dodd-Frank Act as the first step in that process.[260] The interim final temporary rule provides for the reporting of pre-enactment SBSs and enables the Commission to obtain data on pre-enactment SBSs until registered SDRs are operating and able to accept the reports.

Today, the Commission is proposing new rules and a new form that provide for the registration of SDRs and establish and expand upon the core principles and duties applicable to registered SDRs. SDRs are intended to play a critical role in enhancing transparency in the SBS market, bolstering market efficiency and liquidity, promoting standardization, and reducing systemic risks. In conjunction with recordkeeping and reporting rules to be proposed with respect to other SBS market entities, such as SB SEFs, SBS exchanges, SBS dealers, and major SBS participants, the proposed SDR rules will lead to a more robust, transparent environment for the market for SBSs.[261]

Proposed Rules 13n–1 through 13n–3 and proposed Form SDR establish the mechanism by which entities meeting the definition of a "security-based swap data repository" must register as such pursuant to Exchange Act Section 13(n). Proposed Rules 13n–4 through 13n–10 prescribe the duties and core principles for SDRs and provide further guidance with respect to compliance with such duties and core principles. Finally, proposed Rule 13n–11 provides for the designation of and imposes obligations on SDR CCOs.

The Commission is sensitive to the costs and benefits imposed by its rules, and it has identified the following costs and benefits. In particular, the Commission focuses our discussion below on the costs and benefits of the decisions made by the Commission to fulfill the mandates of the Dodd-Frank Act within the permitted discretion, rather than the mandates of the Dodd-Frank Act. However, to the extent that the Commission's discretion is aligned to take full advantage of the benefits intended by the Dodd-Frank Act, the

[258] With respect to CDS, for example, the Government Accountability Office found that "comprehensive and consistent data on the overall market have not been readily available," that "authoritative information about the actual size of the CDS market is generally not available," and that regulators currently are unable "to monitor activities across the market." Government Accountability Office, "Systemic Risk: Regulatory Oversight and Recent Initiatives to Address Risk Posed by Credit Default Swaps," GAO–09–397T (March 2009), at 2, 5, 27. *See* Robert E. Litan, "The Derivatives Dealers' Club and Derivatives Market Reform," Brookings Institution (April 7, 2010) at 15–20. *See also* Michael Mackenzie, June 25, 2010, *Era of an opaque swaps market ends,* Fin. Times, June 25, 2010.

[259] *See, e.g.,* 156 Cong. Rec. S5915 (daily ed. July 15, 2010) (statement of Sen. Reed) ("A major problem with derivatives is that they have not been regulated nor well-understood by even those buying and selling them. The legislation changes that and brings transparency to the marketplace for swaps * * * by requiring the reporting of the terms of these contracts to regulators and market participants.").

[260] Reporting of Security-Based Swap Transaction Data, Exchange Act Release No. 63094 (Oct. 13, 2010), 75 FR 64643 (Oct. 20, 2010).

[261] *See, e.g.,* 156 Cong. Rec. S5920 (daily ed. July 15, 2010) (statement of Sen. Lincoln) ("These new 'data repositories' will be required to register with the CFTC and the SEC and be subject to the statutory duties and core principles which will assist the CFTC and the SEC in their oversight and market regulation responsibilities.").

two types of benefits are not entirely separable. The Commission requests that commenters provide data and any other information or statistics that the commenters relied on to reach any conclusions on such estimates.

A. Registration Requirements and Form SDR

The Commission is proposing Rule 13n–1 to set forth the information that must be submitted by a person on new Form SDR to register as an SDR and also provides for amendments to Form SDR, including interim amendments and required annual amendments that must be filed within 60 days after the end of each fiscal year. Each non-resident SDR would be required to certify on Form SDR and provide an opinion of counsel that the SDR can, as a matter of law, provide the Commission with access to the books and records of such SDR and can submit to onsite inspection and examination by the Commission. Proposed Rule 13n–2 sets forth the process by which a registered SDR would withdraw its registration and proposed Rule 13n–3 sets forth the process for a succession of registration for SDRs.[262] The proposed rules and form are in response to the mandate of the Dodd-Frank Act, which, among other things, requires the Commission to prescribe, by rule, the process for registration to be used by SDRs. The proposed rules and form prescribe information and documents to be submitted by SDRs in order to register with the Commission.

1. Benefits

The proposed rules and form described in this section provide for the registration of SDRs, and the withdrawal from registration and/or successor registration of SDRs. Congress enacted the new registration requirements as part of the Dodd-Frank Act in order to bring transparency to the SBS market. The registration process is intended to assist the Commission in overseeing and regulating the SBS market. The requirement that a non-resident SDR certify and provide an opinion of counsel that it can provide the Commission with access to its books and records and submit to inspection and examination will allow the Commission to better evaluate an SDR's ability to meet the requirements for registration and ongoing supervision.

The proposed rules and form described in this section would be issued pursuant to specific grants of rulemaking authority in the Dodd-Frank Act[263] and are designed to further the legislation's goals by enhancing the Commission's ability to oversee the marketplace for SBSs, which is critical to the continued integrity of our markets. The information to be provided in Form SDR is necessary in order to enable the Commission to assess whether an applicant has the capacity to perform the duties of an SDR and to comply with the duties, core principles, and other requirements imposed on registered SDRs pursuant to Exchange Act Section 13(n) and the rules and regulations promulgated thereunder.

The Commission solicits comment on the benefits associated with the registration-related rules and new Form SDR. The Commission specifically requests comment on whether it should require different and/or additional information to be provided on the form and the frequency with which routine amendments should be filed. Please describe and, to the extent practicable, quantify the benefits associated with any comments that are submitted.

2. Costs

The Commission preliminarily anticipates that the primary costs to SDRs from the proposed registration-related rules and form result from the requirement to complete Form SDR and any amendments thereto.

As discussed above, the Commission estimates that the average initial paperwork cost of SDR registration would be 400 hours per SDR and the average ongoing paperwork cost of interim and annual updated Form SDR would be 36 hours for each registered SDR.[264] Assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost would be $584,000[265] and the aggregate ongoing estimated dollar cost per year would be $49,080[266] to comply with the proposed rule.

As discussed above, the Commission estimates that the average initial paperwork cost for each non-resident SDR to provide an opinion of counsel that the SDR can, as a matter of law, provide the Commission with prompt access to its books and records and submit to onsite inspection and examination would be 3 hours and $900 per SDR. Assuming a maximum of three non-resident SDRs,[267] the aggregate one-time estimated dollar cost would be $5,544.[268]

The Commission solicits comment on the costs associated with the registration-related rules and new Form SDR. The Commission specifically requests comment on the estimated number of respondents that would be filing proposed Form SDR and the initial costs associated with completing the registration form and the ongoing annual costs of completing the required annual amendments. Please describe and, to the extent practicable, quantify the costs associated with any comments that are submitted.

The Commission does not expect these initial costs to have any significant effect on how SDRs conduct business because such costs would not be so large as to result in a change in how such SDRs conduct business, create a barrier to entry, or otherwise alter the competitive landscape among SDRs.[269]

B. SDR Duties, Data Collection and Maintenance, Automated Systems, and Direct Electronic Access

Proposed Rules 13n–4(b)(2)—(7), (9), and (10), 13n–5, and 13n–6 include

[262] *See supra* Sections III.A—III.C.

[263] *See* Public Law 111–203, § 763(i) (adding Exchange Act Section 13(n)(1)).

[264] *See supra* Section V.D.1.

[265] The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney and a Compliance Clerk. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Attorney is $291 per hour and the cost of a Compliance Clerk is $59 per hour. Thus, the total one-time estimated dollar cost of complying with the initial registration-related requirements is $58,400 per SDR and $584,000 for all SDRs, calculated as follows: (Compliance Attorney at $291 per hour for 150 hours) + (Compliance Clerk at $59 per hour for 250 hours) × (10 registrants) = $584,000.

[266] The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney and a Compliance Clerk. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Attorney is $291 per hour and the cost of a Compliance Clerk is $59 per hour. Thus, the total ongoing estimated dollar cost of complying with the registration amendment requirements is $4,908 per year per SDR and $49,080 per year for all SDRs, calculated as follows: (Compliance Attorney at $291 per hour for 12 hours) + (Compliance Clerk at $59 per hour for 24 hours) × (10 registrants) = $49,080.

[267] *See supra* Section V.C.1.

[268] The Commission estimates that an SDR will assign these responsibilities to an Attorney. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of an Attorney is $316 per hour. Thus, the total ongoing estimated dollar cost of complying with the registration amendment requirements is $1,848 per year per SDR and $5,544 per year for all SDRs, calculated as follows: ($900 for outside legal services + (Attorney at $316 per hour for 3 hours)) × (3 non-resident registrants) = $5,544.

[269] The Commission notes that industry representatives have indicated that, based on their knowledge of existing SEC registration forms for other types of registrants, such as clearing agencies, they do not believe that completion of registration forms would impose a significant cost.

various requirements relating to SDRs' information technology systems. Proposed Rules 13n–4(b)(2)—(7), 13n–5, and 13n–6 are intended to codify and elucidate the statutorily mandated duties and core principles relating to an SDR's collection, maintenance, and analysis of transaction data and other records, including upon an SDR's cessation of business.[270]

Under proposed Rule 13n–4(b)(2) and (4), an SDR would be required to accept and maintain transaction data as required by proposed Rule 13n–5.[271] Proposed Rule 13n–4(b)(5) states that each SDR must provide direct electronic access to the Commission or any designee of the Commission. Proposed Rule 13n–4(b)(9) would require an SDR to make available all data obtained by the SDR upon the request of certain government bodies, such as the CFTC and the Department of Justice, on a confidential basis and after notification to the Commission.

Proposed Rule 13n–5 would establish requirements for transaction data collection and maintenance. Proposed Rule 13n–5(b), among other things, would require an SDR to promptly record transaction data, and to establish, maintain, and enforce written policies and procedures (1) reasonably designed to calculate positions for all persons with open SBSs for which the SDR maintains records; (2) reasonably designed to ensure that the transaction data and positions that it maintains are accurate; and (3) reasonably designed to prevent any provision in a valid SBS from being invalidated or modified through the procedures or operations of the SDR. Proposed Rule 13n–5(b)(4) would establish requirements related to the time periods for which an SDR must preserve, maintain, and make accessible transaction data. Proposed Rule 13n–5(b)(7) would require an SDR that ceases doing business to preserve, maintain, and make accessible the data and records described above for the remainder of the time period required by proposed Rule 13n–5. Proposed Rule 13n–5(b)(8) would require SDRs to make and keep current a plan to ensure that the transaction data and positions that are recorded in the SDR continue to be maintained in accordance with proposed Rule 13n–5(b)(7).

Proposed Rule 13n–6(b) would require SDRs to establish policies and procedures relating to the SDRs' system capacity, resiliency, and security. Such policies and procedures must include periodic capacity stress tests, reviews of system vulnerability, and adequate contingency and disaster recovery plans. SDRs would be required to promptly notify the Commission of material systems outages and submit a description and analysis of the outages within five business days, and notify the Commission in writing at least thirty calendar days before planned material systems changes.

1. Benefits

The SDR provisions in the Dodd-Frank Act depend on the accuracy of the data maintained by registered SDRs. Exchange Act Section 13(n) specifically instructs the Commission to "prescribe data collection and maintenance standards for" SDRs. The proposed rules related to an SDR's information technology and related policies and procedures are designed to facilitate accurate data collection and retention with respect to SBSs in order to promote transparency with respect to the market for SBSs, as well as facilitate orderly execution and confirmation of SBS transactions and standardization of such transactions.

The proposed rules discussed in this section would be issued pursuant to specific grants of rulemaking authority in the Dodd-Frank Act[272] and are designed to further the legislation's goals by enhancing the Commission's ability to oversee the marketplace for SBSs, which is critical to the continued integrity of our markets. The ability of the Commission and other regulators to monitor risk and detect fraudulent activity depends on having access to market data. In particular, the direct electronic access requirement described in proposed Rule 13n–4(b)(5) will permit the Commission, its designees, and other regulators to carry out these responsibilities in an effective and efficient manner. The proposed requirement that each SDR make and keep current a plan to ensure that SBS data recorded in such SDR continues to be maintained is essential to ensure that regulators will continue to have access to and the ability to analyze SBS data in the event that the SDR ceases to do business. The proposed provisions relating to material systems outages are important to ensure that the Commission is apprised when an SDR's ability to accept, maintain, and provide access to regulators and market participants to accurate and timely transaction data may be impaired.

The requirements in the proposed rules are likely to create various benefits including increased transparency and reduction of systemic risk by providing the Commission and other regulators to access SBS market information. In addition, this data will enhance the Commission's ability to detect and deter fraudulent and manipulative activity and other trading abuses in connection with the derivatives markets, conduct inspections and examinations to monitor the financial responsibility and soundness of market participants, and verify compliance with the statutory requirements and duties of SDRs. For systemic risk monitoring, it is necessary that the Commission and other regulators have access to information regarding all cleared and uncleared trades of market participants and their positions. Pursuant to the proposed rules, in conjunction with Regulation SBSR,[273] SDRs will receive and maintain systemically important information from multiple trade execution facilities, SBS clearing agencies, and other market participants. The resulting benefit will derive from the increased transparency on where exposures to risk reside in financial markets, which will allow regulators to monitor and act before the risks become systematically relevant. Therefor, SDRs will help achieve systemic risk monitoring.

Benefits also may accrue from the Commission's and other regulators' ability to use SBS data in order to oversee the SBS market for illegal conduct. Proposed Rule 13n–5 requires SDRs to satisfy itself of the accuracy of transaction data and preserve such data for a sufficient period so that transaction level data is available to assist regulators in analyzing data to detect market abuse. The proposed rule also requires SDRs to accept data regarding all SBSs in an asset class if the SDR accepts data on any SBS in that particular asset class. These requirements may help the Commission and other regulators to identify fraudulent or other predatory market activity.

The richness of data collected by SDRs also will facilitate market analysis studies by regulators. Periodic reviews of market behavior through the study of SBS transactions will help identify the costs and benefits of Commission rules that can be used to evaluate the overall efficiency of market regulation. Such studies can inform the Commission and other regulators on potential changes to the rules to improve their efficiency.

Central repositories of information also may create benefits from non-core duties, such as facilitating the reporting of life cycle events, asset servicing, or payment calculations. These activities

[270] *See supra* Section III.D—III.F.

[271] *See* Public Law 111–203, § 763(i) (adding Exchange Act Section 13(n)(5)(D)(i)).

[272] *See* Public Law 111–203, § 763(i) (adding Exchange Act Sections 13(n)(4) and (5)).

[273] *See* Regulation SBSR Release, *supra* note 9.

may be less costly to perform when SBS market transaction data is centrally located and accessible.

Since Exchange Act Section 13(n) and the rules and regulations promulgated thereunder allow for multiple SDRs to register with the Commission, potentially within the same asset class, with each collecting data from a subset of market participants, proposed Rule 13n–4(b)(2) requires all SDRs to accept data as prescribed by Regulation SBSR [274] and proposed Rule 13n–5(b)(1) requires all SDRs to maintain the transaction data in a format that is readily accessible to the Commission and other persons with authority to access or view such information. The effect of these provisions, in conjunction with the requirements of Regulation SBSR,[275] is that the same transaction data will be accepted across SBS market entities (including exchanges, SB SEFs, clearing agencies, SBS dealers, and major SBS participants) and service providers and each SDR will maintain the transaction data in a manner that allows the Commission and others with authority to access and view such data. Thus, the rule both attempts to maintain benefits of competition and allow proper aggregation of market-wide SBS data.

The reliability of the aggregation of market-wide SBS data depends upon data integrity and consistent structuring across all service providers. The proposed rule requires an SDR to create policies and procedures such that all transactions are recorded accurately. Aggregating data across SDRs by regulators and other users of such data will benefit to the extent that policies and procedures result in more accurate data reporting.

The Commission solicits comment on the benefits related to Rules 13n–4(b)(2)—(7), (9), and (10), 13n–5, and 13n–6. The Commission specifically requests comment on whether any additional benefits would accrue if the Commission imposed further, more specific technology-related requirements. Are there alternatives that the Commission should consider? Please describe and, to the extent practicable, quantify the benefits associated with any comments that are submitted.

2. Costs

The Commission anticipates that the primary costs to SDRs from the proposed rules described in this section would relate to the cost of developing and maintaining systems to collect and store SBS transaction data. Registered SDRs also would need to develop, maintain, and ensure compliance with related policies and procedures and provide applicable training.

As discussed above, the Commission estimates that the average initial paperwork cost associated with creating the SDR information technology systems would be 42,000 hours and $10,000,000 for each SDR and the average ongoing paperwork cost would be 25,200 hours and $6,000,000 per year for each SDR.[276] Assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost would be $200,020,000 [277] and the aggregate ongoing estimated dollar cost per year would be $120,012,000 [278] to comply with the proposed rules. Based on conversations with industry representatives, the Commission estimates that the cost imposed on SDRs to provide direct electronic access to the Commission should be minimal as SDRs likely have or will establish comparable electronic access mechanisms to enable market participants to provide data to SDRs and review transactions to which such participants are parties.

As discussed above, the Commission estimates that the average initial paperwork cost associated with proposed Rule 13n–4(b)(10) would be $1,600 for each SDR and the average ongoing paperwork cost would be 3 hours for each SDR.[279] Assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost would be $16,000 [280] and the aggregate ongoing estimated dollar cost per year would be $9,480 [281] to comply with the proposed rule.

As discussed above, the Commission estimates that the average initial paperwork cost associated with developing policies and procedures necessary to comply with Rules 13n–5(b)(1), (2), (3), and (5) and 13n–6(b)(1) would be 1,050 hours and $100,000 for each SDR and the average ongoing paperwork cost would be 300 hours per year for each SDR.[282] Assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost would be $3,926,250 [283] and the aggregate ongoing estimated dollar cost per year would be $908,400 [284] to comply with the proposed rules.

[274] *See* Regulation SBSR Release, *supra* note 9.

[275] *See id.*

[276] *See supra* Section V.D.2.

[277] The Commission estimates that an SDR will assign these responsibilities to an Attorney, a Compliance Manager, a Programmer Analyst, and a Senior Business Analyst. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of an Attorney is $316 per hour, a Compliance Manager is $294 per hour, a Programmer Analyst is $190 per hour, and a Senior Business Analyst is $234 per hour. Thus, the total initial estimated dollar cost would be $20,002,000 per SDR and $200,020,000 for all SDRs, calculated as follows: ($10,000,000 for information technology systems + (Attorney at $316 per hour for 7,000 hours) + (Compliance Manager at $294 per hour for 8,000 hours) + (Programmer Analyst at $190 per hour for 20,000 hours) + (Senior Business Analyst at $234 per hour for 7,000 hours)) × 10 registrants = $200,020,000.

[278] The Commission estimates that an SDR will assign these responsibilities to an Attorney, a Compliance Manager, a Programmer Analyst, and a Senior Business Analyst. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of an Attorney is $316 per hour, a Compliance Manager is $294 per hour, a Programmer Analyst is $190 per hour, and a Senior Business Analyst is $234 per hour. Thus, the total ongoing estimated dollar cost would be $12,001,200 per SDR and $120,012,000 for all SDRs, calculated as follows: ($6,000,000 for information technology systems + (Attorney at $316 per hour for 4,200 hours) + (Compliance Manager at $294 per hour for 4,800 hours) + (Programmer Analyst at $190 per hour for 12,000 hours) + (Senior Business Analyst at $234 per hour for 4,200 hours)) × 10 registrants = $120,012,000.

[279] *See supra* Section V.D.2.

[280] $1,600 for outside legal services × 10 registrants = $16,000.

[281] The Commission estimates that an SDR will assign these responsibilities to an Attorney. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of an Attorney is $316 per hour. Thus, the total ongoing estimated dollar cost would be $948 per SDR and $9,480 for all SDRs, calculated as follows: (Compliance Attorney at $316 per hour for 3 hours) × 10 registrants = $9,480.

[282] *See supra* Section V.D.2.

[283] The Commission estimates that an SDR will assign these responsibilities to a Compliance Manager, an Attorney, a Senior Systems Analyst, and an Operations Specialist. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Manager is $294 per hour, the cost of an Attorney is $316 per hour, the cost of a Senior Systems Analyst is $251 per hour, and the cost of an Operation Specialist is $114 per hour. Thus, the total initial estimated dollar cost would be $392,625 per SDR and $3,926,250 for all SDRs, calculated as follows: ($100,000 for outside legal services + (Compliance Manager at $294 per hour for 385 hours) + (Attorney at $316 per hour for 435 hours) + (Senior Systems Analyst at $251 per hour for 115 hours) + (Operations Specialist at $114 per hour for 115 hours)) × 10 registrants = $3,926,250.

[284] The Commission estimates that an SDR will assign these responsibilities to a Compliance Manager and an Attorney. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Manager is $294 per hour and the cost of an Attorney is $216 per hour. Thus, the total ongoing estimated dollar cost would be $90,840 per SDR and $908,400 for all SDRs,

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As discussed above, the Commission estimates that the average ongoing paperwork cost associated with the proposed Rules 13n–6(b)(3) and (4) would be 135.4 hours for each SDR.[285] Assuming a maximum of ten SDRs, the aggregate ongoing estimated dollar cost per year would be $368,965 to comply with the proposed rules.[286]

The Commission believes that persons currently operating as SDRs may have developed and implemented aspects of the proposed rules already. However, such persons currently are not subject to regulation by the Commission and may not be subject to regulation or oversight by other regulatory bodies and may need to enhance their information technology systems and related policies and procedures to comply with the proposed rules. However, the Commission does not believe that the one-time cost of such changes will be significant. The ongoing annual costs for persons currently operating as SDRs likely will be consistent with the estimates provided above.

Exchange Act Section 13(n) and the proposed rules and regulations promulgated thereunder allow for multiple SDRs to register with the Commission, potentially within the same asset class, with each SDR collecting data from a subset of market participants. While multiple SDRs per asset class will allow for market competition to decide how data is collected, it may hinder market-wide data aggregation due to coordination costs, particularly if market participants adopt incompatible reporting standards and practices. The proposed rules do not specify a particular reporting format or structure, which may create the possibility that entities reporting to SDRs, and regulators or other market participants accessing transaction data, will have to accommodate different data standards and develop different systems to accommodate each. This may result in increased costs for reporting entities and users of transaction data.

The costs associated with aggregating data across multiple SDRs by regulators and other users of such data will increase to the extent that SDRs choose to use different identifying information for transactions, counterparties, and products. Data aggregation costs also could accrue to the extent that there is variation in the quality of data maintained across SDRs. Each SDR has discretion over how to implement its policies and procedures in the recording of reportable data, and variations in quality may result. Since aggregated data used for surveillance and risk monitoring requires that the underlying components are provided with the same level of accuracy, variations in the quality of data could be costly if subsequent interpretations of analysis based on the data suffer from issues of integrity. To the extent that market competition among SDRs impacts profit margins and the level of resources devoted to collecting and maintaining transaction data, there is an increased likelihood of variations in the quality of reported data and aggregation of data across multiple SDRs may be difficult.

The Commission solicits comment on the costs related to proposed Rules 13n–4(b)(2)—(7), (9), and (10), 13n–5, and 13n–6. The Commission specifically requests comment on the initial and ongoing costs associated with establishing and maintaining the technology systems and related policies and procedures. Are there additional costs to creating an SDR that the Commission should consider? Are there alternatives that the Commission should consider? Do the estimates accurately reflect the cost of storing data in a convenient and usable electronic format for the required retention period? Please describe and, to the extent practicable, quantify the costs associated with any comments that are submitted.

The Commission does not expect the initial and ongoing costs necessary to comply with these proposed rules to have any significant effect on how SDRs conduct business because such costs would not be so large as to result in a change in how such SDRs conduct business, create a barrier to entry, or otherwise alter the competitive landscape among SDRs.

C. Recordkeeping

Proposed Rule 13n–7 would require an SDR to make and keep certain records relating to its business and retain a copy of records made by the SDR in the course of its business for a period of not less than five years, the first two years in a place that is immediately available to the staff of the Commission for inspection and examination. The proposed rule also would require an SDR that ceases doing business to preserve, maintain, and make accessible the records required to be made and kept pursuant to the rule for the remainder of the time period required by proposed Rule 13n–7.[287]

1. Benefits

The rule discussed in this section is designed to further the Dodd-Frank Act's goals by enhancing the Commission's ability to oversee SDRs, which are critical components of the new regulatory scheme governing SBS. The proposed rule will assist the Commission in monitoring whether an SDR is complying with Exchange Act Section 13(n) and the rules and regulations promulgated thereunder. In addition, the rule is designed to reduce systemic risks by requiring the making and keeping of records pertaining to the day-to-day business of SDRs. Finally, the legislative goals of Title VII depend on the ongoing operation of SDRs as the source for transaction data, and the recordkeeping requirements contained in the proposed rule will enhance the ability of the Commission and other regulators to monitor the financial responsibility and soundness of SDRs.

To the extent that the proposed rule standardizes the business recordkeeping practices of SDRs, regulators will benefit by being able to perform more efficient, targeted inspections and examinations with an increased likelihood of identifying improper conduct at earlier stages in the inspection or examination. In addition, SDRs should benefit from standardized recordkeeping requirements by having their operations interrupted by inspections or examinations for shorter time periods. Both regulators and SDRs should benefit from standardized recordkeeping requirements to the extent that uniform records will enable regulators and SDRs to know what records the SDRs should have on hand.

The Commission solicits comment on the benefits related to proposed Rule 13n–7. Would additional benefits accrue if the Commission imposed different or additional recordkeeping requirements and, if so, what would these requirements entail? Please describe and, to the extent practicable, quantify the benefits associated with any comments that are submitted.

2. Costs

The Commission anticipates that the primary costs to SDRs from proposed

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calculated as follows: ((Compliance Manager at $294 per hour for 180 hours) + (Attorney at $316 per hour for 120 hours)) × 10 registrants = $908,400.

[285] *See supra* Section V.D.2.

[286] The Commission estimates that an SDR will assign these responsibilities to a Compliance Manager and a Senior Systems Analyst. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Manager is $294 per hour and the cost of a Senior Systems Analyst is $251 per hour. Thus, the total ongoing estimated dollar cost would be $36,896.50 per SDR and $368,965 for all SDRs, calculated as follows: ((Compliance Manager at $294 per hour for 67.7 hours) + (Senior Systems Analyst at $251 per hour for 67.7 hours)) × 10 registrants = $368,965.

[287] *See supra* Section III.G.

Rule 13n–7 would relate to the cost of making and keeping current a list of officers, managers, or persons performing similar functions who are responsible for policies and procedures and developing and maintaining information technology systems to collect and store the various records created in the course of an SDR's business.

As discussed above, the Commission estimates that the average initial paperwork cost associated with making and keeping a list of responsible officer, manager, or persons performing similar functions and developing and maintaining information technology systems to ensure compliance with the proposed recordkeeping requirements would be 346 hours and $1,800 for each SDR and the average ongoing paperwork cost associated with developing policies and procedures to ensure compliance with the proposed recordkeeping requirements would be 279.17 hours per year for each SDR.[288] Assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost would be $1,015,460[289] and the aggregate ongoing estimated dollar cost per year would be $820,760[290] to comply with the proposed rule.

The Commission does not believe that persons currently operating as SDRs will be subject to significant additional recordkeeping costs as a result of proposed Rule 13n–7 because such persons already maintain business records as part of their day-to-day operations. However, the proposed rule provides specific parameters relating to the retention and maintenance of these records and the proposed requirements may be more extensive than current market practices.

The Commission solicits comment on the costs related to proposed Rule 13n–7. The Commission specifically requests comment on the initial and ongoing costs associated with establishing and maintaining the recordkeeping systems and related policies and procedures, including whether currently-operating SDRs would incur different recordkeeping costs. Are there additional costs related to recordkeeping that the Commission should consider? Are there alternatives that the Commission should consider? Please describe and, to the extent practicable, quantify the costs associated with any comments that are submitted.

The Commission does not expect the initial and ongoing costs necessary to comply with the proposed rule to have any significant effect on how SDRs conduct business because such costs would not be so large as to result in a change in how such SDRs conduct business, create a barrier to entry, or otherwise alter the competitive landscape among SDRs.

D. Reports and Reviews

Proposed Rule 13n–6(b)(2) would require an SDR to submit an annual review of its systems that support or integrally relate to its performance as an SDR to the Commission.[291] Proposed Rule 13n–8 would require an SDR to comply with certain reporting requirements, including promptly providing reports or information upon request by the Commission.[292]

1. Benefits

Title VII of the Dodd-Frank Act establishes a regulatory framework for the OTC derivatives market that depends on the Commission's and other regulators' access to information regarding the current and historical operation of the SBS market to verify compliance with the statute and effective monitoring for market risk and abuse. In addition, specific provisions of Title VII require routine, targeted monitoring of certain types of events. The rules discussed in this section would be issued pursuant to specific grants of rulemaking authority in the Dodd-Frank Act[293] and are designed to further the legislation's goals by (a) ensuring that each SDR's systems provide adequate levels of capacity, resiliency, and security, and (b) facilitating access by the Commission and other regulators to information necessary to achieve their legislative mandates and to establish mechanisms by which SDRs will provide routine reports to the Commission. Access to such information will enhance regulators' ability to oversee the SBS market, which is critical to the continued integrity of our markets, and detect and deter fraudulent and manipulative activity and other trading abuses in connection with the derivatives markets.

The Commission solicits comment on the benefits related to the requirements contained in proposed Rules 13n–6(b)(2) and 13n–8. Please describe and, to the extent practicable, quantify the benefits associated with any comments that are submitted.

2. Costs

The Commission anticipates that the primary costs to an SDR from proposed Rule 13n–6(b)(2) would relate to the cost of conducting an annual review of the SDR's systems and, if the review is performed by an internal department, the cost associated with hiring an objective, external firm to assess the internal department's objectivity, competency, and work performance. The Commission anticipates that the primary costs to SDRs from proposed Rule 13n–8 would relate to the cost of developing and maintaining systems to respond to requests for information and provide the necessary reports and establishing related policies and procedures. In addition, SDRs will need to maintain staff to respond to the requests and provide the reports required under the proposed rules.[294]

As discussed above, the Commission estimates that the average ongoing paperwork cost associated with proposed Rule 13n–6(b)(2) would be 825 hours and $90,000.[295] Assuming a maximum of ten SDRs, the aggregate ongoing estimated dollar cost per year would be $2,845,750 to comply with the proposed rule.[296]

[288] *See supra* Section V.D.3.

[289] The Commission estimates that an SDR will assign these responsibilities primarily to a Compliance Manager as well as a Senior Systems Analyst. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Manager is $294 per hour and the cost of a Senior Systems Analyst is $251 per hour. Thus, the total initial estimated dollar cost would be $101,546 per SDR and $1,015,460 for all SDRs, calculated as follows: ($1,800 in information technology costs + (Compliance Manager at $294 per hour for 300 hours) + (Senior Systems Analyst at $251 per hour for 46 hours)) × 10 registrants = $1,015,460.

[290] The Commission estimates that an SDR will assign these responsibilities to a Compliance Manager. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Manager is $294 per hour. Thus, the total ongoing estimated dollar cost would be $82,076 per SDR and $820,760 for all SDRs, calculated as follows: (Compliance Manager at $294 per hour for 279.17 hours) × 10 registrants = $820,760.

[291] *See supra* Section III.F.

[292] *See supra* Section III.H.

[293] *See* Public Law 111–203, § 763(i) (adding Exchange Act Section 13(n)).

[294] The Commission understands some currently-existing SDRs may have dedicated personnel who are responsible for responding to and providing ad hoc report requests from regulators, including the Commission. To the extent that proposed Rule 13n–8 may result in more automated reporting, the need for such dedicated personnel resources may be reduced.

[295] *See supra* Section V.D.4.

[296] The Commission estimates that an SDR will assign these responsibilities to an Attorney, a Manager Internal Audit, and a Senior Internal Auditor. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits,

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As discussed above, the Commission estimates that the average ongoing paperwork cost associated with proposed Rule 13n–8 would be 1 hour per year for each SDR.[297] Assuming a maximum of ten SDRs, the aggregate ongoing estimated dollar cost per year would be $2,340 to comply with the proposed rule.[298]

The Commission solicits comment on the costs related to proposed Rules 13n–6(b)(2) and 13n–8. The Commission specifically requests comment on the initial and ongoing costs associated with establishing and providing the reports required under the proposed rules. Are there additional costs associated with supplying the required reports that the Commission should consider? Are there alternatives that the Commission should consider? Please describe and, to the extent practicable, quantify the costs associated with any comments that are submitted.

The Commission does not expect the initial and ongoing costs necessary to comply with proposed Rules 13n–6(b)(2) and 13n–8 to have any significant effect on how SDRs conduct business because such costs would not be so large as to result in a change in how such SDRs conduct business, create a barrier to entry, or otherwise alter the competitive landscape among SDRs.

E. Disclosure

Under proposed Rule 13n–10, before collecting any transaction data from a market participant or upon the market participant's request, each SDR would be required to furnish the market participant a disclosure document containing certain information that reasonably will enable the market participant to identify and evaluate the risks and costs associated with using the services of the SDR.[299] An SDR's disclosure document must include, among other things, the SDR's criteria for providing others with access to services offered and data maintained by the SDR; the SDR's criteria for those seeking to connect to or link with the SDR; a description of the SDR's policies and procedures regarding safeguarding of data and operational reliability, and privacy; the SDR's policies and procedures regarding its non-commercial and/or commercial use of transaction data; dispute resolution procedures; description of all services, including ancillary services; schedule of dues, unbundled prices, and discounts or rebates; and a description of the SDR's governance arrangements.

1. Benefits

Proposed Rule 13n–10 is intended to provide certain information regarding an SDR to market participants prior to entering into an agreement to provide transaction data to the SDR. Although the Commission anticipates that there may be only one SDR for any given asset class, to the extent that multiple SDRs accept data for the same asset class, the disclosure document would enable market participants to make an informed choice among SDRs. Even if only one SDR serves a given asset class, the disclosure document is necessary to inform market participants of the nature of the services provided by the SDR and the conditions and obligations that are imposed on market participants in order for the participants to submit data to the SDR.

The rule discussed in this section is designed to further the Dodd-Frank Act's goals by providing market participants with applicable information regarding the operation of SDRs. The Commission solicits comment on the benefits related to proposed Rule 13n–10. Should the Commission narrow or broaden the scope of the information to be included in the disclosure document? Should the Commission adjust the frequency with which the disclosure document is provided to market participants? Please describe and, to the extent practicable, quantify the benefits associated with any comments that are submitted.

2. Costs

As discussed above, the Commission estimates that the average initial paperwork cost associated with developing the disclosure document and related policies and procedures would be 97.5 hours and $9,400 for each SDR and the average ongoing paperwork cost would be 1 hour per year for each SDR.[300] Assuming a maximum of ten registered SDRs, the aggregate one-time estimated dollar cost would be $266,087.50[301] and the aggregate ongoing estimated dollar cost per year would be $1,765[302] to comply with the proposed rule.

The Commission solicits comment on the costs related to proposed Rule 13n–10. The Commission specifically requests comment on the initial and ongoing costs associated with drafting, reviewing, printing, and providing the required disclosure document. Are there alternatives that the Commission should consider? Please describe and, to the extent practicable, quantify the costs associated with any comments that are submitted.

The Commission does not expect the initial and ongoing costs necessary to comply with proposed Rule 13n–10 to have any significant effect on how SDRs conduct business because such costs would not be so large as to result in a change in how such SDRs conduct business, create a barrier to entry, or otherwise alter the competitive landscape among SDRs.

F. Chief Compliance Officer and Compliance Functions

Proposed Rules 13n–4(b)(11) and 13n–11 would require each registered SDR to designate on Form SDR a CCO whose duties include preparing an annual compliance report, which would be submitted to the Commission annually along with an annual financial report.[303] The CCO would be appointed

and overhead, suggest that the cost of an Attorney is $316 per hour, the cost of a Manager Internal Audit is $291 per hour, and the cost of a Senior Internal Auditor is $195 per hour. Thus, the total ongoing estimated dollar cost would be $284,575 per SDR and $2,845,750 for all SDRs, calculated as follows: ($90,000 for external audit firm + (Attorney at $316 per hour for 100 hours) + (Manager Internal Auditor at $291 per hour for 225 hours) + (Senior Systems Analyst at $251 per hour for 500 hours)) × 10 registrants = $2,845,750.

[297] *See supra* Section V.D.4.

[298] The Commission estimates that an SDR will assign these responsibilities to a Senior Business Analyst. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Senior Business Analyst is $234 per hour. Thus, the total ongoing estimated dollar cost would be $234 per SDR and $2,340 for all SDRs, calculated as follows: (Senior Business Analyst at $234 per hour for 1 hour) × 10 registrants = $2,340.

[299] *See supra* Section III.J.

[300] *See supra* Section V.D.5.

[301] The Commission estimates that an SDR will assign these responsibilities to a Compliance Manager and a Compliance Clerk. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Manager is $294 per hour and a Compliance Clerk is 59 per hour. Thus, the total initial estimated dollar cost would be $26,608.75 per SDR and $266,087.50 for all SDRs, calculated as follows: ($4,400 for external legal costs + $5,000 for external compliance consulting costs + (Compliance Manager at $294 per hour for 48.75 hours) + (Compliance Clerk at $59 per hour for 48.75 hours)) × 10 registrants = $266,087.50.

[302] The Commission estimates that an SDR will assign these responsibilities to a Compliance Manager and a Compliance Clerk. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Manager is $294 per hour and a Compliance Clerk is 59 per hour. Thus, the total ongoing estimated dollar cost would be $176.50 per SDR and $1,765 for all SDRs, calculated as follows: ((Compliance Manager at $294 per hour for 0.5 hours) + (Compliance Clerk at $59 per hour for 0.5 hours)) × 10 registrants = $1,765.

[303] *See supra* Sections III.D and III.K.

by the SDR's board and would report directly to the chief executive officer of the SDR or the board. The CCO would be responsible for reviewing the compliance of the SDR with the duties and core principles contained in Exchange Act Section 13(n) and the rules promulgated thereunder and reviewing and administering, and ensuring compliance with, the SDR's policies and procedures reasonably designed to achieve compliance with the federal securities laws. The CCO also would resolve any conflicts of interest, in consultation with the board or the SDR's chief executive officer, and establish procedures for the remediation of noncompliance issues. The CCO would be required to prepare and sign an annual compliance report and submit the report to the board for its review prior to the submission of the report to the Commission. Finally, the annual compliance report must be included with the annual financial report that must be prepared and filed with the Commission pursuant to the requirements of proposed Rule 13n–11(f). The compliance report must be filed in a tagged data format in accordance with the instructions contained in the EDGAR Filer Manual,[304] and the financial report must be provided in XBRL as required in Rules 405(a)(1), (a)(3), (b), (c), (d), and (e) of Regulation S–T.[305]

1. Benefits

Proposed Rules 13n–4(b)(11) and 13n–11 would be issued pursuant to specific grants of rulemaking authority in the Dodd-Frank Act[306] and are designed to further the legislation's goals by enhancing the Commission's ability to oversee the marketplace for SBS, which is critical to the continued integrity of our markets. The proposed rules are designed to ensure that SDRs comply with the Federal securities laws, including Exchange Act Section 13(n) and the rules and regulations promulgated thereunder. Although persons currently operating as SDRs already may have CCOs in place, the proposed rules would make this standard practice for all registered SDRs, as mandated by the Dodd-Frank Act.

The reliability of the aggregation of market-wide transaction data depends upon data integrity and consistent structuring across all service providers. As a result of the proposed rule, the accuracy, reliability, integrity, and consistency of data and other records maintained by each SDR would be less likely to be harmed by violations of the securities laws because experience has shown that strong internal compliance programs lower the likelihood of securities laws violations and enhance the likelihood that any violations that do occur will be detected and corrected. The designation of a CCO, who will, among other things, monitor the application of the rules proposed herein and the relevant SDR policies and procedures, will help ensure that each SDR complies with the policies and procedures that it adopts. The ability of regulators and other users of transaction data to aggregate such data across SDRs will improve to the extent that compliance with applicable policies and procedures result in more accurate data reporting.

Proposed Rule 13n–11(f) would require SDRs to submit annual financial reports to the Commission. This rule would enhance Commission oversight by facilitating the Commission's monitoring of an SDR's financial and managerial resources. The financial reports also would assist the Commission in monitoring potential conflicts of interests of a financial nature arising from the operation of an SDR.

Benefits also will accrue from requiring SDRs to submit the filings required by the proposed rules using the interactive data format. This requirement would enable regulators to analyze the reported information more quickly, more accurately, and at a lower cost. In particular, the tagged data will make it easier to aggregate information collected from SDRs and compare across entities and over time, which the Commission believes is important for regulators to perform their duties under the Dodd-Frank Act.

The Commission solicits comment on the benefits related to Rules 13n–4(b)(11) and 13n–11. The Commission specifically requests comment on the benefits that would accrue from designating a CCO who would be responsible for preparing and certifying as accurate an annual compliance report and reporting annually to the board. Are there alternative reporting structures that could be established? Should the Commission consider additional provisions related to the annual compliance report? The Commission also requests comment on the benefits associated with the annual financial reports. Please describe and, to the extent practicable, quantify the benefits associated with any comments that are submitted.

2. Costs

The establishment of a designated CCO and compliance with the accompanying responsibilities of a CCO would impose certain costs on registered SDRs. As discussed above, the Commission estimates that the average initial paperwork cost associated with establishing procedures for the remediation of noncompliance issues identified by the CCO and establishing and following appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues would be 420 hours and $40,000 for each registered SDR and the average ongoing paperwork cost would be 120 hours for each registered SDR.[307] In addition, each SDR would be required to hire a CCO in order to comply with the proposed rules, at an annual cost of $703,800.[308] Assuming a maximum of ten SDRs, the aggregate initial estimated dollar cost per year would be $1,622,200[309] and the aggregate ongoing estimated dollar cost per year would be $7,387,200[310] to comply with the proposed rules.

As discussed above, the Commission estimates that the average ongoing paperwork cost associated with preparing and submitting annual compliance reports to the SDR's board pursuant to proposed Rule 13n–11(d)

[304] *See* 17 CFR 232.301.

[305] *See* 17 CFR 232.405 (imposing content, format, submission and Web site posting requirements for an interactive data file, as defined in Rule 11 of Regulation S–T).

[306] *See* Public Law 111–203, § 763(i) (adding Exchange Act Section 13(n)(6)).

[307] *See supra* Section V.D.6.

[308] Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a CCO is $391 per hour.

[309] The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Attorney is $291 per hour. Thus, the total initial estimated dollar cost would be $162,220 per SDR and $1,622,200 for all SDRs, calculated as follows: ($40,000 for outside legal services + (Compliance Attorney at $291 per hour for 420 hours)) × 10 registrants = $1,622,200.

[310] The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Attorney is $291 per hour. Thus, the total ongoing estimated dollar cost would be $738,720 per SDR and $7,387,200 for all SDRs, calculated as follows: ($703,800 for a CCO + (Compliance Attorney at $291 per hour for 120 hours)) × 10 registrants = $7,387,200.

and (g) would be 5 hours.[311] Assuming a maximum of ten SDRs, the aggregate ongoing estimated dollar cost per year would be $14,550 to comply with the proposed rule.[312]

As discussed above, the Commission estimates that the average ongoing paperwork cost associated with preparing annual financial reports pursuant to proposed Rule 13n–11(f) and (g) would be 500 hours and $500,000 for each registered SDR.[313] Assuming a maximum of ten SDRs, the aggregate ongoing estimated dollar cost per year would be $5,915,000 to comply with the proposed rules.[314]

As discussed above, the Commission estimates that the average ongoing paperwork cost associated with submitting annual compliance and financial reports to the Commission pursuant to proposed Rule 13n–11(d), (f), and (g) would be 54 hours and $22,772 for each registered SDR.[315] Assuming a maximum of ten SDRs, the aggregate ongoing estimated dollar cost per year would be $363,260 to comply with the proposed rules.[316]

The Commission believes that currently-existing SDRs already maintain compliance programs that are overseen by a CCO or an individual who effectively serves as a CCO. In addition, such SDRs may prepare compliance reports presented to senior management and/or the SDRs' boards as part of their current business practice. Therefore, the Commission expects that SDRs with substantial commitments to compliance would incur only minimal costs in connection with the adoption of the proposed rule. However, the preparation of annual compliance and financial reports and implementation of related policies and procedures may require a staff beyond just a CCO, and therefore the proposed rules may result in additional direct costs to entities that register as SDRs.

The Commission believes that currently-existing SDRs already prepare financial reports similar to those that would be prepared in accordance with proposed Rule 13n–1(f). Therefore, the Commission expects that most SDRs would incur only minimal costs in connection with the adoption of the proposed financial reporting requirement.

The Commission solicits comment on the costs related to Rules 13n–4(b)(11) and 13n–11. The Commission specifically requests comment on the initial and ongoing costs associated with designating a CCO and the costs associated with any personnel that may be necessary to support the CCO and create the annual compliance and financial reports. Are there additional costs that the Commission should consider? Are there alternatives that the Commission should consider? Do the estimates accurately reflect the cost of preparing annual compliance and financial reports? Please describe and, to the extent practicable, quantify the costs associated with any comments that are submitted.

The Commission does not expect the costs necessary to comply with proposed Rules 13n–4(b)(11) and 13n–11 to have any significant effect on how SDRs conduct business because such costs would not be so large as to result in a change in how such SDRs conduct business, create a barrier to entry, or otherwise alter the competitive landscape among SDRs.

G. Other Policies and Procedures Relating to an SDR's Business

The proposed rules explicitly and implicitly will require registered SDRs to develop and maintain various policies and procedures.[317] Proposed Rule 13n–9 will require each SDR to comply with certain duties and core principles pertaining to confidentiality, disclosure, and use of information.[318] Proposed Rule 13n–4(c) would require each SDR to comply with certain core principles pertaining to market access to services and data, governance arrangements, and conflicts of interest, including developing policies and procedures related to fees, operational reliability, and objective access and participation criteria.[319] Proposed Rule 13n–5(b)(6) would require SDRs to develop dispute resolution mechanisms.[320]

1. Benefits

The proposed rules described in this section would be issued pursuant to specific grants of rulemaking authority in the Dodd-Frank Act[321] and are designed to further the legislation's goals by specifying the obligations of registered SDRs necessary to comply with the goals of the Dodd-Frank Act. The proposed privacy requirement is intended to safeguard transaction data provided to SDRs by market participants. Privacy is necessary in order to ensure that market participants will utilize the services of registered SDRs.

The proposed rule relating to market access to services and data is designed to further the legislation's goals by ensuring that SDRs impose fair, reasonable, and consistently applied fees and maintain objective access and participation criteria. As with the privacy requirement, this rule would encourage market participants to make use of SDRs' services.

The proposed governance requirements are designed to reduce the conflicts of interest relating to SDRs. In addition, by requiring fair representation of market participants on the board with the opportunity to participate in the process for nominating directors and the right to petition for alternative candidates, the proposed rule will help reduce the likelihood that an incumbent SBS market participant could exert undue influence on the board.

While the above requirements will serve to prevent and constrain potential conflicts of interest, proposed Rule 13n–4(c)(3) directly addresses conflicts of interest through targeted policies and procedures and an obligation to establish a process for resolving conflicts of interest. This rule would

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[311] *See supra* Section V.D.6.

[312] The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Attorney is $291 per hour. Thus, the total ongoing estimated dollar cost would be $1,455 per SDR and $14,550 for all SDRs, calculated as follows: (Compliance Attorney at $291 per hour for 5 hours) × 10 registrants = $14,550.

[313] *See supra* Section V.D.6.

[314] The Commission estimates that an SDR will assign these responsibilities to a Senior Accountant. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Senior Accountant is $183 per hour. Thus, the total ongoing estimated dollar cost would be $591,500 per SDR and $5,915,000 for all SDRs, calculated as follows: ($500,000 for independent public accounting services (Senior Accountant at $183 per hour for 500 hours)) × 10 registrants = $5,915,000.

[315] *See supra* Section V.D.6.

[316] The Commission estimates that an SDR will assign these responsibilities to a Senior Systems Analyst. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Senior Systems Analyst is $251 per hour. Thus, the total ongoing estimated dollar cost would be $36,236 per SDR and $363,260 for all SDRs, calculated as follows: ($22,772 for information technology services (Senior Systems Analyst at $251 per hour for 54 hours)) × 10 registrants = $363,260.

[317] *See supra* Section VI.B for a discussion of the cost and benefits associated with the policies and procedures SDRs must develop and maintain with respect to their information systems.

[318] *See supra* Section III.I.

[319] *See supra* Section III.D.

[320] *See supra* Section III.E.

[321] *See* Public Law 111–203, § 763(i) (adding Exchange Act Sections 13(n)(5)(F)–(H) and (7)(A)–(C)).

help mitigate the possibility that SDRs' business practices and internal structures might disadvantage market participants and provide a mechanism through which conflicts may be resolved once identified.

The proposed dispute resolution requirements also serve the legislative purpose of maintaining accurate records relating to SDRs. In addition to ensuring the accuracy of data contained in SDRs, the dispute resolution requirement would provide a forum in which market participants could correct inaccuracies in transaction data regarding transactions to which they are parties, thereby fostering increased confidence from market participants in SDRs and the transaction records such SDRs maintain.

Collectively, the rules described in this section would help ensure that SDRs operate consistently with the objectives set forth in the Exchange Act by providing fair, open, and not unreasonably discriminatory access to all market participants without taking advantage of the SDRs' access to transaction data that market participants are required to submit to the SDRs.

The Commission solicits comment on the benefits related to Rules 13n–4(c), 13n–5(b)(6), and 13n–9. Would additional benefits accrue if the Commission imposed further requirements related to the policies and procedures that SDRs must maintain and, if so, what would these additional requirements be? Please describe and, to the extent practicable, quantify the benefits associated with any comments that are submitted.

2. Costs

The Commission anticipates that the primary costs to SDRs from proposed Rules 13n–4(c), 13n–5(b)(6), and 13n–9 will derive from developing, maintaining, and ensuring compliance with the required policies and procedures.

The governance requirements could impose costs resulting from educating senior management and each director about SBS trading and reporting and the new regulatory structure that will govern SBS, which could slow management or board processes at least initially.

The dispute resolution requirement also would impose costs on registered SDRs because SDRs would be required to develop and implement processes through which market participants could challenge the validity of the transaction data relating to agreements to which such participant is a counterparty.

As discussed above, the Commission estimates that the average initial paperwork cost associated with proposed Rule 13n–4(c)(1) would be 367.5 hours and $35,000 and the average ongoing cost would be 105 hours per year for each SDR.[322] Assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost would be $1,374,800[323] and the aggregate ongoing estimated dollar cost per year would be $294,070[324] to comply with the proposed rule.

As discussed above, the Commission estimates that the average initial paperwork cost associated with proposed Rule 13n–4(c)(2) would be 210 hours and $20,000 for each SDR and the average ongoing paperwork cost would be 60 hours per year for each SDR.[325] Assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost would be $811,100[326] and the aggregate ongoing estimated dollar cost per year would be $174,600[327] to comply with the proposed rule.

As discussed above, the Commission estimates that the average initial paperwork cost associated with proposed Rule 13n–4(c)(3) would be 420 hours and $40,000 for each SDR and the average ongoing paperwork cost would be 120 hours per year for each SDR.[328] Assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost would be $1,622,200[329] and the aggregate ongoing estimated dollar cost per year would be $349,200[330] to comply with the proposed rule.

As discussed above, the Commission estimates that the average initial paperwork cost associated with proposed Rule 13n–5(b)(6) would be 315 hours and $30,000 for each SDR and the average ongoing paperwork cost would be 90 hours per year for each SDR.[331] Assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost would be $1,216,650[332] and

[322] *See supra* Section V.D.7.

[323] The Commission estimates that an SDR will assign these responsibilities to a Compliance Manager, an Attorney, a Senior Systems Analyst, and an Operations Specialist. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Manager is $294 per hour, the cost of an Attorney is $316 per hour, the cost of a Senior Systems Analyst is $251 per hour, and the cost of an Operation Specialist is $114 per hour. Thus, the total initial estimated dollar cost would be $137,480 per SDR and $1,374,800 for all SDRs, calculated as follows: ($35,000 for outside legal services + (Compliance Manager at $294 per hour for 135 hours) + (Attorney at $316 per hour for 152.5 hours) + (Senior Systems Analyst at $251 per hour for 40 hours) + (Operations Specialist at $114 per hour for 40 hours)) × 10 registrants = $1,374,800.

[324] The Commission estimates that an SDR will assign these responsibilities to a Compliance Manager, an Attorney, a Senior Systems Analyst, and an Operations Specialist. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Manager is $294 per hour, the cost of an Attorney is $316 per hour, the cost of a Senior Systems Analyst is $251 per hour, and the cost of an Operation Specialist is $114 per hour. Thus, the total ongoing estimated dollar cost would be $29,407 per SDR and $294,070 for all SDRs, calculated as follows: ((Compliance Manager at $294 per hour for 38 hours) + (Attorney at $316 per hour for 45 hours) + (Senior Systems Analyst at $251 per hour for 11 hours) + (Operations Specialist at $114 per hour for 11 hours)) × 10 registrants = $294,070.

[325] *See supra* Section V.D.7.

[326] The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Attorney is $291 per hour. Thus, the total initial estimated dollar cost would be $81,110 per SDR and $811,100 for all SDRs, calculated as follows: ($20,000 for outside legal services + (Compliance Attorney at $291 per hour for 210 hours)) × 10 registrants = $811,100.

[327] The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Attorney is $291 per hour. Thus, the total ongoing estimated dollar cost would be $17,460 per SDR and $174,600 for all SDRs, calculated as follows: (Compliance Attorney at $291 per hour for 120 hours) × 10 registrants = $174,600.

[328] *See supra* Section V.D.7.

[329] The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Attorney is $291 per hour. Thus, the total initial estimated dollar cost would be $162,220 per SDR and $1,622,200 for all SDRs, calculated as follows: ($40,000 for outside legal services + (Compliance Attorney at $291 per hour for 420 hours)) × 10 registrants = $1,622,200.

[330] The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Attorney is $291 per hour. Thus, the total ongoing estimated dollar cost would be $34,920 per SDR and $349,200 for all SDRs, calculated as follows: (Compliance Attorney at $291 per hour for 120 hours) × 10 registrants = $349,200.

[331] *See supra* Section V.D.7.

[332] The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Data from SIFMA's *Management & Professional Earnings in the Securities Industry*

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the aggregate ongoing estimated dollar cost per year would be $261,900 [333] to comply with the proposed rule.

As discussed above, the Commission estimates that the average initial paperwork cost associated with proposed Rule 13n–9 would be 630 hours and $60,000 for each SDR and the average ongoing paperwork cost would be 180 hours per year for each SDR.[334] Assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost would be $2,433,300 [335] and the aggregate ongoing estimated dollar cost per year would be $523,800 [336] to comply with the proposed rule.

The Commission solicits comment on the costs related to proposed Rules 13n–4(c), 13n–5(b)(6), and 13n–9. The Commission specifically requests comment on the initial and ongoing costs associated with establishing and maintaining the policies and procedures required by the proposed rules, particularly as the costs apply to entities currently operating as SDRs. Are there additional costs implicated by the proposed rules related to policies and procedures that the Commission should consider? Are there alternatives that the Commission should consider? Do the estimates accurately reflect the cost of maintaining, implementing, and revising the required policies and procedures? Please describe and, to the extent practicable, quantify the costs associated with any comments that are submitted.

The Commission does not expect the initial and ongoing costs necessary to comply with the rules relating to policies and procedures to have any significant effect on how SDRs conduct business because such costs would not be so large as to result in a change in how such SDRs conduct business, create a barrier to entry, or otherwise alter the competitive landscape among SDRs.

H. Total Costs

Based on the analyses described above, the Commission preliminarily estimates that proposed Rules 13n–1 through 13n–11 and proposed Form SDR would impose on registered SDRs an aggregate total initial one-time estimated dollar cost of approximately $214,913,592.[337] The Commission further preliminarily estimates that proposed Rules 13n–1 through 13n–11 and proposed Form SDR would impose on registered SDRs a total ongoing annualized aggregate dollar cost of approximately $140,302,120.[338] Altogether, the Commission preliminarily estimates that proposed Rules 13n–1 through 13n–11, proposed Form SDR, and proposed Regulation SBSR [339] would impose on registered SDRs aggregate initial estimated dollar costs of approximately $295,891,852 [340] and aggregate ongoing annualized dollar costs of approximately $245,428,520.[341]

I. Request for Comment

The Commission requests data to quantify the costs and the value of the benefits above. The Commission seeks estimates of these costs and benefits, as well as any costs and benefits not already defined, which may result from the adoption of the proposed rules and Form SDR. Commenters should provide analysis and empirical data to support their views on the costs and benefits associated with the proposals.

VII. Consideration of Burden on Competition, and Promotion of Efficiency, Competition, and Capital Formation

Exchange Act Section 23(a) [342] requires the Commission, when making rules and regulations under the Exchange Act, to consider the impact a new rule would have on competition. Exchange Act Section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Securities Act Section 2(b) [343] and Exchange Act Section 3(f) [344] require the Commission, when engaging in rulemaking that requires it to consider whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation. Below, the Commission addresses these issues for the proposed rules regarding data collection and maintenance and recordkeeping by SDRs and books and records relating to SBS. The Commission focuses on the effects of the discretion used by the Commission rather than the mandates of the Dodd-Frank Act. However, to the extent that the discretion is used to take full advantage of the benefits intended by the Dodd-Frank Act, the two types of benefits are not entirely separable.

The economic effects of the proposed rules were discussed in detail in the

2009, modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Attorney is $291 per hour. Thus, the total initial estimated dollar cost would be $121,665 per SDR and $1,216,650 for all SDRs, calculated as follows: ($30,000 for outside legal services + (Compliance Attorney at $291 per hour for 315 hours)) × 10 registrants = $1,216,650.

[333] The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Attorney is $291 per hour. Thus, the total initial estimated dollar cost would be $26,190 per SDR and $261,900 for all SDRs, calculated as follows: (Compliance Attorney at $291 per hour for 90 hours) × 10 registrants = $261,900.

[334] *See supra* Section V.D.7.

[335] The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Attorney is $291 per hour. Thus, the total initial estimated dollar cost would be $243,330 per SDR and $2,433,300 for all SDRs, calculated as follows: ($60,000 for outside legal services + (Compliance Attorney at $291 per hour for 630 hours)) × 10 registrants = $2,433,300.

[336] The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2009,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Attorney is $291 per hour. Thus, the total ongoing estimated dollar cost would be $52,380 per SDR and $523,800 for all SDRs, calculated as follows: (Compliance Attorney at $291 per hour for 180 hours) × 10 registrants = $523,800.

[337] The Commission derived its estimate from the following: ($589,544 ($584,000 + $5,544) for Registration Requirements and Form SDR) + ($203,962,250 ($200,020,000 + $16,000 + $3,926,250) for SDR Duties, Data Collection and Maintenance, Automated Systems, and Direct Electronic Access) + ($1,015,460 for Recordkeeping) + ($266,088 for Disclosure) + ($1,622,200 for Chief Compliance Officer and Compliance Functions) + ($7,458,050 ($1,374,800 + $811,100 + $1,622,200 + $1,216,650 + $2,433,300) for Other Policies and Procedures Relating to an SDR's Business) = $214,913,592.

[338] The Commission derived its estimate from the following: ($49,080 for Registration Requirements and Form SDR) + ($121,298,845 ($120,012,000 + $9,480 + $908,400 + $368,965) for SDR Duties, Data Collection and Maintenance, Automated Systems, and Direct Electronic Access) + ($820,760 for Recordkeeping) + ($2,848,090 ($2,845,750 + $2,340) for Reports and Reviews) + ($1,765 for Disclosure) + ($13,680,010 ($7,387,200 + $14,550 + $5,915,000 + $363,260) for Chief Compliance Officer and Compliance Functions) + ($1,603,570 ($294,070 + $174,600 + $349,200 + $261,900 + $523,800) for Other Policies and Procedures Relating to an SDR's Business) = $140,302,120.

[339] *See* Regulation SBSR Release, *supra* note 9.

[340] The Commission derived its estimate from the following: ($214,913,592 for proposed Rules 13n–1 through 13n–11 and proposed Form SDR) + ($80,978,260 for proposed Regulation SBSR) = $295,891,852.

[341] The Commission derived its estimate from the following: ($140,302,120 for proposed Rules 13n–1 through 13n–11 and proposed Form SDR) + ($105,126,400 for proposed Regulation SBSR) = $245,428,520.

[342] 15 U.S.C. 78w(a).

[343] 15 U.S.C. 77b(b).

[344] 15 U.S.C. 78c(f).

costs and benefits section. These economic benefits encompassed effects on economic efficiency, competition, and capital formation.

To reiterate, by allowing multiple SDRs to provide data collection, maintenance, and recordkeeping services, the rules are intended to promote competition among SDRs. We do not preliminarily believe that the provisions would give undue market influence to any potential market participants. We believe that non-resident SDRs generally can take steps to comply with their home country requirements and the Commission's supervisory requirements, and therefore can register with the Commission. We recognize that there potentially could be instances in which a non-resident SDR is unable to register because, for example, they cannot make the certification or provide the opinion of counsel required by proposed Rule 13n–1(g). We believe, however, that these requirements are necessary and appropriate in furtherance of the purpose of the Exchange Act.

However, by allowing multiple SDRs, the proposed rules may result in inefficiencies as explained in the benefits and costs section of this release. In particular, the potential reporting of transaction data to multiple SDRs would create a need to aggregate those data by regulators and other interested parties. From a systemic risk perspective, monitoring costs increase if identifiers or data field definitions used by different SDRs are not compatible with each other and aggregation is difficult. The complications associated with aggregation could be particularly costly when aggregation is required across the same asset class and different legs of the same transaction reside in different SDRs. However, the current market structure essentially consists of only one SDR per asset class, and it is likely that the market would, under competitive forces, ultimately converge to an efficient outcome that does not present compatibility problems or that entails fewer, rather than many, SDRs.

The Commission believes that the proposed rules use the discretion that the Dodd-Frank Act permits the Commission to use to promote data collection, maintenance, and recordkeeping according to existing best practices that are used in similar capital market institutions. This is likely to positively affect transparency in credit markets. Therefore, the proposed rules would help capital formation in the broader capital markets whose participants rely on SBS markets to meet their hedging objectives.

The practices that are proposed in the rules would also help regulators perform their supervisory functions in an effective manner. The resulting increase in market integrity is likely to affect capital formation in our capital markets positively. In addition, regulators would be better equipped to perform their duties in the management and mitigation of systemic risk.

VIII. Initial Regulatory Flexibility Act Certification

Section 603(a) of the Regulatory Flexibility Act [345] ("RFA") requires the Commission to undertake an initial regulatory flexibility analysis of the impact of proposed Rules 13n–1 through 13n–11 on small entities, unless the Commission certifies that the proposed rules, if adopted, would not have significant economic impact on a substantial number of small entities.[346]

A. SDRs

Proposed Rules 13n–1 through 13n–11 would apply to all SDRs. In the Dodd-Frank Act, Congress defined for the first time what activity would constitute an SDR and mandated the registration of these new entities. The Commission does not know exactly how many entities may seek to register as SDRs and become subject to the requirements of the proposed rules. However, based on its understanding of the market and conversations with industry sources, the Commission preliminarily believes that likely no more than ten SDRs could be subject to the requirements of proposed Rules 13n–1 through 13n–11.

For purposes of Commission rulemaking in connection with the RFA, an issuer or person, other than an investment company, is a small business if its total assets on the last day of its most recent fiscal year were $5 million or less.[347] The Commission preliminarily believes that the entities likely to register as SDRs will not be considered small entities. The Commission preliminarily believes that most, if not all, of the SDRs will be part of large business entities, and that all SDRs will have assets in excess of $5 million and total capital in excess of $500,000.[348] Therefore, the Commission preliminarily believes that none of the SDRs will be considered small entities.

B. Certification

In the Commission's preliminary view, the proposed rules would not have a significant economic impact on a substantial number of small entities, including national securities exchanges, clearing agencies, or other small businesses or small organizations. For the above reasons, the Commission certifies that the proposed rules would not have a significant economic impact on a substantial number of small entities. The Commission requests comment regarding this certification. The Commission requests that commenters describe the nature of any impact on small entities, including national securities exchanges, clearing agencies, or other small businesses or small organizations that may register as SDRs, and provide empirical data to support the extent of the impact.

IX. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or "SBREFA," [349] the Commission must advise the OMB as to whether the proposed regulations constitute a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in: (1) An annual effect on the economy of $100 million or more (either in the form of an increase or a decrease); (2) a major increase in costs or prices for consumers or individual industries; or (3) significant adverse effect on competition, investment or innovation.

The Commission requests comment on the potential impact of the proposed rules on the economy on an annual basis, on the costs or prices for consumers or individual industries, and on competition, investment, or innovation. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

X. Statutory Authority

Pursuant to the Exchange Act, and particularly Sections 13(n) and 23(a) thereof, 15 U.S.C. 78m(n) and 78w(a), the Commission proposes new Rules 13n–1 to 13n–11, which would govern SDRs.

List of Subjects in 17 CFR Parts 240 and 249

Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, Title 17, Chapter II of the Code of

[345] 5 U.S.C. 603(a).

[346] 5 U.S.C. 605(b).

[347] 17 CFR 230.157. *See also* 17 CFR 240.0–10(a).

[348] Commission staff based this determination on its review of public sources of financial information about the current repositories that are providing services in the OTC derivatives market.

[349] 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).

Federal Regulations is proposed to be amended as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. 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, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78ll, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.;* 18 U.S.C. 1350; and 12 U.S.C. 5221(e)(3), unless otherwise noted.

* * * * *

2. Sections 240.13n–1 through 240–13n–11 are added to read as follows:

Sec.

§ 240.13n–1 Registration of security-based swap data repository.

(a) *Definition.* For purposes of this section—

(1) *EDGAR Filer Manual* has the same meaning as set forth in Rule 11 of Regulation S–T (17 CFR 232).

(2) *Non-resident security-based swap data repository* means:

(i) In the case of an individual, one who resides in or has his principal place of business in any place not in the United States;

(ii) In the case of a corporation, one incorporated in or having its principal place of business in any place not in the United States; or

(iii) In the case of a partnership or other unincorporated organization or association, one having its principal place of business in any place not in the United States.

(3) *Tag* (including the term *tagged*) means an identifier that highlights specific information submitted to the Commission that is in the format required by the EDGAR Filer Manual, as described in Rule 301 of Regulation S–T (17 CFR 232.301).

(b) An application for the registration of a security-based swap data repository shall be filed electronically in a tagged data format on Form SDR (17 CFR 249.1500) with the Commission in accordance with the instructions contained therein. As part of the application process, each SDR shall provide additional information to the Commission upon request.

(c) Within 90 days of the date of the filing of such application (or within such longer period as to which the applicant consents), the Commission shall—

(1) By order grant registration, or

(2) Institute proceedings to determine whether registration should be denied. Such proceedings shall include notice of the grounds for denial under consideration and opportunity for hearing on the record and shall be concluded not later than 180 days after the date on which the application for registration is filed with the Commission under paragraph (b) of this section. At the conclusion of such proceedings, the Commission, by order, shall grant or deny such registration. The Commission may extend the time for conclusion of such proceedings for up to 90 days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the applicant consents.

(3) The Commission shall grant the registration of a security-based swap data repository if the Commission finds that such security-based swap data repository is so organized, and has the capacity, to be able to assure the prompt, accurate, and reliable performance of its functions as a security-based swap data repository, comply with any applicable provision of the federal securities laws and the rules and regulations thereunder, and carry out its functions in a manner consistent with the purposes of Section 13(n) of the Act (15 U.S.C. 78m(n)) and the rules and regulations thereunder. The Commission shall deny the registration of a security-based swap data repository if it does not make any such finding.

(d) For any application of registration as a security-based swap data repository, the Commission, upon the request of a security-based swap data repository, may grant temporary registration of the security-based swap data repository that shall expire on the earlier of:

(1) The date that the Commission grants or denies registration of the security-based swap data repository; or

(2) The date that the Commission rescinds the temporary registration of the security-based swap data repository.

(e) If any information reported in items 1 through 16, 25, and 44 of Form SDR (17 CFR 249.1500) or in any amendment thereto is or becomes inaccurate for any reason, whether before or after the registration has been granted, the security-based swap data repository shall promptly file an amendment on Form SDR updating such information. In addition, the security-based swap data repository shall annually file an amendment on Form SDR within 60 days after the end of each fiscal year of such security-based swap data repository.

(f) Each security-based swap data repository shall designate and authorize on Form SDR an agent in the United States, other than a Commission member, official, or employee, who shall accept any notice or service of process, pleadings, or other documents in any action or proceedings brought against the security-based swap data repository to enforce the Federal securities laws and the rules and regulations thereunder.

(g) Any non-resident security-based swap data repository applying for registration pursuant to this section shall certify on Form SDR and provide an opinion of counsel that the security-based swap data repository can, as a matter of law, provide the Commission with prompt access to the books and records of such security-based swap data repository and that the security-based swap data repository can, as a matter of law, submit to onsite inspection and examination by the Commission.

(h) An application for registration or any amendment thereto that is filed pursuant to this section shall be considered a "report" filed with the Commission for purposes of Sections 18(a) and 32(a) of the Act (15 U.S.C. 78r(a) and 78ff(a)) and the rules and regulations thereunder and other applicable provisions of the United States Code and the rules and regulations thereunder.

§ 240.13n–2 Withdrawal from registration.

(a) *Definitions.* For purposes of this section—

(1) *Control* (including the terms *controlled by* and *under common control with*) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise. A person is presumed to control another person if the person:

(i) Is a director, general partner, or officer exercising executive responsibility (or having similar status or functions);

(ii) Directly or indirectly has the right to vote 25 percent of more of a class of voting securities or has the power to sell or direct the sale of 25 percent or more of a class of voting securities; or

(iii) In the case of a partnership, has the right to receive, upon dissolution, or has contributed, 25 percent or more of the capital.

(2) *Person associated with a security-based swap data repository* means:

(i) Any partner, officer, or director of such security-based swap data repository (or any person occupying a similar status or performing similar functions);

(ii) Any person directly or indirectly controlling, controlled by, or under common control with such security-based swap data repository; or

(iii) Any employee of such security-based swap data repository.

(b) A registered security-based swap data repository may withdraw from registration by filing a notice of withdrawal with the Commission. The security-based swap data repository shall designate on its notice of withdrawal a person associated with the security-based swap data repository to serve as the custodian of the security-based swap data repository's books and records. Prior to filing a notice of withdrawal, a security-based swap data repository shall file an amended Form SDR (17 CFR 249.1500) to update any inaccurate information.

(c) A notice of withdrawal from registration filed by a security-based swap data repository shall become effective for all matters (except as provided in this paragraph (c)) on the 60th day after the filing thereof with the Commission, within such longer period of time as to which such security-based swap data repository consents or which the Commission, by order, may determine as necessary or appropriate in the public interest or for the protection of investors, or within such shorter period of time as the Commission may determine.

(d) A notice of withdrawal that is filed pursuant to this section shall be considered a "report" filed with the Commission for purposes of Sections 18(a) and 32(a) of the Act (15 U.S.C. 78r(a) and 78ff(a)) and the rules and regulations thereunder and other applicable provisions of the United States Code and the rules and regulations thereunder.

(e) If the Commission finds, on the record after notice and opportunity for hearing, that any registered security-based swap data repository has obtained its registration by making any false and misleading statements with respect to any material fact or has violated or failed to comply with any provision of the federal securities laws and the rules and regulations thereunder, the Commission, by order, may revoke the registration. Pending final determination of whether any registration shall be revoked, the Commission, by order, may suspend such registration, if such suspension appears to the Commission, after notice and opportunity for hearing on the record, to be necessary or appropriate in the public interest or for the protection of investors.

(f) If the Commission finds that a registered security-based swap data repository is no longer in existence or has ceased to do business in the capacity specified in its application for registration, the Commission, by order, may cancel the registration.

§ 240.13n–3 Registration of successor to registered security-based swap data repository.

(a) In the event that a security-based swap data repository succeeds to and continues the business of a security-based swap data repository registered pursuant to Section 13(n) of the Act (15 U.S.C. 78m(n)), the registration of the predecessor shall be deemed to remain effective as the registration of the successor if, within 30 days after such succession, the successor files an application for registration on Form SDR (17 CFR 249.1500), and the predecessor files a notice of withdrawal from registration with the Commission; *provided, however,* that the registration of the predecessor security-based swap data repository shall cease to be effective 90 days after the application for registration on Form SDR is filed by the successor security-based swap data repository.

(b) Notwithstanding paragraph (a) of this section, if a security-based swap data repository succeeds to and continues the business of a registered predecessor security-based swap data repository, and the succession is based solely on a change in the predecessor's date or state of incorporation, form of organization, or composition of a partnership, the successor may, within 30 days after the succession, amend the registration of the predecessor security-based swap data repository on Form SDR to reflect these changes. This amendment shall be deemed an application for registration filed by the predecessor and adopted by the successor.

§ 240.13n–4 Duties and core principles of security-based swap data repository.

(a) *Definitions.* For purposes of this section—

(1) *Affiliate* of a security-based swap data repository means a person that, directly or indirectly, controls, is controlled by, or is under common control with the security-based swap data repository.

(2) *Board* means the board of directors of the security-based swap data repository or a body performing a function similar to the board of directors of the security-based swap data repository.

(3) *Control* (including the terms *controlled by* and *under common control with*) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise. A person is presumed to control another person if the person:

(i) Is a director, general partner, or officer exercising executive responsibility (or having similar status or functions);

(ii) Directly or indirectly has the right to vote 25 percent of more of a class of voting securities or has the power to sell or direct the sale of 25 percent or more of a class of voting securities; or

(iii) In the case of a partnership, has the right to receive, upon dissolution, or has contributed, 25 percent or more of the capital.

(4) *Director* means any member of the board.

(5) *Direct electronic access* means access, which shall be in a form and manner acceptable to the Commission, to data stored by a security-based swap data repository in an electronic format and updated at the same time as the security-based swap data repository's data is updated so as to provide the Commission or any of its designees with the ability to query or analyze the data in the same manner that the security-based swap data repository can query or analyze the data.

(6) *End-user* means any counterparty to a security-based swap that is described in Section 3C(g)(1) of the Act (15 U.S.C. 78c–3(g)(1)) and the rules and regulations thereunder.

(7) *Market participant* means any person participating in the security-based swap market, including, but not limited to, security-based swap dealers, major security-based swap participants, and any other counterparties to a security-based swap transaction.

(8) *Nonaffiliated third party* of a security-based swap data repository means any person except:

(i) The security-based swap data repository,

(ii) Any affiliate of the security-based swap data repository, or

(iii) A person employed by a security-based swap data repository and any entity that is not the security-based swap data repository's affiliate (and "nonaffiliated third party" includes such entity that jointly employs the person).

(9) *Person associated with a security-based swap data repository* means:

(i) Any partner, officer, or director of such security-based swap data repository (or any person occupying a similar status or performing similar functions);

(ii) Any person directly or indirectly controlling, controlled by, or under common control with such security-based swap data repository; or

(iii) Any employee of such security-based swap data repository.

(b) *Duties.* To be registered, and maintain registration, as a security-based swap data repository, a security-based swap data repository shall:

(1) Subject itself to inspection and examination by the Commission;

(2) Accept data as prescribed in Regulation SBSR for each security-based swap;

(3) Confirm, as prescribed in Rule 13n–5, with both counterparties to the security-based swap the accuracy of the data that was submitted;

(4) Maintain, as prescribed in Rule 13n–5, the data described in Regulation SBSR in such form, in such manner, and for such period as provided therein and in the Act and the rules and regulations thereunder;

(5) Provide direct electronic access to the Commission (or any designee of the Commission, including another registered entity);

(6) Provide the information described in Regulation SBSR in such form and at such frequency as prescribed in Regulation SBSR to comply with the public reporting requirements set forth in Section 13(m) of the Act (15 U.S.C. 78m(m)) and the rules and regulations thereunder;

(7) At such time and in such manner as may be directed by the Commission, establish automated systems for monitoring, screening, and analyzing security-based swap data;

(8) Maintain the privacy of any and all security-based swap transaction information that the security-based swap data repository receives from a security-based swap dealer, counterparty, or any registered entity as prescribed in Rule 13n–9;

(9) On a confidential basis, pursuant to Section 24 of the Act (15 U.S.C. 78x) and the rules and regulations thereunder, upon request, and after notifying the Commission of the request, make available all data obtained by the security-based swap data repository, including individual counterparty trade and position data, to the following:

(i) Each appropriate prudential regulator, as defined in Section 3(a)(74) of the Act (15 U.S.C. 78c(a)(74));

(ii) The Financial Stability Oversight Council;

(iii) The Commodity Futures Trading Commission;

(iv) The Department of Justice; and

(v) The Federal Deposit Insurance Corporation and any other person that the Commission determines to be appropriate, including, but not limited to—

(A) Foreign financial supervisors (including foreign futures authorities);

(B) Foreign central banks; and

(C) Foreign ministries;

(10) Before sharing information with any entity described in paragraph (b)(9) of this section, obtain a written agreement from each entity stating that the entity shall abide by the confidentiality requirements described in Section 24 of the Act (15 U.S.C. 78x) and the rules and regulations thereunder relating to the information on security-based swap transactions that is provided, and each entity shall agree to indemnify the security-based swap data repository and the Commission for any expenses arising from litigation relating to the information provided under Section 24 of the Act (15 U.S.C. 78x) and the rules and regulations thereunder; and

(11) Designate an individual to serve as a chief compliance officer who shall comply with Rule 13n–11.

(c) *Compliance with core principles.* A security-based swap data repository shall comply with the core principles as described in this paragraph.

(1) *Market Access to Services and Data.* Unless necessary or appropriate to achieve the purposes of the Act and the rules and regulations thereunder, the security-based swap data repository shall not adopt any policies and procedures or take any action that results in an unreasonable restraint of trade or impose any material anticompetitive burden on the trading, clearing, or reporting of transactions. To comply with this core principle, each security-based swap data repository shall:

(i) Ensure that any dues, fees, or other charges imposed by, and any discounts or rebates offered by, a security-based swap data repository are fair and reasonable and not unreasonably discriminatory. Such dues, fees, other charges, discounts, or rebates shall be applied consistently across all similarly-situated users of such security-based swap data repository's services, including, but not limited to, market participants, market infrastructures (including central counterparties), venues from which data can be submitted to the security-based swap data repository (including exchanges, security-based swap execution facilities, electronic trading venues, and matching and confirmation platforms), and third party service providers;

(ii) Permit market participants to access specific services offered by the security-based swap data repository separately;

(iii) Establish, monitor on an ongoing basis, and enforce clearly stated objective criteria that would permit fair, open, and not unreasonably discriminatory access to services offered and data maintained by the security-based swap data repository as well as fair, open, and not unreasonably discriminatory participation by market participants, market infrastructures, venues from which data can be submitted to the security-based swap data repository, and third party service providers that seek to connect to or link with the security-based swap data repository; and

(iv) Establish, maintain, and enforce written policies and procedures reasonably designed to review any prohibition or limitation of any person with respect to access to services offered, directly or indirectly, or data maintained by the security-based swap data repository and to grant such person access to such services or data if such person has been discriminated against unfairly.

(2) *Governance arrangements.* Each security-based swap data repository shall establish governance arrangements that are transparent to fulfill public interest requirements under the Act and the rules and regulations thereunder; to carry out functions consistent with the Act, the rules and regulations thereunder, and the purposes of the Act; and to support the objectives of the Federal Government, owners, and participants. To comply with this core principle, each security-based swap data repository shall:

(i) Establish governance arrangements that are well defined and include a clear organizational structure with effective internal controls;

(ii) Establish governance arrangements that provide for fair representation of market participants;

(iii) Provide representatives of market participants, including end-users, with the opportunity to participate in the process for nominating directors and

with the right to petition for alternative candidates; and

(iv) Establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the security-based swap data repository's senior management and each member of the board or committee that has the authority to act on behalf of the board possess requisite skills and expertise to fulfill their responsibilities in the management and governance of the security-based swap data repository, to have a clear understanding of their responsibilities, and to exercise sound judgment about the security-based swap data repository's affairs.

(3) *Conflicts of interest.* Each security-based swap data repository shall establish and enforce written policies and procedures reasonably designed to minimize conflicts of interest in the decision-making process of the security-based swap data repository and establish a process for resolving any such conflicts of interest. Such conflicts of interest include, but are not limited to: conflicts between the commercial interests of a security-based swap data repository and its statutory responsibilities; conflicts in connection with the commercial interests of certain market participants or linked market infrastructures, third party service providers, and others; conflicts between, among, or with persons associated with the security-based swap data repository, market participants, affiliates of the security-based swap data repository, and nonaffiliated third parties; and misuse of confidential information, material, nonpublic information, and/or intellectual property. To comply with this core principle, each security-based swap data repository shall:

(i) Establish, maintain, and enforce written policies and procedures reasonably designed to identify and mitigate potential and existing conflicts of interest in the security-based swap data repository's decision-making process on an ongoing basis;

(ii) With respect to the decision-making process for resolving any conflicts of interest, require the recusal of any person involved in such conflict from such decision-making; and

(iii) Establish, maintain, and enforce reasonable written policies and procedures regarding the security-based swap data repository's non-commercial and/or commercial use of the security-based swap transaction information that it receives from a market participant, any registered entity, or any other person.

Note to § 240.13n–4: This rule is not intended to limit, or restrict, the applicability of other provisions of the Federal securities laws, including, but not limited to, Section 13(m) of the Act (15 U.S.C. 78m(m)) and the rules and regulations thereunder.

§ 240.13n–5 Data collection and maintenance.

(a) *Definitions.* For purposes of this section—

(1) *Transaction data* means all information reported to a security-based swap data repository pursuant to the Act and the rules and regulations thereunder.

(2) *Position* means the gross and net notional amounts of open security-based swap transactions aggregated by one or more attributes, including, but not limited to, the:

(i) Underlying instrument, index, or reference entity;

(ii) Counterparty;

(iii) Asset class;

(iv) Long risk of the underlying instrument, index, or reference entity; and

(v) Short risk of the underlying instrument, index, or reference entity.

(3) *Asset class* means those security-based swaps in a particular broad category, including, but not limited to, credit derivatives, equity derivatives, and loan-based derivatives.

(b) *Requirements.* Every security-based swap data repository registered with the Commission shall comply with the following data collection and data maintenance standards:

(1) *Transaction data.*

(i) Every security-based swap data repository shall establish, maintain, and enforce written policies and procedures reasonably designed for the reporting of transaction data to the security-based swap data repository and shall accept all transaction data that is reported in accordance with such policies and procedures.

(ii) If a security-based swap data repository accepts any security-based swap in a particular asset class, the security-based swap data repository shall accept all security-based swaps in that asset class that are reported to it in accordance with its policies and procedures required by paragraph (b)(1) of this section.

(iii) Every security-based swap data repository shall establish, maintain, and enforce written policies and procedures reasonably designed to satisfy itself by reasonable means that the transaction data that has been submitted to the security-based swap data repository is accurate, including clearly identifying the source for each trade side and the pairing method (if any) for each transaction in order to identify the level of quality of the transaction data.

(iv) Every security-based swap data repository shall promptly record the transaction data it receives.

(2) *Positions.* Every security-based swap data repository shall establish, maintain, and enforce written policies and procedures reasonably designed to calculate positions for all persons with open security-based swaps for which the security-based swap data repository maintains records.

(3) Every security-based swap data repository shall establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the transaction data and positions that it maintains are accurate.

(4) Every security-based swap data repository shall maintain transaction data for not less than five years after the applicable security-based swap expires and historical positions for not less than five years:

(i) In a place and format that is readily accessible to the Commission and other persons with authority to access or view such information; and

(ii) In an electronic format that is non-rewriteable and non-erasable.

(5) Every security-based swap data repository shall establish, maintain, and enforce written policies and procedures reasonably designed to prevent any provision in a valid security-based swap from being invalidated or modified through the procedures or operations of the security-based swap data repository.

(6) Every security-based swap data repository shall establish procedures and provide facilities reasonably designed to effectively resolve disputes over the accuracy of the transaction data and positions that are recorded in the security-based swap data repository.

(7) If a security-based swap data repository ceases doing business, or ceases to be registered pursuant to Section 13(n) of the Act (15 U.S.C. 78m(n)) and the rules and regulations thereunder, it must continue to preserve, maintain and make accessible the transaction data and historical positions required to be collected, maintained and preserved by this section in the manner required by the Act and the rules and regulations thereunder and for the remainder of the period required by this section.

(8) Every security-based swap data repository shall make and keep current a plan to ensure that the transaction data and positions that are recorded in the security-based swap data repository continue to be maintained in accordance with Rule 13n–5(b)(7), which shall include procedures for transferring the transaction data and positions to the Commission or its

designee (including another registered security-based swap data repository).

§ 240.13n–6 Automated systems.

(a) *Definitions.* For purposes of this section—

(1) *Material system outage* means an unauthorized intrusion into any system, or an event at a security-based swap data repository that causes a problem in its systems or procedures that results in:

(i) A failure to maintain service level agreements or constraints;

(ii) A disruption of normal operations, including switchover to back-up equipment with no possibility of near-term recovery of primary hardware;

(iii) A loss of use of any system;

(iv) A loss of transactions;

(v) Excessive back-ups or delays in processing;

(vi) A loss of ability to disseminate transaction data and positions;

(vii) A communication of an outage situation to other external entities;

(viii) A report or referral of an event to the security-based swap data repository's board of directors, a body performing a function similar to the board of the directors, or senior management;

(ix) A serious threat to its systems operations even though its systems operations were not disrupted;

(x) A queuing of data between system components or queuing of messages to or from customers of such duration that a customer's normal service delivery is affected; or

(xi) A failure to maintain the integrity of its systems that results in the entry of erroneous or inaccurate transaction data or other information in the security-based swap data repository or the securities markets.

(2) *Material systems change* means a change to automated systems of a security-based swap data repository that:

(i) Significantly affects its existing capacity or security;

(ii) In itself, raises significant capacity or security issues, even if it does not affect other existing systems;

(iii) Relies upon substantially new or different technology;

(iv) Is designed to provide a new service or function; or

(v) Otherwise significantly affects the operations of the security-based swap data repository.

(3) *Objective review* means an internal or external review, performed by competent, objective personnel following established procedures and standards, and containing a risk assessment conducted pursuant to a review schedule.

(4) *Competent, objective personnel* means a recognized information technology firm or a qualified internal department knowledgeable of information technology systems.

(5) *Review schedule* means a schedule in which each element contained in paragraph (b)(1) of this section would be assessed at specific, regular intervals.

(6) *Transaction data* has the same meaning as in Rule 13n–5(a)(1).

(7) *Position* has the same meaning as in Rule 13n–5(a)(2).

(b) *Requirements for security-based swap data repositories.* Every security-based swap data repository, with respect to those systems that support or are integrally related to the performance of its activities, shall:

(1) Establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its systems provide adequate levels of capacity, resiliency, and security. These policies and procedures shall, at a minimum:

(i) Establish reasonable current and future capacity estimates;

(ii) Conduct periodic capacity stress tests of critical systems to determine such systems' ability to process transactions in an accurate, timely, and efficient manner;

(iii) Develop and implement reasonable procedures to review and keep current its system development and testing methodology;

(iv) Review the vulnerability of its systems and data center computer operations to internal and external threats, physical hazards, and natural disasters; and

(v) Establish adequate contingency and disaster recovery plans.

(2) On an annual basis, submit an objective review to the Commission within thirty calendar days of its completion. Where the objective review is performed by an internal department, an objective, external firm shall assess the internal department's objectivity, competency, and work performance with respect to the review performed by the internal department. The external firm must issue a report of the objective review, which the security-based swap data repository must submit to the Commission on an annual basis, within 30 calendar days of completion of the review;

(3) Promptly notify the Commission of material systems outages and any remedial measures that have been implemented or are contemplated. Prompt notification includes the following:

(i) Immediately notify the Commission when a material systems outage is detected;

(ii) Immediately notify the Commission when remedial measures are selected to address the material systems outage;

(iii) Immediately notify the Commission when the material systems outage is addressed; and

(iv) Submit to the Commission within five business days of the occurrence of the material systems outage a detailed written description and analysis of the outage and any remedial measures that have been implemented or are contemplated; and

(4) Notify the Commission in writing at least thirty calendar days before implementation of any planned material systems changes.

(c) *Electronic filing.* Every security-based swap data repository shall submit every notification, review, or description and analysis that is required to be submitted to the Commission pursuant to this section (other than the notifications pursuant to paragraph (b)(3)(i), (ii), or (iii) of this section) in an appropriate electronic format. Every such notification, review, or description and analysis shall be submitted to the Division of Trading and Markets, Office of Market Operations, at the principal office of the Commission in Washington, DC. Every such notification, review, or description and analysis shall be considered submitted when an electronic version is received at the Division of Trading and Markets, Office of Market Operations, at the principal office of the Commission in Washington, DC.

(d) *Confidential treatment.* A person who submits a notification, review, or description and analysis pursuant to this section for which he or she seeks confidential treatment shall clearly mark each page or segregable portion of each page with the words "Confidential Treatment Requested." A notification, review, or description and analysis submitted pursuant to this section will be accorded confidential treatment to the extent permitted by law.

§ 240.13n–7 Recordkeeping of security-based swap data repository.

(a) Every security-based swap data repository shall make and keep current the following books and records relating to its business:

(1) A record for each office listing, by name or title, each person at that office who, without delay, can explain the types of records the security-based swap data repository maintains at that office and the information contained in those records; and

(2) A record listing each officer, manager, or person performing similar functions of the security-based swap data repository responsible for establishing policies and procedures

that are reasonably designed to ensure compliance with the Act and the rules and regulations thereunder.

(b) *Recordkeeping rule for security-based swap data repositories.*

(1) Every security-based swap data repository shall keep and preserve at least one copy of all documents, including all documents and policies and procedures required by the Act and the rules and regulations thereunder, correspondence, memoranda, papers, books, notices, accounts, and other such records as shall be made or received by it in the course of its business as such.

(2) Every security-based swap data repository shall keep all such documents for a period of not less than five years, the first two years in a place that is immediately available to the staff of the Commission for inspection and examination.

(3) Every security-based swap data repository shall, upon request of any representative of the Commission, promptly furnish to the possession of such representative copies of any documents required to be kept and preserved by it pursuant to paragraphs (a) and (b) of this section.

(c) If a security-based swap data repository ceases doing business, or ceases to be registered pursuant to Section 13(n) of the Act (15 U.S.C. 78m(n)) and the rules and regulations thereunder, it must continue to preserve, maintain, and make accessible the records/data required to be collected, maintained and preserved by this section in the manner required by this section and for the remainder of the period required by this section.

(d) This section does not apply to data collected and maintained pursuant to Rule 13n–5.

§ 240.13n–8 Reports to be provided to the Commission.

Every security-based swap data repository shall promptly 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 the rules and regulations thereunder.

§ 240.13n–9 Privacy requirements of security-based swap data repository.

(a) *Definitions.* For purposes of this section—

(1) *Affiliate* of a security-based swap data repository means a person that, directly or indirectly, controls, is controlled by, or is under common control with the security-based swap data repository.

(2) *Control* (including the terms *controlled by* and *under common control with*) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise. A person is presumed to control another person if the person:

(i) Is a director, general partner, or officer exercising executive responsibility (or having similar status or functions);

(ii) Directly or indirectly has the right to vote 25 percent of more of a class of voting securities or has the power to sell or direct the sale of 25 percent or more of a class of voting securities; or

(iii) In the case of a partnership, has the right to receive, upon dissolution, or has contributed, 25 percent or more of the capital.

(3) *Market participant* means any person participating in the security-based swap market, including, but not limited to, security-based swap dealers, major security-based swap participants, and any other counterparties to a security-based swap transaction.

(4) *Nonaffiliated third party* of a security-based swap data repository means any person except:

(i) The security-based swap data repository,

(ii) The security-based swap data repository's affiliate, or

(iii) A person employed by a security-based swap data repository and any entity that is not the security-based swap data repository's affiliate (and *nonaffiliated third party* includes such entity that jointly employs the person).

(5) *Nonpublic personal information* means:

(i) Personally identifiable information and

(ii) Any list, description, or other grouping of market participants (and publicly available information pertaining to them) that is derived using personally identifiable information that is not publicly available information.

(6) *Personally identifiable information* means any information:

(i) A market participant provides to a security-based swap data repository to obtain service from the security-based swap data repository,

(ii) About a market participant resulting from any transaction involving a service between the security-based swap data repository and the market participant, or

(iii) The security-based swap data repository obtains about a market participant in connection with providing a service to that market participant.

(7) *Person associated with a security-based swap data repository* means:

(i) Any partner, officer, or director of such security-based swap data repository (or any person occupying a similar status or performing similar functions);

(ii) Any person directly or indirectly controlling, controlled by, or under common control with such security-based swap data repository; or

(iii) Any employee of such security-based swap data repository.

(b) Each security-based swap data repository shall:

(1) Establish, maintain, and enforce written policies and procedures reasonably designed to protect the privacy of any and all security-based swap transaction information that the security-based swap data repository receives from a security-based swap dealer, counterparty, or any registered entity. Such policies and procedures shall include, but are not limited to, policies and procedures to protect the privacy of any and all security-based swap transaction information that the security-based swap data repository shares with affiliates and nonaffiliated third parties; and

(2) Establish and maintain safeguards, policies, and procedures reasonably designed to prevent the misappropriation or misuse, directly or indirectly, of:

(i) Any confidential information received by the security-based swap data repository, including, but not limited to, trade data, position data, and any nonpublic personal information about a market participant or any of its customers;

(ii) Material, nonpublic information; and/or

(iii) Intellectual property, such as trading strategies or portfolio positions, by the security-based swap data repository or any person associated with the security-based swap data repository for their personal benefit or the benefit of others. Such safeguards, policies, and procedures shall address, without limitation,

(A) Limiting access to such confidential information, material, nonpublic information, and intellectual property,

(B) Standards pertaining to the trading by persons associated with the security-based swap data repository for their personal benefit or the benefit of others, and

(C) Adequate oversight to ensure compliance with this subparagraph.

§ 240.13n–10 Disclosure requirements of security-based swap data repository.

(a) *Definition.* For purposes of this section—

(1) *Market participant* means any person participating in the over-the-counter derivatives market, including, but not limited to, security-based swap dealers, major security-based swap participants, and any other counterparties to a security-based swap transaction.

(b) Before accepting any security-based swap data from a market participant or upon a market participant's request, a security-based swap data repository shall furnish to the market participant a disclosure document that contains the following written information, which must reasonably enable the market participant to identify and evaluate accurately the risks and costs associated with using the services of the security-based swap data repository:

(1) The security-based swap data repository's criteria for providing others with access to services offered and data maintained by the security-based swap data repository;

(2) The security-based swap data repository's criteria for those seeking to connect to or link with the security-based swap data repository;

(3) A description of the security-based swap data repository's policies and procedures regarding its safeguarding of data and operational reliability to protect the confidentiality and security of such data, as described in Rule 13n–6;

(4) A description of the security-based swap data repository's policies and procedures reasonably designed to protect the privacy of any and all security-based swap transaction information that the security-based swap data repository receives from a security-based swap dealer, counterparty, or any registered entity, as described in Rule 13n–9(b)(1);

(5) A description of the security-based swap data repository's policies and procedures regarding its non-commercial and/or commercial use of the security-based swap transaction information that it receives from a market participant, any registered entity, or any other person;

(6) A description of the security-based swap data repository's dispute resolution procedures involving market participants, as described in Rule 13n–5(b)(6);

(7) A description of all the security-based swap data repository's services, including any ancillary services;

(8) The security-based swap data repository's updated schedule of any dues; unbundled prices, rates, or other fees for all of its services, including any ancillary services; any discounts or rebates offered; and the criteria to benefit from such discounts or rebates; and

(9) A description of the security-based swap data repository's governance arrangements.

§ 240.13n–11 Designation of chief compliance officer of security-based swap data repository.

(a) *In general.* Each security-based swap data repository shall identify on Form SDR (17 CFR 249.1500) a person who has been designated by the board to serve as a chief compliance officer of the security-based swap data repository. The compensation and removal of the chief compliance officer shall require the approval of a majority of the security-based swap data repository's board.

(b) *Definitions.* For purposes of this section—

(1) *Affiliate* of a security-based swap data repository means a person that, directly or indirectly, controls, is controlled by, or is under common control with the security-based swap data repository.

(2) *Board* means the board of directors of the security-based swap data repository or a body performing a function similar to the board of directors of the security-based swap data repository.

(3) *Director* means any member of the board.

(4) *EDGAR Filer Manual* has the same meaning as set forth in Rule 11 of Regulation S–T (17 CFR 232.11).

(5) *Material change* means a change that a chief compliance officer would reasonably need to know in order to oversee compliance of the security-based swap data repository.

(6) *Material compliance matter* means any compliance matter that the board would reasonably need to know to oversee the compliance of the security-based swap data repository and that involves, without limitation:

(i) A violation of the Federal securities laws by the security-based swap data repository, its officers, directors, employees, or agents;

(ii) A violation of the policies and procedures of the security-based swap data repository by the security-based swap data repository, its officers, directors, employees, or agents; or

(iii) A weakness in the design or implementation of the policies and procedures of the security-based swap data repository.

(7) *Tag* (including the term *tagged*) means an identifier that highlights specific information submitted to the Commission that is in the format required by the EDGAR Filer Manual, as described in Rule 301 of Regulation S–T (17 CFR 232.301).

(c) *Duties.* Each chief compliance officer of a security-based swap data repository shall:

(1) Report directly to the board or to the chief executive officer of the security-based swap data repository;

(2) Review the compliance of the security-based swap data repository with respect to the requirements and core principles described in Section 13(n) of the Act (15 U.S.C. 78m(n)) and the rules and regulations thereunder;

(3) In consultation with the board or the chief executive officer of the security-based swap data repository, resolve any conflicts of interest that may arise;

(4) Be responsible for administering each policy and procedure that is required to be established pursuant to Section 13 of the Act (15 U.S.C. 78m) and the rules and regulations thereunder;

(5) Ensure compliance with the Act and the rules and regulations thereunder relating to security-based swaps, including each rule prescribed by the Commission under Section 13 of the Act (15 U.S.C. 78m);

(6) Establish procedures for the remediation of noncompliance issues identified by the chief compliance officer through any—

(i) Compliance office review;

(ii) Look-back;

(iii) Internal or external audit finding;

(iv) Self-reported error; or

(v) Validated complaint; and

(7) Establish and follow appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.

(d) *Annual reports.*

(1) *In general.* The chief compliance officer shall annually prepare and sign a report that contains a description of the compliance of the security-based swap data repository with respect to the Act and the rules and regulations thereunder and each policy and procedure of the security-based swap data repository (including the code of ethics and conflicts of interest policies of the security-based swap data repository). Each compliance report shall also contain, at a minimum, a description of:

(i) The security-based swap data repository's enforcement of its policies and procedures;

(ii) Any material changes to the policies and procedures since the date of the preceding compliance report;

(iii) Any recommendation for material changes to the policies and procedures as a result of the annual review, the rationale for such recommendation, and whether such policies and procedures

were or will be modified by the security-based swap data repository to incorporate such recommendation; and

(iv) Any material compliance matters identified since the date of the preceding compliance report.

(2) *Requirements.* A financial report of the security-based swap data repository shall be filed with the Commission as described in paragraph (f) of this section and shall accompany a compliance report as described in paragraph (d)(1) of this section. The compliance report shall include a certification that, under penalty of law, the compliance report is accurate and complete. The compliance report shall also be filed in a tagged data format in accordance with the instructions contained in the EDGAR Filer Manual, as described in Rule 301 of Regulation S–T (17 CFR 232.301).

(e) The chief compliance officer shall submit the annual compliance report to the board for its review prior to the submission of the report to the Commission.

(f) *Financial report.* Each financial report filed with a compliance report shall:

(1) Be a complete set of financial statements of the security-based swap data repository that are prepared in accordance with U.S. generally accepted accounting principles for the most recent two fiscal years of the security-based swap data repository;

(2) Be audited in accordance with the standards of the Public Company Accounting Oversight Board by a registered public accounting firm that is qualified and independent in accordance with Rule 2–01 of Regulation S–X (17 CFR 210.2–01);

(3) Include a report of the registered public accounting firm that complies with paragraphs (a) through (d) of Rule 2–02 of Regulation S–X (17 CFR 210.2–02);

(4) If the security-based swap data repository's financial statements contain consolidated information of a subsidiary of the security-based swap data repository, provide condensed financial information, in a financial statement footnote, as to the financial position, changes in financial position and results of operations of the security-based swap data repository, as of the same dates and for the same periods for which audited consolidated financial statements are required. Such financial information need not be presented in greater detail than is required for condensed statements by Rules 10–01(a)(2), (3), and (4) of Regulation S–X (17 CFR 210.10–01). Detailed footnote disclosure that would normally be included with complete financial statements may be omitted with the exception of disclosures regarding material contingencies, long-term obligations, and guarantees. Descriptions of significant provisions of the security-based swap data repository's long-term obligations, mandatory dividend or redemption requirements of redeemable stocks, and guarantees of the security-based swap data repository shall be provided along with a five-year schedule of maturities of debt. If the material contingencies, long-term obligations, redeemable stock requirements, and guarantees of the security-based swap data repository have been separately disclosed in the consolidated statements, then they need not be repeated in this schedule; and

(5) Be provided in eXtensible Business Reporting Language consistent with Rules 405 (a)(1), (a)(3), (b), (c), (d), and (e) of Regulation S–T (17 CFR 232.405).

(g) Reports filed pursuant to paragraphs (d) and (f) of this section shall be filed within 60 days after the end of the fiscal year covered by such reports.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

3. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201; and 18 U.S.C. *et seq.* unless otherwise noted.

4. Subpart P consisting of § 249.1500 is added to read as follows:

Subpart P—Form for Registration of Security-Based Swap Data Repositories

§ 249.1500 Form SDR, application for registration as a security-based swap data repository.

[**Note:** The text of Form SDR does not, and the amendments will not, appear in the Code of Federal Regulations.]

The form shall be used for registration as a security-based swap data repository, and for the amendments to, such registration pursuant to Section 13(n) of the Exchange Act (15 U.S.C. 78m(n)).

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM SDR

APPLICATION OR AMENDMENT TO APPLICATION FOR REGISTRATION AS SECURITY-BASED SWAP DATA REPOSITORY UNDER THE SECURITIES EXCHANGE ACT OF 1934

GENERAL INSTRUCTIONS FOR PREPARING AND FILING FORM SDR

1. Form SDR and Exhibits thereto are to be filed electronically in a tagged data format with the Securities and Exchange Commission by an applicant for registration as a security-based swap data repository, or by a registered security-based swap data repository amending its registration, pursuant to Section 13(n) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 13n–1 thereunder. No application for registration shall be effective unless the Commission grants such registration.

2. Individuals' names shall be given in full (last name, first name, middle name).

3. Form SDR shall be signed by a person who is duly authorized to act on behalf of the security-based swap data repository.

4. If Form SDR is being filed as an application for registration, all applicable items must be answered in full. If any item is not applicable, indicate by "none" or "N/A" as appropriate.

5. Disclosure of the information specified on this form is mandatory prior to processing of an application for registration as a security-based swap data repository. The information will be used for the principal purpose of determining whether the Commission should grant or deny registration to an applicant. 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 will be included routinely in the public files of the Commission and will be available for inspection by any interested person. A form that is not prepared and executed in compliance with applicable requirements may be deemed as not acceptable for filing. Acceptance of this form, however, shall not constitute any finding that it has been filed as required or that the information submitted is true, current, or complete. Intentional misstatements or omissions of fact constitute federal criminal violations (*see* 18 U.S.C. 1001 and 15 U.S.C. 78ff(a)).

6. Rule 13n–1(e) under the Exchange Act requires a security-based swap data repository to amend promptly Form SDR if any information contained in items 1 through 16, 25, and 44 of this application, or any supplement or amendment thereto, is or becomes inaccurate for any reason.

7. For the purposes of this form, the term "applicant" includes any applicant for registration as a security-based swap data repository or any registered security-based swap data repository that is amending Form SDR.

8. Applicants filing Form SDR as an amendment (other than an annual amendment) need file only the cover page (items 1 through 3), the signature page (item 12), and any pages on which an answer is being amended, together with such exhibits as are being amended. An applicant submitting an amendment represents that all unamended items and exhibits remain true, current, and complete as previously filed.

DEFINITIONS: Unless the context requires otherwise, all terms used in this form have the same meaning as in the Exchange Act, as amended, and in the rules and regulations of the Commission thereunder.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM SDR

APPLICATION OR AMENDMENT TO APPLICATION FOR REGISTRATION AS SECURITY-BASED SWAP DATA REPOSITORY UNDER THE SECURITIES EXCHANGE ACT OF 1934

_____

(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 an application, or to an effective registration (including an annual amendment), list all items that are amended and check here ☐

_____

_____

_____

GENERAL INFORMATION

1. Name under which business is conducted, if different than name specified herein: _____

_____

2. If name of business is amended, state previous business name: _____

_____

3. Mailing address, if different than address specified herein: _____

_____

(Number and Street)

_____

(City) (State) (Zip Code)

4. List of principal office(s) and address(es) where security-based swap data repository activities are conducted:

Office	Address

5. If the applicant is a successor (within the definition of Rule 12b–2 under the Exchange Act) to a previously registered security-based swap data repository, please complete the following:

a. Date of succession _____

b. Full name and address of predecessor security-based swap data repository

_____

(Name)

_____

(Number and Street)

_____

(City) (State) (Zip Code)

6. List all asset classes of security-based swaps for which the applicant is collecting and maintaining or for which it proposes to collect and maintain.

_____

_____

7. Furnish a description of the function(s) that the applicant performs or proposes to perform. _____

_____

_____

_____

BUSINESS ORGANIZATION

8. Applicant is a:

☐ Corporation

☐ Partnership

☐ Other Form of Organization (Specify) _____

9. If applicant is a corporation:

a. Date of incorporation _____

b. Place of incorporation or state/country of formation _____

10. If Applicant is a partnership:

a. Date of filing of partnership articles _____

b. Place where partnership agreement was filed _____

11. Applicant understands and consents that any notice or service of process, pleadings, or other documents in connection with any action or proceeding against the applicant may be effectuated by certified mail to the officer specified or person named below at the U.S. address given. Such officer or person cannot be a Commission member, official, or employee.

(Name of Person or, if Applicant is a Corporation, Title of Officer) _____

(Name of Applicant or Applicable Entity) _____

(Number and Street) _____

(City) (State) (Zip Code) _____

(Area Code) (Telephone Number)

12. SIGNATURES: Applicant has duly caused this application or amendment to be signed on its behalf by the undersigned, hereunto duly authorized, this _____day of _____,____.

Applicant and the undersigned hereby represent 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 and that the submission of any amendment represents that all unamended items and Exhibits remain true, current, and complete as previously filed. If the applicant is a non-resident security-based swap data repository, Applicant and the undersigned further represent that the applicant can, as a matter of law, provide the Commission with prompt access to the applicant's books and records and that the applicant can submit to an onsite inspection and examination by the Commission. For purposes of this certification, "non-resident security-based swap data repository" means (i) in the case of an individual, one who resides in or has his principal place of business in any place not in the United States; (ii) in the case of a corporation, one incorporated in or having its principal place of business in any place not in the United States; or (iii) in the case of a partnership or other unincorporated organization or association, one having its principal place of business in any place not in the United States.

(Name of Applicant) _____

(Signature of General Partner, Managing Agent or Principal Officer) _____

(Title) _____

Exchange Act that owns 10 percent or more of the applicant's stock or that, either directly or indirectly, through agreement or otherwise, in any other manner, may control or direct the management or policies of the applicant. State in Exhibit A 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.

14. Attach as Exhibit B the following information about the chief compliance officer who has been appointed by the board of directors of the security-based swap data repository or a person or group performing a function similar to such board of directors:
a. Name
b. Title
c. Date of commencement and, if appropriate, termination of present term of position
d. Length of time the chief compliance officer has held the same position
e. Brief account of the business experience of the chief compliance officer over the last five years
f. Any other business affiliations in the securities industry or OTC derivatives industry
g. Details of:
(1) any order of the Commission with respect to such person pursuant to Sections 15(b)(4), 15(b)(6), 19(h)(2), or 19(h)(3) of the Exchange Act;
(2) any conviction or injunction of a type described in Sections 15(b)(4)(B) or (C) of the Exchange Act within the past ten years;
(3) any action of a self-regulatory organization with respect to such person imposing a final disciplinary sanction pursuant to Sections 6(b)(6), 15A(b)(7), or 17A(b)(3)(G) of the Exchange Act;
(4) any final action by a self-regulatory organization with respect to such person constituting a denial, bar, prohibition, or limitation of membership, participation, or association with a member, or of access to services offered by, such organization of a member thereof; and
(5) any final action by another federal regulatory agency, including the Commodity Futures Trading Commission, any state regulatory agency, or any foreign financial regulatory authority resulting in:
i. a finding that such person has made a false statement or omission, or has been dishonest, unfair, or unethical;
ii. a finding that such person has been involved in a violation of any securities-related regulations or statutes;
iii. a finding that such person has been a cause of a business having its authorization to do business denied, suspended, revoked, or restricted;
iv. an order entered, in the past ten years, against such person in connection with a securities-related activity; or
v. any disciplinary sanction, including a denial, suspension, or revocation of such person's registration or license or otherwise, by order, a prevention from associating with a securities-related business or a restriction of such person's activities.

15. Attach as Exhibit C a list of the officers, directors, governors, and persons performing similar functions, and the members of all standing committees grouped by committee of the security-based swap data repository or of the entity identified in item 18 that performs the security-based swap data repository activities of the applicant, indicating for each:
a. Name
b. Title
c. Dates of commencement and, if appropriate, termination of present term of office or position
d. Length of time each present officer, director, governor, persons performing similar functions, or member of a standing committee has held the same office or position
e. Brief account of the business experience of each officer, director, governor, persons performing similar functions, or member of a standing committee over the last five years
f. Any other business affiliations in the securities industry or OTC derivatives industry
g. Details of:
(1) any order of the Commission with respect to such person pursuant to Sections l5(b)(4), 15(b)(6), 19(h)(2), or 19(h)(3) of the Exchange Act;
(2) any conviction or injunction of a type described in Sections l5(b)(4)(B) or (C) of the Exchange Act within the past ten years;
(3) any action of a self-regulatory organization with respect to such person imposing a final disciplinary sanction pursuant to Sections 6(b)(6), l5A(b)(7), or 17A(b)(3)(G) of the Exchange Act;
(4) any final action by a self-regulatory organization with respect to such person constituting a denial, bar, prohibition, or limitation of membership, participation, or association with a member, or of access to services offered by, such organization of a member thereof; and
(5) any final action by another federal regulatory agency, including the Commodity Futures Trading Commission, any state regulatory agency, or any foreign financial regulatory authority resulting in:
i. a finding that such person has made a false statement or omission, or has been dishonest, unfair, or unethical;
ii. a finding that such person has been involved in a violation of any securities-related regulations or statutes;
iii. a finding that such person has been a cause of a business having its authorization to do business denied, suspended, revoked, or restricted;
iv. an order entered, in the past ten years, against such person in connection with a securities-related activity; or
v. any disciplinary sanction, including a denial, suspension, or revocation of such person's registration or license or otherwise, by order, a prevention from associating with a securities-related business or a restriction of such person's activities.

16. Attach as Exhibit D a copy of documents relating to the governance arrangements of the applicant, including, but not limited to, the nomination and selection process of the members on the applicant's board of directors, a person or group performing a function similar to a board of directors (collectively, "board"), or any committee that has the authority to act on behalf of the board; the responsibilities of each of the board and such committee; the composition of each board and such committee; and the applicant's policies and procedures reasonably designed to ensure that the applicant's senior management and each member of the board or such committee possess requisite skills and expertise to fulfill their responsibilities in the management and governance of the applicant, to have a clear understanding of their responsibilities, and to exercise sound judgment about the applicant's affairs.

17. Attach as Exhibit E a copy of the constitution, articles of incorporation or association with all amendments thereto, existing by-laws, rules, procedures, and

instruments corresponding thereto, of the applicant.

18. Attach as Exhibit F a narrative and/or graphic description of the organizational structure of the applicant. Note: If the security-based swap data repository activities of the applicant are conducted primarily by a division, subdivision, or other segregable entity within the applicant's corporation or organization, describe the relationship of such entity within the overall organizational structure and attach as Exhibit F the description that applies to the segregable entity.
19. Attach as Exhibit G a list of all affiliates of the security-based swap data repository and indicate the general nature of the affiliation. For purposes of this application, an "affiliate" of a security-based swap data repository means a person that, directly or indirectly, controls, is controlled by, or is under common control with the security-based swap data repository.
20. Attach as Exhibit H 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 property is the subject. Include the name of the court or agency in which the proceeding(s) are pending, the date(s) instituted, the principal parties to the proceeding, a description of the factual basis alleged to underlie the proceeding(s) and the relief sought. Include similar information as to any such proceeding(s) known to be contemplated by any governmental agencies.
21. Attach as Exhibit I copies of all material contracts with any security-based swap execution facility, clearing agency, central counterparty, or third party service provider. To the extent that form contracts are used by the applicant, submit a sample of each type of form contract used. In addition, include a list of security-based swap execution facilities, clearing agencies, central counterparties, and third party service providers with whom the applicant has entered into material contracts.
22. Attach as Exhibit J procedures implemented by the applicant to minimize conflicts of interest in the decision-making process of the security-based swap data repository and to resolve any such conflicts of interest.

EXHIBITS—FINANCIAL INFORMATION

23. Attach as Exhibit K a balance sheet, statement of income and expenses, statement of sources and application of revenues and all notes or schedules thereto, as of the most recent fiscal year of the applicant. If a balance sheet and statements certified by an independent public accountant are available, such balance sheet and statement shall be submitted as Exhibit K. Alternatively, a financial report, as described in Rule 13n–11(f) under the Exchange Act, may be filed as Exhibit K.
24. Attach as Exhibit L a balance sheet and statement of income and expenses for each affiliate of the security-based swap data repository as of the end of the most recent fiscal year of each such affiliate. Alternatively, identify, if available, the most recently filed Annual Report on Form 10–K under the Exchange Act for any such affiliate as Exhibit L.
25. Attach as Exhibit M the following:
    a. A complete list of all dues, fees, and other charges imposed, or to be imposed, as well as all discounts or rebates offered, or to be offered, by or on behalf of the applicant for its services, including the security-based swap data repository's services and any ancillary services, and identify the service(s) provided for each such due, fee, other charge, discount, or rebate;
    b. A description of the basis and methods used in determining at least annually the level and structure of the services as well as the dues, fees, other charges, discounts, or rebates listed in paragraph a of this item; and
    c. If the applicant differentiates, or proposes to differentiate, among its customers, or classes of customers in the amount of any dues, fees, or other charges imposed or any discount or rebate offered for the same or similar services, then state and indicate the amount of each differential. In addition, identify and describe any differences in the cost of providing such services, and any other factors, that account for such differences.

EXHIBITS—OPERATIONAL CAPABILITY

26. Attach as Exhibit N a narrative description, or the functional specifications, of each service or function listed in item 7 and performed as a security-based swap data repository. Include a description of all procedures utilized for the collection and maintenance of information or records with respect to transactions or positions in, or the terms and conditions of, security-based swaps entered into by market participants.
27. Attach as Exhibit O a list of all computer hardware utilized by the applicant to perform the security-based swap data repository functions listed in item 7, indicating:
    a. Name of manufacturer and manufacturer's equipment identification number;
    b. Whether such hardware is purchased or leased (If leased, state from whom leased, duration of lease, and any provisions for purchase or renewal); and
    c. Where such equipment (exclusive of terminals and other access devices) is physically located.
28. Attach as Exhibit P a description of the personnel qualifications for each category of professional, non-professional, and supervisory employees employed by the security-based swap data repository or the division, subdivision, or other segregable entity within the security-based swap data repository as described in item 18.
29. Attach as Exhibit Q a description of the measures or procedures implemented by the applicant to provide for the security of any system employed to perform the functions of the security-based swap data repository. Include a general description of any physical and operational safeguards designed to prevent unauthorized access (whether by input or retrieval) to the system. Describe any circumstances within the past year in which the described security measures or safeguards failed to prevent any such unauthorized access to the system and any measures taken to prevent a reoccurrence. Describe any measures used by the applicant to satisfy itself that the information received or disseminated by the system is accurate.
30. Where security-based swap data repository functions are performed by automated facilities or systems, attach as Exhibit R a description of all backup systems or subsystems that are designed to prevent interruptions in the performance of any such function as a result of technical malfunctions or otherwise in the system itself, in any permitted input or output system

connection, or as a result of any independent source.

31. Attach as Exhibit S the following:
   a. For each of the security-based swap data repository functions described in item 7:
   (1) quantify in appropriate units of measure the limits on the security-based swap data repository's capacity to receive (or collect), process, store, or display the data elements included within each function; and
   (2) identify the factors (mechanical, electronic or other) that account for the current limitations reported in answer to (1) on the security-based swap data repository's capacity to receive (or collect), process, store, or display the data elements included within each function.
   b. If the applicant is able to employ, or presently employs, its system(s) for any use other than for performing the functions of a security-based swap data repository, state the priorities of assignment of capacity between such functions and such other uses, and state the methods used or able to be used to divert capacity between such functions and other uses.

EXHIBITS—ACCESS TO SERVICES AND DATA

32. Attach as Exhibit T the following:
   a. State the number of persons who subscribe, or who have notified the applicant of their intention to subscribe, to the security-based swap data repository's services.
   b. For each instance during the past year in which any person has been prohibited or limited with respect to access to services offered or data maintained by the applicant, indicate the name of each such person and the reason for the prohibition or limitation.
   c. For each service that is furnished in machine-readable form, state the storage media of any service furnished and define the data elements of such service.
33. Attach as Exhibit U copies of all contracts governing the terms by which persons may subscribe to the security-based swap data repository services and any ancillary services provided by the applicant. To the extent that form contracts are used by the applicant, submit a sample of each type of form contract used.
34. Attach as Exhibit V a description of any specifications, qualifications, or other criteria that limit, are interpreted to limit, or have the effect of limiting access to or use of any security-based swap data repository services offered or data maintained by the applicant and state the reasons for imposing such specifications, qualifications, or other criteria.
35. Attach as Exhibit W any specifications, qualifications, or other criteria required of persons who supply security-based swap information to the applicant for collection and maintenance by the applicant or of persons who seek to connect to or link with the applicant.
36. Attach as Exhibit X any specifications, qualifications, or other criteria required of any person, including, but not limited to, regulators, market participants, market infrastructures, venues from which data could be submitted to the applicant, and third party service providers who request access to data maintained by the applicant.
37. Attach as Exhibit Y policies and procedures implemented by the applicant to review any prohibition or limitation of any person with respect to access to services offered or data maintained by the applicant and to grant such person access to such services or data if such person has been discriminated against unfairly.

EXHIBITS—OTHER POLICIES AND PROCEDURES

38. Attach as Exhibit Z policies and procedures implemented by the applicant to protect the privacy of any and all security-based swap transaction information that the security-based swap data repository receives from a market participant or any registered entity.
39. Attach as Exhibit AA a description of safeguards, policies, and procedures implemented by the applicant to prevent the misappropriation or misuse of (a) any confidential information received by the applicant, including, but not limited to, trade data, position data, and any nonpublic personal information about a market participant or any of its customers; (b) material, nonpublic information; and/or (c) intellectual property by applicant or any person associated with the applicant for their personal benefit or the benefit of others.
40. Attach as Exhibit BB policies and procedures implemented by the applicant regarding its use of the security-based swap transaction information that it receives from a market participant, any registered entity, or any person for non-commercial and/or commercial purposes.
41. Attach as Exhibit CC procedures and a description of facilities of the applicant for effectively resolving disputes over the accuracy of the transaction data and positions that are recorded in the security-based swap data repository.
42. Attach as Exhibit DD policies and procedures relating to the applicant's calculation of positions.
43. Attach as Exhibit EE policies and procedures implemented by the applicant to prevent any provision in a valid security-based swap from being invalidated or modified through the procedures or operations of the applicant.
44. Attach as Exhibit FF a plan to ensure that the transaction data and position data that are recorded in the applicant continue to be maintained after the applicant withdraws from registration as a security-based swap data repository, which shall include procedures for transferring the transaction data and position data to the Commission or its designee (including another registered security-based swap data repository).
45. Attach as Exhibit GG all of the policies and procedures required under Regulation SBSR.

EXHIBIT—LEGAL OPINION

46. If the applicant is a non-resident security-based swap data repository, then attach as Exhibit HH an opinion of counsel that the security-based swap data repository can, as a matter of law, provide the Commission with prompt access to the books and records of such security-based swap data repository and that the security-based swap data repository can, as a matter of law, submit to onsite inspection and examination by the Commission.

By the Commission.

Dated: November 19, 2010.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–29719 Filed 12–9–10; 8:45 am]

BILLING CODE 8011–01–P

Federal Register

Friday,

December 10, 2010

Part V

Department of Defense

Office of the Secretary

Science and Technology Reinvention Laboratory Personnel Management Demonstration Project, Department of Navy, Office of Naval Research; Notice

DEPARTMENT OF DEFENSE

Office of the Secretary

Science and Technology Reinvention Laboratory Personnel Management Demonstration Project, Department of Navy, Office of Naval Research

AGENCY: Office of the Deputy Under Secretary of Defense (Civilian Personnel Policy) (DUSD (CPP)), Department of Defense (DoD).

ACTION: Notice.

SUMMARY: Section 342(b) of Public Law (Pub .L.) 103–337, as amended by section 1114 of Public Law 106–398, authorizes the Secretary of Defense (SECDEF) to conduct personnel management demonstration projects at Department of Defense (DoD) laboratories designated as Science and Technology Reinvention Laboratories (STRLs). Section 1107 of Public Law 110–181, as amended by section 1109 of Public Law 110–417, requires the SECDEF to execute a process and plan to employ the Department's personnel management demonstration project authorities found in section 4703 of title 5, United States Code (U.S.C.) at the STRLs enumerated in section 9902(c)(2) of title 5 U.S.C., as redesignated in section 1105 of Public Law 111–84 and 73 **Federal Register** (FR) 73248, to enhance the performance of the missions of the laboratories. Section 1107 of Public Law 110–181 further authorizes in subsection 1107(c) that any flexibility available to any demonstration laboratory shall be available for use at any other laboratory as enumerated in section 9902(c)(2) of title 5 U.S.C. The Office of Naval Research (ONR) is listed as one of the designated STRLs.

This notice announces the approval of the final personnel demonstration project plan for the ONR. This includes adoption of existing demonstration project flexibilities in other STRL demonstration project plans and any necessary modifications thereto for better conformance to the ONR mission requirements and culture.

DATES: Implementation of this demonstration project will begin no earlier than December 1, 2010.

FOR FURTHER INFORMATION CONTACT: Office of Naval Research: Ms. Margaret J. Mitchell, Director, Human Resources Office, Office of Naval Research, 875 North Randolph Street, Code 01HR, Arlington, VA 22203; *Margaret.J.Mitchell@navy.mil.*

DoD: Ms. Betty A. Duffield, CPMS–PSSC, Suite B–200, 1400 Key Boulevard, Arlington, VA 22209–5144

SUPPLEMENTARY INFORMATION:

1. Background

Since 1966, many studies of Department of Defense (DoD) laboratories have been conducted on laboratory quality and personnel. Almost all of these studies have recommended improvements in civilian personnel policy, organization, and management. Pursuant to the authority provided in section 342(b) of Public Law 103–337, as amended, a number of DoD STRL personnel demonstration projects were approved. These projects are "generally similar in nature" to the Department of Navy's "China Lake" Personnel Demonstration Project. The terminology, "generally similar in nature," does not imply an emulation of various features, but rather implies a similar opportunity and authority to develop personnel flexibilities that significantly increase the decision authority of laboratory department heads and/or directors.

This demonstration project involves: (1) Streamlined delegated examining; (2) noncitizen hiring; (3) expanded detail authority; (4) extended probationary period for newly hired employees; (5) expanded temporary promotion; (6) voluntary emeritus program; (7) pay banding; (8) contribution-based compensation system; (9) performance-based reduction-in-pay or removal actions; and (10) reduction-in-force (RIF) procedures.

2. Overview

DoD published notice in 73 FR 73248, December 2, 2008, that pursuant to subsection 1107(c) of Public Law 110–181 the three STRLs listed in 73 FR 73248 not having personnel demonstration projects at this time may adopt the flexibilities of the other laboratories listed in subsection 9902(c)(2), as redesignated in section 1105 of Public Law 111–84. ONR is one of the three STRLs specified in this provision.

Accordingly, ONR intends to build its demonstration project using flexibilities adopted from existing STRL demonstration projects (specifically the Naval Research Laboratory (NRL), Aviation Missile Research, Development and Engineering Center (AMRDEC), Medical Research and Materiel Command (MRMC), and Communications-Electronics Research, Development and Engineering Center (CERDEC)). Final plans for the NRL, AMRDEC, MRMC, CERDEC personnel management demonstration projects were published in **Federal Registers** as follows:

- *Department of the Navy:* NRL—64 FR 33970, June 24, 1999. No amendments have been published;
- *Department of the Army:* AMRDEC—62 FR 34876 and 62 FR 34906, June 27, 1997; and amendments and/or corrections to final plans published—64 FR 11074, March 8, 1999; 64 FR 12216, March 11, 1999; 65 FR 53142, August 31, 2000; and 67 FR 5716, February 6, 2002;
- *Department of the Army:* MRMC—63 FR 10439, March 3, 1998; and amendments and/or corrections to final plans published—64 FR 30377, June 7, 1999; 64 FR 12216, March 11, 1999; 65 FR 53142, August 31, 2000; and 67 FR 5716, February 6, 2002; and
- *Department of the Army:* CERDEC—66 FR 10439, October 30, 2001.

On May 28, 2010, DoD published the proposed ONR demonstration project plan in 75 FR 30918. During the public comment period ending June 28, 2010, DoD received comments from 22 individuals. All comments were carefully considered.

The following summary addresses the comments received, provides responses, and notes resultant changes to the original proposed project plan. Most commenters addressed several topics which are counted separately. Thus, the total number of comments exceeds the number of individuals cited earlier.

A. General Project Comments

(1) *Comment:* Five commenters addressed the necessity and wisdom of implementing a laboratory personnel demonstration project at ONR considering the recent repeal of the DoD National Security Personnel System (NSPS), and that the implementation of a demonstration project similar to NSPS could not improve overall performance of an above-average organization and could only create controversial concerns for ONR's workforce.

Response: Government studies have validated the need for establishing different personnel systems within STRLs. There are currently eight operating STRL Personnel Demonstration Projects with another seven STRL personnel demonstration projects pending expected implementation between December 2010 and April 2011. These seven STRLs were mandated to implement a demonstration project within eighteen months of enactment of NDAA for FY 2010 (Public Law 111–84) by section 1105 of that law. Regarding the similarity to NSPS, ONR's demonstration project does have foundational similarities, but its rating and payout structures differ from NSPS.

(2) *Comment:* One commenter wanted to know what the reasons are behind ONR's decision to implement a demonstration project.

Response: Section 1105 of Public Law 111–84 requires all STRLs named therein to implement a demonstration project within 18 months of the enactment of the law. Regardless of the legal mandate to implement a demonstration project, ONR has displayed a continued interest in having a demonstration project since 2001. Since that time, ONR leadership has believed that a personnel demonstration project will enable greater overall organizational effectiveness, enable ONR to sustain a quality workforce, improve overall employee satisfaction, and ultimately improve ONR's ability to achieve its mission.

(3) *Comment:* One commenter felt that the implementation of a demonstration project performance management system will be overly cumbersome, elaborate, and time consuming.

Response: The performance management system to be carried out under the demonstration project will require more attention from employees and supervisors when compared to the General Schedule's performance management system. The demonstration project places a greater emphasis on performance management by utilizing the concepts of cascading, line-of-sight goals and on-going performance communications. Organizations employing such techniques in their performance management systems experience increased productivity and customer satisfaction. A primary goal of the performance management system under ONR's demonstration project is to facilitate a decrease in misdirected work activities, and as a result, provide meaning and distinguishing value to the employee's work and contributions.

(4) *Comment:* Three commenters questioned ONR's decision to adopt the Naval Research Laboratory's demonstration project, as they do not see a similarity between NRL's and ONR's operation, location, and workforce structure.

Response: Although there are some important differences between work performed by NRL and ONR, there are close similarities between the workforces. Just like NRL, ONR has a highly educated and experienced workforce, with expertise in science, engineering, acquisition/contracting, finance, and other professional areas. The demonstration project programs that were designed to attract, motivate, reward, and retain the NRL workforce have been carefully reviewed by ONR management to be sure they are right for the ONR workforce. Where needed, some modifications to NRL's programs have been made to better suit ONR's workforce needs and culture. The demonstration project programs are not dependent on where the employees are physically working, but rather they make up a new system for the Command to manage and reward all employees' work and contributions consistently and fairly.

(5) *Comment:* Two commenters inquired about the possibility of conducting a pilot demonstration project at ONR Headquarters to test the demonstration project programs prior to implementation at the regional or global offices.

Response: As established by section 1105 of Public Law 111–84, ONR must implement a demonstration project before the end of April 2011 for all eligible employees, regardless of the location of their official duty station. Due to the deadline of this mandate, there is not sufficient time to design, implement, and test a small pilot before activating the demonstration project for all eligible ONR employees.

(6) *Comment:* One commenter believed that the WIGI buy-in calculation is flawed for OCONUS employees because the formula assumes everyone receives locality pay. This was specifically in reference to paragraph 5 on page 30217 stating that special salary employees will be eligible to receive full locality pay and OCONUS employees do not receive locality pay.

Response: The determination of basic pay (not including locality pay or a special salary rate) is the foundation of the formula for both the WIGI buy-in and the recalculation of pay for an employee on a special salary rate. Once the new basic pay is determined in either situation, any WIGI buy-in is added to the new basic pay and the sum is multiplied by a locality pay percentage, if appropriate. If the new basic pay exceeds the maximum for the current pay band, the employee will be granted maintained pay.

(7) *Comment:* One commenter asked how Living Quarters Allowance (LQA) and post allowance levels established by the Department of State Standardized Regulations (DSSR) would be determined under Lab Demo.

Response: Typically, personnel demonstration projects determine a General Schedule grade equivalency using their conversion out of the demonstration project schema to determine entitlements to such items as Living Quarters Allowance, training, base housing, etc. The equivalent General Schedule grade is then used to compare with the entitlement requirements. For example, the demo General Schedule equivalency grade would be compared to the LQA matrix chart containing GS grades in section 135.2 of the DSSR to determine comparable LQA entitlements.

(8) *Comment:* One commenter asked how the Global offices will be supported when there is a large time-zone difference and ONR's Human Resource (HR) department is not opened 24 hours a day.

Response: ONR's Global offices will continue to receive the same high level of support under the demonstration project as they do currently under the General Schedule. Based on the experience of other previously implemented personnel demonstration projects, ONR does not anticipate any issues associated with the demonstration project that would require routine around-the-clock access to the Headquarters HR Department. ONR HR will endeavor to respond to any concern within 24 hours on demo issues and make accommodations for their Global customers to ensure continued enhanced customer satisfaction.

(9) *Comment:* One commenter noted that ONR has primarily adopted NRL's STRL personnel demonstration project, and used in its FRN the language from NRL's original FRN. A proposed amendment has since been written by NRL and the commenter recommended that ONR review NRL's proposed amendment and adopt the suggested changes as appropriate. The commenter also recommended ONR review the minor changes that NRL made as well and include those where appropriate.

Response: ONR agrees with the commenter and has carefully reviewed NRL's amendment and list of minor changes. ONR has modified the FRN in a number of places as a result of this review and those changes are listed in the subsequent summary of substantive changes.

B. CCS Appraisal Process

(1) *Comment:* One commenter expressed concern that employees will be told verbally by their supervisors to expect a certain Overall Contribution Score (OCS) and payout but the actual payout amount received would be less than what the employee was led to expect by their supervisor.

Response: Under ONR's demonstration project, standard operating procedures and policies will be such that employees receive notification of their OCS and adjusted basic pay including locality only after a final decision has been rendered by the Pay Pool Panel. Employees are not to be

made aware of their initial suggested score provided by their supervisor or potential adjusted basic pay prior to the Pay Pool Manager's approval of the Pay Pool Panel's final decision.

(2) *Comments:* Fairness: Six commenters stated concerns about the equitable application of the evaluations made under the Contribution-based Compensation System (CCS). Two commenters thought the system was too subjective and favoritism would drive the process. One commenter expressed concern that more credit would be given to scientific than support personnel. One commenter felt that the CCS system would only reward supervisors for outcomes and ultimately create a negative working environment for their subordinates. Two commenters discussed the need for a 360-degree performance evaluation plan for supervisors to ensure accountability for their performance management duties.

Response: To promote fairness and reduce favoritism, the CCS process provides for review of employee assessments by a group of supervisory officials who are in the same pay pool. In the pay pool panel process, scores assigned by individual supervisors are reviewed by other supervisors in the same pay pool. The supervisors work to apply the CCS level descriptors consistently within their pay pool, and to identify and correct any inappropriately inflated or deflated scores. The pay pool manager provides an additional level of review and is the ultimate approval level. CCS contains various mechanisms to ensure employees receive proper credit under the generic contribution elements, descriptors, and discriminators. Contribution elements may be weighted, expectations and results to be achieved for the work assigned may be described in supplemental criteria, and discriminators may be considered either separately or in a more integrated manner for groups of employees. Meaningful assessment demands consideration of quality, value, customer service, and other criteria can be established early in the cycle and described in supplemental information to the CCS factors. Flexibility was deemed necessary for individual divisions to tailor the system to their special needs. Supervisors will continue to determine the value of employees' accomplishments when assessing their contributions. Work valued under the current system will continue to be valued under CCS. In addition, supervisors and employees will be encouraged to communicate throughout the appraisal period to avoid misunderstandings at the end of the year.

The primary benefit expected from Lab Demo is greater organizational effectiveness through increased supervisor and employee interaction leading to enhanced employee involvement, communication, understanding, satisfaction, and productivity. Lab Demo training, targeting the CCS process and goals, has been rolled out across the Command to ensure a synonymous understanding of performance management practices for both employees and supervisors, and to ensure that proper performance management techniques will occur under CCS. The CCS performance management process is designed to help supervisors create a performance culture in which the performance and contributions of the workforce are linked to the ONR mission. This in turn will add meaning to the employee's job and contributions.

Supervisors will be held accountable for their performance management duties under CCS. The CCS contribution elements and level descriptors specifically include expectations regarding performance management and workforce development to recognize the importance of this value at ONR.

The managers/second-line supervisors have always been free to solicit feedback from subordinate employees and other customers to consider in assessing and appraising the supervisory effectiveness of their direct subordinates and their employees. This will continue to be an option under CCS. However, a formal program providing for 360-degree evaluations for supervisors has not currently been implemented. ONR has also provided mandatory hands-on training for supervisors that emphasized supervisory responsibilities and how to engage employees in the performance management process. In addition, supervisor performance will be evaluated as an enhancement of the normal pay pool process.

(3) *Comment:* One commenter questioned the use of the CCS terms Overcompensated and Undercompensated. The commenter felt that both terms have a negative connotation and will not be received well by the workforce.

Response: ONR agrees these terms could have a potential negative connotation to some employees. However, because ONR is adopting the CCS automated system from NRL where these terms are hosted, ONR has decided to adopt these terms as well in order to make efficient use of available resources. Other demos have used and are using these terms, including NRL which has not experienced any difficulties as a result of this terminology. It is important to note that the over- and undercompensated nomenclature do not reflect employees' work ethic and/or the value of their work.

(4) *Comment:* One commenter stated that the grouping of different General Schedule (GS) grades in the same pay band and pay pool will not incentivize the workforce to take on supervisory/team lead positions; instead, it will inhibit one's decision to take on a leadership role since, for example, a GS–14 could potentially make the same amount as a GS–15 without taking on the added leadership responsibilities.

Response: This commenter may have misunderstood the purpose and intent behind pay banding (grouping GS grades into one pay band). One of the goals of ONR's demonstration project is to provide a compensation system that will provide more flexibility to enable ONR to compensate its employees equitably at a rate that is commensurate with their levels of responsibility and contribution, and is more competitive with those found in the labor market. Although the General Schedule system did allow an organization to distinguish levels of performance and provide different levels of rewards, the demonstration project will provide more authority and flexibility for ONR to utilize a wider variety of recognition. By implementing pay banding, ONR will have the opportunity to provide a more direct link between levels of individual contribution and the compensation received. ONR will be able to compensate their workforce in a manner that is appropriate to their contribution. Basic pay increases will no longer be automatic under Lab Demo. Therefore, the workforce should have increased motivation to take on leadership and/or supervisory roles in order to have a higher contribution, thus having eligibility for a larger payout. In addition, ONR has decided to adopt a Supervisory Pay Adjustment and Differential flexibility providing even additional incentive for the workforce to take on supervisory/team lead positions.

(5) *Comment:* One commenter noted that the Contribution Elements had not yet been finalized by leadership and still needed to be reviewed and possibly modified.

Response: This commenter is correct and ONR's leadership has reviewed and modified the Contribution Elements as needed. The revised Contribution Elements are included in this version of the FRN.

(6) *Comment:* One commenter noted that OCSs against normal pay range

would actually not be available until January; therefore, any reference to providing them at the beginning of the performance assessment cycle was incorrect.

Response: ONR agrees and has modified the FRN to reflect that OCSs applicable to an employee's normal pay range for each appraisal period will be available when pay actions are effected in January.

C. Compensation

(1) *Comment:* Two commenters had questions pertaining to those individuals who are at the top of their pay band and questioned how under the new system those employees would receive any benefit; whether these individuals could receive additional compensation, and how the system specifically would benefit, those that were assigned to a pay band that hosted only one GS grade.

Response: If an employee's basic pay is at the top of the pay band, s/he can receive a pay increase that is commensurate with the general increase designated by Congress for that year. An employee whose basic pay is at the maximum of her/his pay band may receive recognition through a contribution award, Time-off Award, or a combination of both. For those employees entering into a pay band that hosts only a single grade, they will only be eligible for basic pay assigned to that pay band. However, the employee may have the opportunity to advance to a pay band with a higher maximum basic pay through a CCS promotion, if appropriate.

(2) *Comment:* One commenter expressed concern over the possibility of the science and engineering professionals' pay pool receiving disproportionate funding over the other pay pools in order to provide greater benefit to those in the Science and Engineering Career Track with greater bonuses and basic pay increases over others at ONR.

Response: The pay pool funding normally will be set percentages of the total basic pay of all eligible employees in a specific pay pool. The pay pool funding percentages are the same for all pay pools. The percentage of basic pay allotted for basic pay increases for employees in the ONR pay pools will be the same for each pay pool, and the percentage of basic pay allotted for contribution bonuses will also be the same for each pay pool. For example, if the total basic pay of the employees in Pay Pool A is $1,000,000 and the total basic pay of the employees in Pay Pool B is $2,000,000, then the pay pool funding for performance-based contribution awards (using ONR's historical percentage of 1.5% for contribution-based bonuses) would be $15,000 for Pay Pool A and $30,000 for Pay Pool B to be distributed among their respective members based on contribution.

(3) *Comment:* Four commenters suggested for ONR to adopt a flexibility for Supervisory Pay Differentials and Adjustments to compensate supervisors for their additional performance management responsibilities and workload.

Response: ONR agrees with the commenters and has adopted CERDEC's flexibility for a Supervisory Pay Differential and Adjustment.

(4) *Comment:* One commenter expressed concern that a decision could be made by the pay pool panel to decrease an employee's compensation.

Response: Under CCS, as with the General Schedule, an employee's salary can only decrease as a result of an adverse or performance-based action. This requirement currently operates under the General Schedule and will be retained by the demonstration project to preserve an emphasis on employee performance and conduct under a contribution-based compensation system. The CCS rating system by itself does not implement any mechanism to decrease an employee's basic pay. During the actual CCS rating process and pay pool panel deliberations an employee's basic pay will not be decreased. If based on the OCS and current salary an employee is assessed to be in the Overcompensated category then that employee would not be eligible for a merit increase or contribution award, and may or may not receive a general increase. They would still receive locality pay.

(5) *Comment:* One commenter noted the adjusted minimum basic rate of pay for the S&E Professional Level V needs to be adjusted to be 120% of the GS–15, step 1, basic pay rate for 2010, or $119,554.

Response: ONR agrees and has made the change where applicable in the FRN.

D. Accessions and Internal Placements

(1) *Comment:* One Commenter expressed the need for ONR to have Lab Demo training required for all new hires.

Response: ONR agrees and will make Lab Demo training mandatory for all new employees and new supervisors.

(2) *Comment:* One commenter questioned if veterans' preference still applied under the demonstration project and if ONR's demonstration project complied with laws protecting veterans and disabled veterans.

Response: All statutes and regulations covering veterans' preference will be observed under all lab demonstration programs.

E. Technology

(1) *Comment:* One commenter expressed the concern that the RIF Support Systems (RIFSS) could not accommodate NRL's need and ONR should reconsider if they will still use this system or adopt another.

Response: ONR agrees and prior to committing specifically to RIFSS will look closely at the system's availability and capacity.

(2) *Comment:* One commenter pointed out that DCPDS is no longer a legacy system.

Response: ONR agrees and the language in Section X.B. has been modified accordingly.

(3) *Comment:* One commenter noted that ONR does not intend to use the COREDOC application to generate RDs.

Response: The commenter is correct and ONR will be using RDWriter instead. The language in Section X.C. has been updated to reflect the correct tool intended to be used.

F. Classification

(1) *Comment:* Three commenters did not believe that some of the occupational series were correctly aligned with the proper career tracks; one stated that 0335, Computer Clerk series, was listed under both Administrative Support and Administrative Specialist and Professional and only belonged in the Administrative Support Career Track; the second stated that 0110, Economist series, should be moved to the S&E Professional Career Track because of the similarities to the education requirements and other social science professions included in that Career Track; and a third stated that 0802, Engineering Technician series, should not be in the Science and Engineering Professional Career Track but rather in the Administrative Specialist and Professional Career Track.

Response: ONR management agrees with the reasoning of the first commenter. Therefore, occupational series 0335 will only be aligned with the Administrative Support Career Track. Based on the work being done, the qualifications required, and how other STRLs, such as the Air Force Research Laboratory, have classified 0110, ONR management disagrees with the second commenter and occupational series 0110 will remain in the Administrative Specialist & Professional Career Track. In the case of the third commenter, ONR management agrees and since ONR does

not have a technical career track, the proper classification for 0802 is the Administrative Specialist and Professional Career Track.

(2) *Comment:* Seven commenters felt that the construction of the pay band levels for the Administrative Specialist and Professional Career Track is either unfair or biased. One commenter specifically noted pay band IV in the Administrative Specialist and Professional career track sets an unfair barrier for those employees who are currently a GS–13, and in turn signals that their work is of less importance and therefore is not mixed with higher GS grades. Six commenters specifically questioned why the Administrative Specialists and Professionals Career Track does not have an Above 15 Pay Band the same way the S&E Professionals Career Track does and feel it unfairly elevates the importance of the S&E group over the Administrative Specialist and Professionals.

Response: In accordance with DoD Instruction 1400.37, pages 73248 to 73252 of volume 73, ONR's demonstration project was modeled after the demonstration project implemented at NRL. During the initial review of ONR's demonstration project, ONR leadership learned that any change to the NRL pay band structure would have created a year's delay in implementing ONR's demonstration project, due to additional approval and IT system modification requirements. Given the NDAA requirement that ONR be under a Lab Demo before the end of April 2011, an additional year to implement was not an option. ONR leadership evaluated NRL's pay bands and concluded that the NRL structure would work with ONR's current career paths and GS breakdown of the workforce. ONR leadership decided to move forward with the NRL pay band structure. Operational procedures and guidelines will address any unintended limitations that this structure would impose on the career progression of ONR employees. For example, there will be procedures for non-competitive promotion between bands (if in a career ladder position or if warranted by level of work and value of contributions).

ONR made the decision to participate in the DoD initiative to implement an Above 15 Pay Band for scientific and engineering professionals in order to take advantage of an opportunity to correct a critical void in classification standards and guidance for civilian senior executive Scientific and Professional (ST) and Senior Executive Service (SES) positions. This void impacted an organization's ability to advance scientific and engineering positions which surpass the GS–15 classification criteria because of the combination of excellent scientific and/or engineering expertise and performance of high-level science and technology (S&T) research and development work with significant technical supervisory and managerial responsibilities comprising 25 percent or more of the position's time. These positions were not considered to be appropriately classified as STs because of the degree of supervisory and managerial responsibilities. Conversely, these positions were not appropriately classified as SES positions because of their requirement for highly specialized scientific or engineering expertise and because the positions were not at the level of general managerial authority and impact required for an SES position.

(3) *Comment:* Two commenters questioned ONR's proposed pay band grade composition and if it was the most suitable structure for ONR. One commenter suggested that both the S&E Professional and Administrative Specialist and Professional Career Tracks should be modified to have GS–5 through GS–13 in one pay band. Another commenter suggested that a specific position could be more easily/appropriately filled if the Administrative Support Career Track pay bands were modified to include at least up to a GS–12 level.

Response: As stated in the response to previous comments, ONR leadership evaluated NRL's pay bands and concluded that the NRL structure would work with ONR's current career paths and GS breakdown of the workforce. The different pay band structures in the Career Tracks support the various levels of duties, qualifications, and types and scope of work encompassed by ONR's position management structure. Therefore, ONR management considers the NRL pay banding scheme appropriate at this time. Since many aspects of a demonstration project are experimental, modifications may be made from time to time as experience is gained, results are analyzed, and conclusions are reached on how the new system is working.

(4) *Comment:* One commenter questioned the approval process designated for promotions under ONR's demonstration project. The commenter felt that including the CNR's approval for certain promotions (laid out in section IV.C.8) would slow down the promotion process and actual create a more inflexible system for promotions.

Response: ONR agrees with the commenter's concern and has made the appropriate change under section IV.C.8. It is not ONR's intent to make the promotion process less flexible under the demonstration project. Thus, all individuals covered under the demonstration project who are eligible for a promotion will need a promotion nomination by their supervisor, endorsement from the pay pool panel, and final approval by the pay pool manager. CCS Promotions under the demonstration project will not need approval beyond the pay pool manager.

(5) *Comment:* One commenter stated that the Career Promotion Eligibility clause needed to be expanded to include those employees who may be eligible for an established career ladder promotion to a grade encompassed in the next higher pay band during the first 12 months of the demonstration project and as a result would advance into a higher pay band.

Response: ONR agrees with the commenter's point and the Career Promotion Eligibility clause in the FRN has been modified to also cover previously established career ladders which would contain a career promotion that would be into a higher pay band within the first 12 months of the demonstration project if recommended and the employee meets all requirements. The FRN language has been edited to make this clause clearer.

G. Formatting and Language

(1) *Comment:* Eight commenters made note of various places in the FRN where language was inconsistently used or information was not consistent; the term pay band should be used in places where the term career level was used instead; score ranges and basic pay information listed in the appendices was in some instances different than what was listed in the main part of the document; in various places footnotes do not show up in the correct place or are non-existent; in the normal pay range graph in the appendix it should read mid-rail and not med-rail; and Figure 4 is missing the word 'review' for Administrative Support Career Track pay band III.

Response: ONR agrees and has made these appropriate changes and corrections to formatting and the text.

(2) *Comment:* Three commenters noted places where language was vague and needed to be clarified; the language in section VI.A.4 was noted to be unclear; the language in section IV.C.2 and 3 is unclear if there will only be one pay pool manager; and section VI.A.3 the language was noted as not being clear if this was a prorated portion.

Response: ONR agrees and in each of the sections listed above the language has been edited for clarification.

3. Demonstration Project Notice Changes

The following is a summary of substantive changes and clarifications which have been made to the project proposal.

A. Supplementary Information, Overview. Added MRMC and CERDEC to the list of existing STRL demonstration projects from which ONR is using flexibilities to build its demonstration project.

B. III.H.2. Internal Actions. Added a flexibility for Supervisory Pay Adjustments and Supervisory Pay Differentials.

C. IV.A.1.d. Fair Labor Standards Act. Corrected Figure 4 by including the word 'review' for Pay Band III of the Administrative Support career track.

D. IV.C.4. Annual CCS Appraisal Process. The current FRN states that employees will be notified of the Overall Contribution Scores (OCSs) which correspond to each employee's Normal Pay Range (NPR) at the beginning of the appraisal period. This is corrected to state that OCSs which correspond to each employee's NPR will be available after pay adjustments have been processed, normally early-to-mid January.

E. IV.C.4 and 5. Annual CCS Appraisal Process and Exceptions. Provision added that requires employees who serve less than 90 days during an appraisal cycle to receive a presumptive rating of acceptable.

F. IV.C.4. Annual CCS Appraisal Process. In order to ensure compliance with state bar rules a provision was added that prohibits the pay pool panel from changing CCS scores on ONR attorneys provided by the ONR Counsel.

G. IV.C.4 and 5. Exceptions. Clarified the conditions for which employees who would normally be exempted from the CCS process may still be given a CCS score.

H. IV.C.8.b. Career Movements based on CCS. Corrected to state that it is the ONR Executive Director and not the CNR which must approve certain promotions.

I. IV.C.9. Grievance Process. Modified to clarify the process; prevent the need for the ONR Executive Director from possibly deciding the same grievance twice; inform employees that the contents of the CCS Plans are nongrievable as were the contents of performance plans in the traditional performance management system; and ensure compliance with state bar rules.

J. VI.A.3. WGI Buy-in. Added clarifying language to state that employees will be provided a prorated portion.

K. VI.A.4. Career Promotion Eligibility. Modified to state that an exception will also be made for employees who become eligible for a career ladder promotion during the first 12 months after conversion if their promotion would cause them to move to a higher pay band. Examples included providing greater clarity to the entire section.

L. VI.D. New Hires. Modified to add that mandatory demonstration project training will be provided to new employees and new supervisors.

M. VI.D.3. New Hires. Provided clarification for Federal employees who are on retained pay or who are receiving special salary rates and are moving into the ONR demonstration project.

N. VI.E.1.Grade Determination. Clarified conversion-out rules when there are more than two GS grade levels in a career field.

O. X. Automation. Clarified that DCPDS is not a legacy system, that RD Writer will be used instead of COREDOC, and that the automated tool RIFSS will not specifically be used.

P. Appendix A. Updated chart based on the addition of the supervisory pay adjustment and differential flexibility, and added the MRMC Career Promotion flexibility which had mistakenly been left out previously.

Q. Appendix B. Added required waivers for; the Supervisory Pay Adjustment and Differential Flexibility; the presumptive rating of acceptable for employees who serve less than 90 days, and the Voluntary Emeritus Program (which were erroneously left out previously).

R. Appendix D. Corrected 0335, Computer Clerk series, to be listed only under the Administrative Support career track and moved the 0802 series to the Administrative Specialist and Professional Career Track.

S. Appendix E. Science & Engineering Professional contribution elements were updated to provide additional clarification of the discriminators.

T. Appendix F. Integrated pay chart was updated to reflect the minimum basic pay for S&E pay band V as $119,554.

4. Access to Flexibilities of Other STRLs

Flexibilities published in this **Federal Register** shall be available for use by the STRLs previously enumerated in section 9902(c)(2) of title 5 United States Code, which are now designated in section 1105 of the NDAA for FY 2010, Public Law 111–84, 123 Stat. 2486, October 28, 2009, if they wish to adopt them in accordance with DoD Instruction 1400.37; pages 73248 to 73252 of volume 73, **Federal Register**; and the fulfilling of any collective bargaining obligations.

Dated: December 2, 2010.

Patricia Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

Table of Contents

I. Executive Summary

This project adopts with some modifications the STRL personnel management demonstration project designed by NRL and additional flexibilities from the AMRDEC, MRMC, and CERDEC personnel management demonstration projects. The modified design of the demonstration project described herein was developed by ONR with the participation of and review by the DON, the DoD, and incorporation of the knowledge and design of other STRL demonstration projects.

The Office of Naval Research (ONR) coordinates, executes, and promotes the science and technology programs of the United States Navy and Marine Corps. ONR's directorates balance a robust science and technology portfolio, allocating funds to meet the warfighter's requirements, focusing efforts on all three major phases of development funding: Basic research, applied research and advanced technology development. ONR's six science and technology departments coordinate and execute research in the areas of:

1. Expeditionary Maneuver Warfare and Combating Terrorism
2. Command, Control, Communications, Intelligence, Surveillance, and Reconnaissance
3. Ocean Battlespace Sensing
4. Sea Warfare and Weapons
5. Warfighter Performance
6. Naval Air Warfare and Weapons

In order to sustain these unique capabilities, ONR must be able to hire, retain, and continually motivate enthusiastic, innovative, and highly-educated scientists and engineers, supported by skilled business management and administrative professionals as well as a skilled administrative and technical support staff.

The goal of the project is to enhance the quality and professionalism of the ONR workforce through improvements in the efficiency and effectiveness of the human resource system. The project flexibilities will strive to achieve the best workforce for the ONR mission, adjust the workforce for change, and improve organizational efficiency. The results of the project will be evaluated within five years of implementation.

II. Introduction

A. Purpose

The purpose of the project is to demonstrate that the effectiveness of DoD STRLs can be enhanced by expanding opportunities available to employees and by allowing greater managerial control over personnel functions through a more responsive and flexible personnel system. Federal laboratories need more efficient, cost effective, and timely processes and methods to acquire and retain a highly creative, productive, educated, and trained workforce. This project, in its entirety, attempts to improve employees' opportunities and provide managers, at the lowest practical level,

the authority, control, and flexibility needed to achieve the highest quality organization and hold them accountable for the proper exercise of this authority within the framework of an improved personnel management system.

Many aspects of a demonstration project are experimental. Modifications may be made from time to time as experience is gained, results are analyzed, and conclusions are reached on how the system is working. The provisions of this project plan will not be modified, or extended to individuals or groups of employees not included in the project plan without the approval of the DUSD (CPP). The provisions of DoDI 1400.37 are to be followed for any modifications, adoptions, or changes to this demonstration project plan.

B. Problems With the Current System

The current Civil Service GS system has existed in essentially the same form since the 1920's. Work is classified into one of fifteen overlapping pay ranges that correspond with the fifteen grades. Basic pay is set at one of those fifteen grades and the ten interim steps within each grade. The Classification Act of 1949 rigidly defines types of work by occupational series and grade, with very precise qualifications for each job. This system does not quickly or easily respond to new ways of designing work and changes in the work itself.

The performance management model that has existed since the passage of the Civil Service Reform Act has come under extreme criticism. Employees frequently report there is inadequate communication of performance expectations and feedback on performance. There are perceived inaccuracies in performance ratings with general agreement that the ratings are inflated and often unevenly distributed by grade, occupation and geographic location.

The need to change the current hiring system is essential as ONR must be able to recruit and retain scientific, engineering, acquisition support and other professionals and skilled technicians. ONR must be able to compete with the private sector for the best talent and be able to make job offers in a timely manner with the attendant bonuses and incentives to attract high quality employees.

Finally, current limitations on training, retraining and otherwise developing employees make it difficult to correct skill imbalances and to prepare current employees for new lines of work to meet changing missions and emerging technologies.

C. Waivers Required

ONR proposes changes in the following broad areas to address its problems in human resources management: Accessions and internal placements, sustainment, and separations. Appendix B lists the laws, rules, and regulations requiring waivers to enable ONR to implement the proposed systems. All personnel laws, rules, and regulations not waived by this plan will remain in effect. Basic employee rights will be safeguarded and Merit System Principles will be maintained.

D. Expected Benefits

The primary benefit expected from this demonstration project is greater organizational effectiveness through increased employee satisfaction. The long-standing Department of the Navy "China Lake" and NIST demonstration projects have produced impressive statistics on increased job satisfaction and quality of employees versus that for the Federal workforce in general. This project will demonstrate that a human resource system tailored to the mission and needs of the ONR workforce will facilitate:

(1) Sustainment of ONR's quality scientific and business management workforces in today's competitive environment;

(2) Improved employee satisfaction with pay setting and adjustment, recognition, and career advancement opportunities;

(3) Human Resources (HR) flexibilities needed to staff and shape a quality workforce of the next 10–20 years;

(4) Increased retention of high-level contributors; and

(5) Simpler and more cost effective HR management processes.

An evaluation model was developed for the Director, Defense, Research and Engineering (DDR&E) in conjunction with STRL service representatives and the OPM. The model will measure the effectiveness of this demonstration project, as modified in this plan, and will be used to measure the results of specific personnel system changes.

E. Participating Organizations and Employees

ONR is comprised of the ONR Headquarters in Arlington, Virginia, and ONR employees geographically dispersed at the locations shown in Figure 1. It should be noted that some sites currently have fewer than ten people and that the sites may change should ONR reorganize or realign. Successor organizations will continue coverage in the demonstration project.

The demonstration project will cover approximately 450 ONR civilian employees under title 5, U.S.C. in the occupations listed in Appendix D. The project plan does not cover members of the Senior Executive Service (SES), Senior Level (SL), Scientific and Professional (ST), expert and consultant employees (EH), or Administratively Determined (AD) pay plans. However, SES, SL, and ST employees, after leaving Federal government service, may participate in the Voluntary Emeritus Program. There are no labor unions representing ONR employees.

Figure 1. Location of Covered Employees (as of January 2010)

Location	Number of Employees
Arlington, VA	381
Atlanta, GA	15
Boston, MA	14
Chicago, IL	12
San Diego, CA	13
Seattle, WA	12
Lexington Park, MD	1
Durham, NC	1
Los Alamos, NM	1
Niskayuna, NY	1
Bristol, RI	1
Tokyo, Japan	8
London, United Kingdom	6
Santiago, Chile	0

F. Project Design

In response to the initial authority granted by Congress to develop a demonstration project, ONR chartered a design team to develop the project plan. The team was led by a senior ONR manager from outside the Human Resources Office (HRO) and was responsible for developing project proposals. The team was composed of 20 employees of different grade levels and in different occupations. There was a mix of managers, supervisors, and non-supervisors from offices throughout ONR. The team had the assistance of HR personnel from ONR and from NRL. It also received information and advice from OPM, the Office of the DUSD (CPP), and a number of organizations with on-going demonstration projects. Information and suggestions were solicited from ONR employees and managers through interviews, briefings, small-group meetings, and a suggestion program established specifically for the design effort. This plan was submitted to DUSD (CPP) in 2001. Work on this plan was postponed pending the outcome of several Departmental HR initiatives addressing new personnel systems.

Following enactment of Public Law 110–181, ONR undertook an effort to review and resubmit the demonstration project plan. Upon extensive review and discussion with internal and external stakeholders, ONR leadership decided to adopt existing flexibilities according to subsection 1107(c) of Public Law 110–181 and DoDI 1400.37. Specifically, ONR proposes to adopt the NRL demonstration project plus additional flexibilities from the AMRDEC and MRMC demonstration projects. Appendix A summarizes the modifications proposed for each of the adopted project flexibilities and administrative procedures. Modifications to existing flexibilities are made when necessary to address ONR's specific organizational, workforce, and approval needs; technical modifications to conform to changes in the law and governing Office of Personnel Management (OPM) regulations, which are not being waived, that were effected after the publication of the NRL personnel demonstration project plan. Further changes to the project plan may be made in response to comments received during the 30-day comment period following publication of this notice.

III. Accessions and Internal Placements

A. Hiring Authority

1. Background

Private industry and academia are the principal recruiting sources for scientists and engineers at ONR. It is extremely difficult to make timely offers of employment to hard-to-find scientists and engineers. Even when a candidate is identified, he or she often finds another job opportunity before the lengthy recruitment process can be completed.

2. Delegated Examining

a. Competitive service positions within the ONR Demonstration Project will be filled through Merit Staffing or under Delegated Examining.

b. The "Rule of Three" will be eliminated. When there are no more than 15 qualified applicants and no preference eligibles, all eligible applicants are immediately referred to the selecting official without rating and ranking. Rating and ranking will be required only when the number of qualified candidates exceeds 15 or there is a mix of preference and nonpreference applicants. Statutes and regulations covering veterans'

preference will be observed in the selection process and when rating and ranking are required. If the candidates are rated and ranked, a random number selection method using the application control number will be used to determine which applicants will be referred when scores are tied after the rating process. Veterans will be referred ahead of non-veterans with the same score.

B. Legal Authority

For actions taken under the auspices of the ONR Demonstration Project, the legal authority, Public Law 103–337, will be used. For all other actions, ONR will continue to use the nature of action codes and legal authority codes prescribed by OPM, DoD, or DON.

C. Determining Employee and Applicant Qualifications

Figure 2 displays the minimum General Schedule (GS) qualifications requirements for each career path and pay band. Special DON or DoD requirements not covered by the OPM Qualification Standards Operating Manual for GS Positions, such as Defense Acquisition Workforce Improvement Act (DAWIA) qualification requirements for acquisition positions, physical performance requirements for sea duty, work on board aircraft, etc., must be met.

Minimum Qualifications Requirements

Level	Minimum Qualifications Requirement Equivalent
S&E Professional (NP)	
I	GS-1
II	GS-5
III	GS-11
IV	GS-14
V	Appropriate Experience
Administrative Specialist and Professional (NO)	
I	GS-1
II	GS-5
III	GS-11
IV	GS-13
V	GS-14
Administrative Support (NC)	
I	GS-1
II	GS-5
III	GS-8

Figure 2. Minimum Qualifications Requirements

D. Noncitizen Hiring

Where Executive Orders or other regulations limit hiring noncitizens, ONR will have the authority to approve the hiring of noncitizens into competitive service positions when qualified U.S. citizens are not available. Under the demonstration project, as with the current system, a noncitizen may be appointed only if it has been determined there are no qualified U.S. citizens. In order to make this determination, the position will be advertised extensively throughout the nation using paid advertisements in

major newspapers or scientific journals, etc., as well as the "normal" recruiting methods. If a noncitizen is the only qualified candidate for the position, the candidate may be appointed. The selection is subject to approval by the Department Head or Director of the hiring organization. The demonstration project constitutes a delegated examining agreement from OPM for the purposes of 5 CFR 213.3102(bb).

E. Expanded Detail Authority

Under the demonstration project, ONR's approving manager would have the authority:

(1) To effect details up to one year to demonstration project positions without the current 120-day renewal requirement; and

(2) To effect details to a higher level position in the demonstration project up to one year within a 24-month period without competition.

Details beyond the one-year require the approval of the Chief of Naval Research or designee and are not subject to the 120-day renewal requirement.

F. Extended Probationary Period

All current laws and regulations for the current probationary period are retained except that nonstatus candidates hired under the demonstration project in occupations where the nature of the work requires the manager to have more than one year to assess the employee's job performance will serve a three-year probationary period. Employees with veterans' preference will maintain their rights under current law and regulation.

G. Definitions

1. Basic Pay

The total amount of pay received at the rate fixed through CCS adjustment for the position held by an employee including any merit increase but before any deductions and exclusive of additional pay of any other kind.

2. Maintained Pay

An employee may be entitled to maintain his or her rate of basic pay if that rate exceeds the maximum rate of basic pay for his or her pay band as a result of certain personnel actions (as described in this plan). An employee's initial maintained pay rate is equal to the lesser of (1) the basic pay held by the employee at the time an action is taken which entitles the employee to maintain his or her pay or (2) 150 percent of the maximum rate of basic pay of the pay band to which assigned. The employee is entitled to maintained pay for 2 years or until the employee's basic pay is equal to or more than the employee's maintained pay, whichever occurs first. Exceptions to the 2-year limit include employees on grade and pay retention "grandfathered" in upon initial conversion into the demonstration project, former special rate employees receiving maintained pay as a result of conversion into the project, and employees placed through the priority placement programs. Employees will receive half of the across-the-board GS percentage increase in basic pay and the full locality pay increase while on maintained pay. Upon termination of maintained pay, the employee's basic pay will be adjusted according to the CCS appraisal process. If the employee's basic pay exceeds the maximum basic pay of his or her pay band upon expiration of the 2-year period, the employee's pay will not be reduced; the employee will be in the overcompensated range of basic pay category for CCS pay increase purposes, see Figure 9.

Maintained pay shall cease to apply to an employee who: (1) Has a break in service of 1 workday or more; or (2) is demoted for personal cause or at the employee's request. The employee's maintained rate of pay is basic pay for purposes of locality pay (locality pay is basic pay for purposes of retirement, life insurance, premium pay, severance pay, advances in pay, workers' compensation, and lump-sum payments for annual leave but not for computing promotion increases). Employees promoted while on maintained pay may have their basic pay (excluding locality pay) set up to 20 percent greater than the maximum basic pay for their current pay band or retain their "maintained pay," whichever is greater.

3. Promotion

The movement of an employee to a higher pay band within the same career track or to a different career track and pay band in which the new pay band has a higher maximum basic salary rate than the pay band from which the employee is leaving.

4. Reassignment

The movement of an employee from one position to another position within the same pay band in the same career track or to a position in another career track and pay band in which the new pay band has the same maximum basic salary rate as the pay band from which the employee is leaving.

5. Change to Lower Pay Band

The movement of an employee to a lower pay band within the same career track or to a different career track and pay band in which the new pay band has a lower maximum basic pay range than the pay band from which the employee is leaving.

6. Pay Adjustment

Any increase or decrease in an employee's rate of basic pay where there is no change in the employee's position. Termination of maintained pay is also a pay adjustment.

7. Detail

The temporary assignment of an employee to a different demonstration project position for a specified period when the employee is expected to return to his or her regular duties at the end of the assignment. (An employee who is on detail is considered for pay and strength purposes to be permanently occupying his or her regular position.)

8. Highest Previous Rate

ONR will establish maximum payable rate rules that parallel the rules in 5 CFR 531.202 and 531.203(c) and (d).

9. Approving Manager

Managers at the directorate, division head, division superintendent, or directorate-level staff offices who have budget allocation/execution; position management; position classification; recruitment; and staffing authorities for their organization.

H. Pay Setting Determinations Outside the CCS

1. External New Hires

a. This includes reinstatements. Initial basic pay for new appointees into the demonstration project may be set at any point within the basic pay range for the career track, occupation, and pay band to which appointed that is consistent with the special qualifications of the individual and the unique requirements of the position. These special qualifications may be consideration of education, training, experience, scarcity of qualified applicants, labor market considerations, programmatic urgency, or any combination thereof which is pertinent to the position to which appointed. Highest previous rate may be used to set the pay of new appointees into the demonstration project. (The approving manager authorizes the basic pay.)

b. Transfers from within DoD and other Federal agencies will have their pay set using pay setting policy for internal actions based on the type of pay action.

c. A recruitment or relocation bonus may be paid using the same provisions available for GS employees under 5 U.S.C. 5753. Employees placed through

the DoD Priority Placement Program (PPP), the DON Reemployment Priority List (RPL), or the Federal Interagency Career Transition Assistance Plan are entitled to the last earned rate if they have been separated.

2. Internal Actions

These actions cover employees within the demonstration project, including demonstration project employees who apply and are selected for a position within the project.

a. Promotion.

When an employee is promoted, the basic pay after promotion may be up to 20 percent greater than the employee's current basic pay. However, if the minimum rate of the new pay band is more than 20 percent greater than the employee's current basic pay, then the minimum rate of the new pay band is the new basic pay. The employee's basic pay may not exceed the basic pay range of the new pay band. Highest previous rate may be applied, if appropriate. (The approving manager authorizes the basic pay.) Note: Most target pay band promotions will be accomplished through the CCS appraisal and pay adjustment process (*see* section IV.C.8).

b. Pay Adjustment (Voluntary Change to Lower Pay) or Change to Lower Pay Band (except RIF).

When an employee accepts a voluntary change to lower pay or lower pay band, basic pay may be set at any point within the pay band to which appointed, except that the new basic pay will not exceed the employee's current basic pay or the maximum basic pay of the pay band to which assigned, whichever is lower. Highest previous rate may be applied, if appropriate. (The approving manager authorizes the basic pay.)

(1) Examples of Voluntary Change to a Lower Pay Band. An employee in an Administrative Specialist and Professional Career Track, Pay Band III, position may decide he or she would prefer a Pay Band II position in the Administrative Support Career Track because it offers a different work schedule or duty station. An employee in Pay Band IV of the Administrative Specialist and Professional Career Track who has a family member with a serious medical problem and wants to be relieved of supervisory responsibilities may request a change to Pay Band III.

(2) Example of Pay Adjustment (Voluntary Change to Lower Pay) or change to a Lower Pay Band. An employee may accept a change to lower pay or to a lower pay band through a settlement agreement. A Research Physicist, who is in Pay Band III and is being paid near the top of Pay Band III, is rated unacceptable in the contribution element Research and Development (R&D) Business Management. In settlement of a proposal to remove this employee for unacceptable performance, an agreement is reached which reduces the employee's pay to a rate near the beginning of Pay Band III.

c. Pay Adjustment (Involuntary Change to Lower Pay) or Change to Lower Pay Band Due to Adverse or Performance-based Action.

When an employee is changed to a lower pay band, or receives a change to lower pay due to an adverse or performance-based action, the employee's basic pay will be reduced by at least 6 percent, but will be set at a rate within the rate range for the pay band to which assigned. (The approving manager authorizes the basic pay.) Such employees will be afforded appeal rights as provided by 5 U.S.C. 4303 or 7512.

d. Involuntary Change to Lower Pay Band or Reassignment to a Career Track with a Lower Salary Range, Other than Adverse or Performance-based.

If the change is not a result of an adverse or performance-based action, the basic pay will be preserved to the extent possible within the basic pay range of the new pay band. If the pay cannot be set within the rate range of the new pay band, it will be set at the maximum rate of the new pay band and the employee's pay will be reduced. If the change is a result of a position reclassification resulting in the employee being assigned to a lower pay band or reassigned to a different career track with a lower maximum basic salary range, the employee is entitled to maintained pay if the employee's current salary exceeds the maximum rate for the new band.

e. RIF Action (including employees who are offered and accept a vacancy at a lower pay band or in a different career track).

The employee is entitled to maintained pay, if the employee's current salary exceeds the maximum rate for the new band.

f. Upward Mobility or Other Formal Training Program Selection.

The employee is entitled to maintained pay, if the employee's current salary exceeds the maximum rate for the new band.

g. Return to Limited or Light Duty from a Disability as a Result of Occupational Injury to a Position in a Lower Pay Band or to a Career Track with Lower Basic Pay Potential than Held Prior to the Injury.

The employee is entitled indefinitely to the basic pay held prior to the injury and will receive full general and locality pay increases. If upon reemployment, an employee was not given the higher basic pay (basic pay received at the time of the injury), any retirement annuity or severance pay computation would be based on his or her lower basic pay (salary based on placement in a lower pay band). Even though the Department of Labor (DOL) would make up the difference between the lower basic pay and the higher basic pay earned at the time of injury, the DOL portion is not considered in the retirement or severance pay computation.

h. Restoration to Duty.

Employees returning from the uniformed services following an absence of more than 30 days must be restored as soon as possible after making application, but not later than 30 days after receipt of application. If the employee's uniformed service was for less than 91 days the employee will be placed in the position that he or she would have attained if continuously employed. If not qualified for this position, employee will be placed in the position he or she left. For service of 91 days or more, the employee may also be placed in a position of like seniority, status, and pay. In the case of an employee with a disability incurred in or aggravated during uniformed service, and after reasonable efforts to accommodate the disability is entitled to be placed in another position for which qualified that will provide the employee with the same seniority, status, and pay, or the nearest approximation.

i. Reassignment.

The basic pay normally remains the same. Highest previous rate may be applied, if appropriate. (The approving manager authorizes the basic pay.)

j. Student Educational Employment Program.

The Student Educational Employment Program consists of two components: the Student Temporary Employment Program and the Student Career Experience Program. Initial basic pay for students in either of these programs may be set at any point within the basic pay range for the career track, occupation, and pay band to which appointed. Basic pay may be increased upon return to duty (RTD) or conversion to temporary appointment, in consideration of the student's additional education and experience at the time of the action. Students who work under a parallel work study program may have their basic pay increased in consideration of additional education and/or experience. Basic pay for students may be increased based on their CCS appraisal. (The approving manager authorizes the basic pay.)

k. Hazard Pay or Pay for Duty Involving Physical Hardship.

Employees under the demonstration project will be paid hazardous duty pay under the provisions of 5 CFR part 550, subpart I.

l. Supervisory Pay Adjustments.

(1) Supervisory pay adjustments may be approved by the ONR Executive Director based on the recommendation of the Talent Management Board to compensate employees with supervisory responsibilities. Only employees in supervisory positions as defined by the OPM GS Supervisory Guide may be considered for the pay adjustment. These pay adjustments are funded separately from performance pay pools. These pay adjustments are increases to basic pay, ranging up to ten percent of that pay rate for supervisors. Pay adjustments are subject to the constraint that the adjustment may not cause the employee's basic pay to exceed the pay band maximum basic pay. Criteria to be considered in determining the basic pay increase percentage include:

i. Needs of the organization to attract, retain, and motivate high quality supervisors;

ii. Budgetary constraints;

iii. Years and quality of related experience;

iv. Relevant training;

v. Performance appraisals and experience as a supervisor;

vi. Organizational level of position; and

vii. Impact on the organization.

(2) The pay adjustment will not apply to employees in Pay Band V of the S&E Professional Career Track.

(3) After the date of conversion into the demonstration project, a pay adjustment may be considered under the following conditions:

i. New hires into supervisory positions will have their initial rate of basic pay set at the supervisor's discretion within the pay range of the applicable pay band. This rate of pay may include a pay adjustment determined by using the ranges and criteria outlined above.

ii. An employee selected for a supervisory position that is within the employee's current pay band may also be considered for a basic pay adjustment. If a supervisor is already authorized a basic pay adjustment and is subsequently selected for another supervisor position within the same pay band, then the basic pay adjustment will be re-determined.

iii. Existing supervisors will be converted at their existing rate of basic pay and may be eligible for a basic pay adjustment upon review of the Talent Management Board following the conversion.

(4) The supervisor pay adjustment will be reviewed annually, with possible increases or decreases based on the appraisal scores for the performance elements Cooperation & Supervision or Supervision & Resources Management. The initial dollar amount of a basic pay adjustment will be removed when the employee voluntarily leaves the position. The cancellation of the adjustment under these circumstances is not an adverse action and is not subject to appeal. If an employee is involuntarily removed from a non-probationary supervisory position for unacceptable performance or conduct, the basic pay adjustment will be removed under adverse action procedures. However, if an employee is involuntarily removed from a non-probationary supervisory position for conditions other than unacceptable performance or conduct, then pay retention will follow current law and regulations at 5 U.S.C. 5362 and 5363 and 5 CFR part 536, except as waived or modified in section IX.

m. Supervisory Pay Differentials.

Supervisory pay differentials may be used by the ONR Executive Director to provide an incentive and to reward supervisors as defined by the OPM GS Supervisory Guide. Pay differentials are not funded from performance pay pools. A pay differential is a cash incentive that may range up to ten percent of basic pay for supervisors. It is paid on a pay-period basis for a specified period of time not to exceed (NTE) one year and is not included as part of the basic pay. Criteria to be considered in determining the amount of the pay differential are the same as those identified for Supervisory Pay Adjustments. The pay differential will not apply to employees in Pay Band V of the S&E Professional Career Track.

The pay differential may be considered, either during conversion into or after initiation of the demonstration project. The differential must be terminated if the employee is removed from a supervisory position, regardless of cause.

After initiation of the demonstration project, all personnel actions involving a supervisory differential will require a statement signed by the employee acknowledging that the differential may be terminated or reduced at the discretion of the ONR Executive Director. The termination or reduction of the differential is not an adverse action and is not subject to appeal.

I. Priority Placement Program (PPP)

Current PPP procedures apply to new hires and internal actions.

J. Expanded Temporary Promotion

Current regulations require that temporary promotions for more than 120 days to a higher level position than previously held must be made competitively. Under the demonstration project, ONR would be able to effect temporary promotions of not more than one year within a 24-month period without competition to positions within the demonstration project.

K. Voluntary Emeritus Program

The ONR Voluntary Emeritus Program is similar to the Voluntary Emeritus Program presented in the AMRDEC demonstration project FRN, section III.D.5., page 34890. Under the ONR program, the CNR will have the authority to offer retired or separated individuals voluntary assignments at ONR. This authority will include individuals who have retired or separated from Federal service. Voluntary Emeritus Program assignments are not considered "employment" by the Federal government (except for purposes of injury compensation). Thus, such assignments do not affect an employee's entitlement to buyouts or severance payments based on an earlier separation from Federal service. The Voluntary Emeritus Program will ensure continued quality research while reducing the overall salary line by allowing higher paid individuals to accept retirement incentives with the opportunity to retain a presence in the scientific community. The program will be of most benefit during manpower reductions as senior employees could accept retirement and return to provide valuable on-the-job training or mentoring to less experienced employees. Voluntary service will not be used to replace any employee or interfere with career opportunities of employees.

To be accepted into the emeritus program, a volunteer must be recommended by ONR managers to the CNR or designee. Everyone who applies is not entitled to a voluntary assignment. The approving official must clearly document the decision process for each applicant (whether accepted or rejected) and retain the documentation throughout the assignment. Documentation of rejections will be maintained for two years.

To ensure success and encourage participation, the volunteer's Federal retirement pay (whether military or

civilian) will not be affected while serving in a voluntary capacity. Retired or separated Federal employees may accept an emeritus position without a break or mandatory waiting period.

Volunteers will not be permitted to monitor contracts on behalf of the government or to participate on any contracts or solicitations where a conflict of interest exists. The same rules that currently apply to source selection members will apply to volunteers.

An agreement will be established between the volunteer, the CNR or designee and the HRO Director. The agreement will be reviewed by the local Legal Office for ethics determinations under the Joint Ethics Regulation. The agreement must be finalized before the assumption of duties and shall include:

(1) A statement that the voluntary assignment does not constitute an appointment in the civil service and is without compensation, and any and all claims against the Government (because of the voluntary assignment) are waived by the volunteer;

(2) A statement that the volunteer will be considered a federal employee for the purpose of injury compensation;

(3) Volunteer's work schedule;

(4) Length of agreement (defined by length of project or time defined by weeks, months, or years);

(5) Support provided by the ONR (travel, administrative, office space, supplies);

(6) A one page Statement of Duties and Experience;

(7) A provision that states no additional time will be added to a volunteer's service credit for such purposes as retirement, severance pay, and leave as a result of being a member of the Voluntary Emeritus Program;

(8) A provision allowing either party to void the agreement with 10 working days written notice; and

(9) The level of security access required (any security clearance required by the assignment will be managed by the ONR while the volunteer is a member of the Voluntary Emeritus Program).

IV. Sustainment

A. Position Classification

The position classification changes are intended to streamline and simplify the process of identifying and categorizing the work done at ONR. ONR will establish an Integrated Pay Schedule (IPS) for all demonstration project positions in covered occupations. The IPS will replace the current GS and extend the pay schedule equivalent to the basic pay range of the Government's Senior Level Pay System to accommodate positions classified above the GS–15 level under a proposed new STRL demonstration project initiative being developed by DoD.

1. Career Tracks and Pay Bands

Within the IPS, occupations with similar characteristics will be grouped together into three career tracks. Each career track consists of a number of pay bands, representing the phases of career progression that are typical for the respective career track. The pay bands within each career track are shown in Figure 3, along with their GS equivalents. The equivalents are based on the levels of responsibility as defined in 5 U.S.C. 5104 and not on current basic pay schedules. Appendix C provides definitions for each of the career tracks and the pay bands within them. The career tracks and pay bands were developed based upon administrative, organizational, and position management considerations at ONR. They are designed to enhance pay equity and enable a more seamless career progression to the target pay band for an individual position or category of positions. This combination of career tracks and pay bands allows for competitive recruitment of quality candidates at differing rates of compensation within the appropriate career track, occupation, and pay band. It will also facilitate movement and placement based upon contribution, in conjunction with the CCS described in paragraph IV.C. Other benefits of this arrangement include a dual career track for S&E employees and greater competitiveness with academia and private industry for recruitment. Appendix D identifies the occupational series currently within each of the three career tracks.

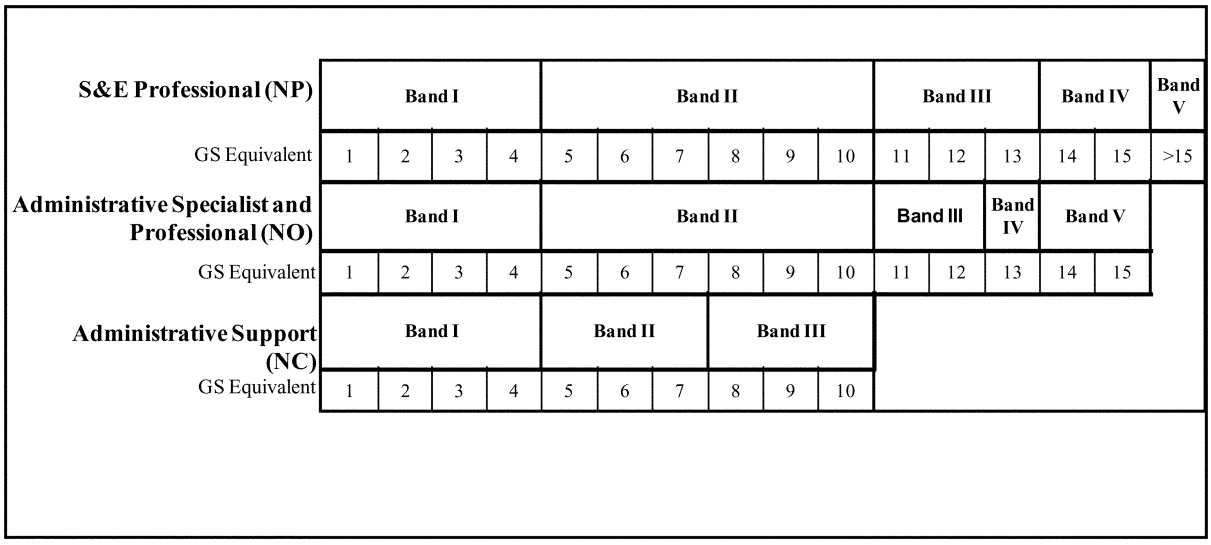

Figure 3. Career Tracks and Pay Bands with Equivalents

a. Target Pay Band.

Each position will have a designated target pay band under the demonstration project. This target pay band will be identified as the pay band to which an incumbent may be advanced without further competition within a career track. These target pay bands will be based upon present full performance levels. Target pay bands may vary based upon occupation or career track. Employees' basic pay will

be capped at the target pay band until other appropriate conditions (*e.g.,* competition, position management approval, increase in or acquisition of higher level duties, and approval of an accretion of duties promotion) have been met, and the employee has been promoted into the next higher level.

b. Occupational Series and Position Titling.

Presently, ONR positions are identified by occupational groups and series of classes in accordance with OPM position classification standards. Under the demonstration project, ONR will continue to use occupational series designators consistent with those currently authorized by OPM to identify positions. This will facilitate related personnel management requirements, such as movement into and out of the demonstration project. Other occupational series may be added or deleted as needed to support the demonstration project. Interdisciplinary positions will be accommodated within the system based upon the qualifications of the individual hired.

Titling practices consistent with those established by OPM classification standards will be used to determine the official title. Such practice will facilitate other personnel management requirements, such as the following: Movement into and out of the demonstration project, reduction in force, external reporting requirements, and recruitment. CCS pay band descriptors and Requirements Document (RD) (*see* paragraph IV.A.2) information will be used for specific career track, pay band, and titling determinations.

c. Classification Standards.

Under the proposed demonstration project, the number of classification standards would be reduced to three (*see* Figure 3.) Each standard would align with one of the three career tracks and would cover all positions within that career track. Each career track has two or three elements that are considered in both classifying a position and in judging an individual's contributions for pay setting purposes. Each element has generic descriptors for every pay band. These descriptors explain the type of work, degree of responsibility, and scope of contributions that need to be ultimately accomplished to reach the highest basic pay potential within each pay band. (*See* Appendix E.) To classify a position, a manager would select the pay band which is most indicative overall of the type of duties to be performed and the contributions needed. For example: A supervisor needs a secretarial position for a branch. In reading the elements and descriptors for the Administrative Support Career Track, the supervisor determines that the Pay Band II descriptors illustrate the type of work and contributions needed. Therefore, the position would be classified as a Secretary, Pay Band II.

d. Fair Labor Standards Act (FLSA).

Demonstration project positions will be covered under the FLSA and 5 CFR part 551. Determination of their status (exempt or nonexempt) will be made based on the criteria contained in 5 CFR part 551. The status of each new position under the demonstration project will be determined using computer assisted analysis as part of an automated process for preparing the RD. Those positions for which the computer is unable to make the final FLSA determination will be "flagged" for referral to a human resources specialist for determination.

(1) Guidelines for FLSA Determinations.

i. Supervisory Information: Provided through an automated system in a checklist format; results of this checklist have an impact on FLSA determination.

ii. FLSA Information: Provided through an automated system in a checklist format; results of this checklist in conjunction with the supervisory information provide a basis for the FLSA determination.

iii. If required, the section entitled "Purpose of Position" will be used to assist in FLSA determination.

iv. RD's requiring additional review before being finalized will be forwarded to a human resources specialist to review the FLSA determination.

(2) Nonsupervisory and Leader Positions.

Figure 4 shows the exempt or nonexempt status applicable to nonsupervisory and leader positions in the indicated career track and pay band. In those cases where "Review" is indicated, the FLSA status must be determined based on the specific duties and responsibilities of the subject position.

FLSA Status of Nonsupervisory and Leader Positions*

	Pay Band I	Pay Band II	Pay Band III	Pay Band IV	Pay Band V
S&E Professional	FLSA-covered	Review	Exempt	Exempt	Exempt
Administrative Specialist and Professional	FLSA-covered	Review	Exempt	Exempt	Exempt
Administrative Support	FLSA-covered	FLSA-covered	Review		

*FLSA exemption and nonexemption determinations will be made consistent with criteria found in 5 CFR part 551. All employees are covered by the FLSA unless they meet the executive, administrative, or professional criteria for exemption. As a general rule, the FLSA status can generally be matched to the occupational families and pay bands found in Table 3. Exceptions to these guidelines include supervisors/managers who meet the definition outlined in the OPM GS Supervisory Guide. The generic position descriptions will not be the sole basis for the FLSA determination. Each position will be evaluated on a case-by-case basis by comparing the duties and responsibilities assigned and the classification standards for each pay band, under 5 CFR part 551 criteria.

Figure 4. FLSA Status of Nonsupervisory and Leader Positions

(3) Supervisory Positions.

FLSA determination for supervisory positions must be made based on the duties and responsibilities of the particular position involved. As a rule, if a position requires supervision of employees who are exempt under FLSA, the supervisory position is likely to be exempt also.

2. Requirements Document (RD)

An RD will replace the Optional Form 8 and position description used under the current classification system. The RD will be prepared by managers using a menu-driven, automated system. The automated system will enable managers to classify and establish many positions without intervention by a human resources specialist. The abbreviated RD will combine the position information, staffing requirements, and contribution expectations into a 1- or 2-page document.

3. Delegation of Classification Authority

Classification authority will be delegated to managers as a means of increasing managerial effectiveness and expediting the classification function. This will be accomplished as follows:

a. Delegated Authority.

i. The Chief of Naval Research will delegate classification authority to the Human Resources Office (HRO) Director. The HRO Director may further delegate authority to Department Heads and Directors of the immediate organization of the position being classified.

ii. The classification approval must be at least one level above the first-level supervisor of the position.

iii. First-line supervisors at any level will provide classification recommendations.

iv. HRO support will be available for guidance and recommendations concerning the classification process. (Any dispute over the proper classification between a manager and the HRO will be resolved by the CNR or designee.)

b. Position Classification Accountability.

Those to whom authority is delegated are accountable to the CNR. The CNR is accountable to the CO. Those with delegated authority are expected to comply with demonstration project guidelines on classification and position management, observe the principle of equal pay for equal work, and ensure that RD's are current. First-line supervisors will develop positions using the automated system. All positions must be approved through the proper chain of command.

B. Integrated Pay Schedule

Under the demonstration project, an IPS will be established which will cover all demonstration project positions at ONR. This IPS, which does not include locality pay, will initially extend from the basic pay for GS–1, step 1 to the basic pay for GS–15, step 10. The adjusted basic pay cap, which does include locality pay, is Executive Level IV, currently $155,500. The salary range for the S&E pay band V pay band is expected to be established under the new STRL demonstration project initiative being developed for positions classified above GS–15.

1. Annual Pay Action

ONR will eliminate separate pay actions for within-grade increases, general and locality pay increases, performance awards, quality step increases, and most career promotions, and replace them with a single annual pay action (including either permanent or bonus pay or both) linked to the CCS. This will eliminate the paperwork and processing associated with multiple pay actions which average three per employee per year.

2. Overtime Pay

Overtime will be paid in accordance with 5 CFR part 550, subpart A. All nonexempt employees will be paid overtime based upon their "hourly regular rate of pay," as defined in existing regulation (5 CFR part 551).

3. Classification Appeals

An employee may appeal the occupational series, title, career track, or pay band of his or her position at any time. An employee must formally raise the area of concern to supervisors in the immediate chain of command, either verbally or in writing. If an employee is not satisfied with the supervisory response, he or she may then appeal to the DoD appellate level. If an employee is not satisfied with the DoD response, he or she may then appeal to the OPM only after DoD has rendered a decision under the provisions of this demonstration project. Since OPM does not accept classification appeals on positions which exceed the equivalent of a GS–15 level, appeal decisions involving Pay Band V for Advanced Research Scientists and Engineers (ARSAE) will be rendered by DoD and will be final. Appellate decisions from OPM are final and binding on all administrative, certifying, payroll, disbursing, and accounting officials of the Government. Time periods for case processing under 5 CFR subpart F, sections 511.603, 511.604, and 511.605 apply.

An employee may not appeal the accuracy of the RD, the demonstration project classification criteria, or the pay-setting criteria; the propriety of a basic pay schedule; the assignment of occupational series to the occupational family; or matters grievable under an administrative or negotiated grievance procedure or an alternative dispute resolution procedure.

The evaluation of classification appeals under this demonstration project is based upon the demonstration project classification criteria. Case files will be forwarded for adjudication through the HRO and will include copies of appropriate demonstration project criteria.

4. Above GS–15 Positions

The pay banding plan for the Scientific and Engineering occupational family includes a pay band V to provide the ability to accommodate positions with duties and responsibilities that exceed the General Schedule GS–15 classification criteria. This pay band is based on the Above GS–15 Position concept found in other STRL personnel management demonstration projects that was created to solve a critical classification problem. The STRLs have positions warranting classification above GS–15 because of their technical expertise requirements including inherent supervisory and managerial responsibilities. However, these positions are not considered to be appropriately classified as Scientific and Professional Positions (STs) because of the degree of supervision and level of managerial responsibilities. Neither are these positions appropriately classified as Senior Executive Service (SES) positions because of their requirement for advanced specialized scientific or engineering expertise and because the positions are not at the level of general managerial authority and impact required for an SES position.

The original Above GS–15 Position concept was to be tested for a five-year period. The number of trial positions was set at 40 with periodic reviews to determine appropriate position requirements. The Above GS–15 Position concept is currently being evaluated by DoD management for its effectiveness; continued applicability to the current STRL scientific, engineering and technology workforce needs; and appropriate allocation of billets based on mission requirements. The degree to which the laboratory plans to participate in this concept and develop classification, compensation and performance management policy, guidance, and implementation

processes will be based on the final outcome of the DoD evaluation.

5. Distinguished Contributions Allowance (DCA)

The DCA is a temporary monetary allowance up to 25 percent of basic pay (which, when added to an employee's rate of basic pay, may not exceed the rate of basic pay for Executive Level IV) paid on either a bi-weekly basis (concurrent with normal pay days) or as a lump sum following completion of a designated contribution period(s), or combination of these, at the discretion of ONR. It is not basic pay for any purpose, *i.e.,* retirement, life insurance, severance pay, promotion, or any other payment or benefit calculated as a percentage of basic pay. The DCA will be available to certain employees at the top of their target pay bands, whose present contributions are worthy of scores found at a higher pay band, whose level of contribution is expected to continue at the higher pay band for at least 1 year, and current market conditions require additional compensation.

Assignment of the DCA rather than a change to a higher pay band will generally be appropriate for such employees under the following circumstances: Employees have reached the top of their target pay bands and (1) when it is not certain that the higher level contributions will continue indefinitely (*e.g.,* a special project expected to be of 1- up to 5-year duration), or (2) when no further promotion or compensation opportunities are available or externally imposed limits (such as high-grade restrictions) make changes to higher pay bands unavailable, and in either situation, current market conditions compensate similar contributions at a greater rate in like positions in private industry and academia and there is a history of significant recruitment and retention difficulties associated with such positions.

a. Eligibility.

(1) Employees in Pay Bands III and IV of the S&E Professional Career Track and those in Pay Bands III, IV, and V of the Administrative Specialist and Professional Career Track are eligible for the DCA if they have reached the top CCS score for their target pay band with recommendations for a higher Overall Contribution Score (OCS) for their contributions; they have reached the maximum rate of basic pay available for their target pay band; there are externally imposed limits to higher pay bands or the higher level contributions are not expected to last indefinitely; and market conditions require greater compensation for these contributions.

(2) Employees may receive a DCA for up to three years. The DCA authorization will be reviewed and reauthorized as necessary, but at least annually at the time of the CCS appraisal through nomination by the pay pool manager and approval by the CNR. Employees in the S&E Professional Career Track may receive an extension of up to two additional years (for a total of five years). The DCA extension authorization will be reviewed and reauthorized as necessary, but at least on an annual basis at the time of the CCS appraisal through nomination by the pay pool manager and approval by the CNR.

(3) Monetary payment may be up to 25 percent of basic pay.

(4) Nominees would be required to sign a memorandum of understanding or a statement indicating they understand that the DCA is a temporary allowance; it is not a part of basic pay for any purpose; it would be subject to review at any time, but at least on an annual basis, and the reduction or termination of the DCA is not appealable or grievable.

b. Nomination.

In connection with the annual CCS appraisal process, pay pool managers may nominate eligible employees who meet the criteria for the DCA. Packages containing the recommended amount and method of payment of the DCA and a justification for the allowance will be forwarded through the supervisory chain to the CNR. Details regarding this process will be addressed in standard operating procedures. These details will include time frames for nomination and consideration, payout scheme, justification content and format, budget authority, guidelines for selecting employees for the allowance and for determining the appropriate amount, and documentation required by the employee acknowledging he or she understands the criteria and temporary nature of the DCA.

c. Reduction or Termination of a DCA.

(1) A DCA may be reduced or terminated at any time the ONR deems appropriate (*e.g.,* when the special project upon which the DCA was based ends; if performance or contributions decrease significantly; or if labor market conditions change, *etc.*). The reduction or termination of a DCA is not appealable or grievable.

(2) If an employee voluntarily separates from ONR before the expiration of the DCA, an employee may be denied DCA payment. Authority to establish conditions and/or penalties will be spelled out in the written authorization of an individual's DCA.

d. Lump-Sum DCA Payments.

(1) When ONR chooses to pay part or all of an employee's DCA as a lump sum payable at the end of a designated period, the employee will accrue entitlement to a growing lump-sum balance each pay period. The percentage rate established for the lump-sum DCA will be multiplied by the employee's biweekly amount of basic pay to determine the lump sum accrual for any pay period. This lump-sum percentage rate is included in applying the 25-percent limitation.

(2) If an employee covered under a lump-sum DCA authorization separates, or the DCA is terminated (*see* paragraph c), before the end of that designated period, the employee may be entitled to payment of the accrued and unpaid balance under the conditions established by ONR. ONR may establish conditions governing lump-sum payments (including penalties in cases such as voluntary separation or separation for personal cause) in general plan policies or in the individual employee's DCA authorization.

e. DCA Budget Allocation.

The CNR may establish a total DCA budget allocation that is never greater than 10 percent of the basic salaries of the employees currently at the cap in the S&E Professional Career Track, Pay Bands III and IV, and the Administrative Specialist and Professional Career Track, Pay Bands III, IV, and V.

f. Concurrent Monetary Payments.

Employees eligible for a DCA may be authorized to receive a DCA and a retention allowance at the same time, up to a combined total of 25 percent of basic pay. A merit increase which raises an employee's pay to the top rate for his or her target pay band (thus making the employee eligible for the DCA) may be granted concurrent with the DCA. Receipt of the DCA does not preclude an employee from being granted any award (including a contribution award) for which he or she is otherwise eligible.

C. Contribution-Based Compensation System (CCS)

1. General

The purpose of the CCS is to provide an effective means for evaluating and compensating the ONR workforce. It provides management, at the lowest practical level, the authority, control, and flexibility needed to develop a highly competent, motivated, and productive workforce. CCS will promote increased fairness and consistency in the appraisal process, facilitate natural career progression for employees, and

provide an understandable basis for career progression by linking contribution to basic pay determinations.

CCS combines performance appraisal and job classification into one annual process. At the end of each CCS appraisal period, basic pay adjustment decisions are made based on each employee's actual contribution to the organization's mission during the period. A separate function of the process includes comparison of performance in contribution elements to acceptable standards to identify unacceptable performance that may warrant corrective action in accordance with 5 CFR part 432. Supervisory officials determine scores to reflect each employee's contribution, considering both how well and at what level the employee is performing. Often the two considerations are inseparable. For example, an employee whose written documents need to be returned for rework more often than those of his or her peers also likely requires a closer level of oversight, an important factor when considering level of pay.

The performance planning and rating portions of the demonstration project's appraisal process constitute a performance appraisal program which complies with 5 CFR part 430 and the DoD Performance Management System, except where waivers have been approved. Performance-related actions initiated prior to implementation of the demonstration project (under DON performance management regulations) shall continue to be processed in accordance with the provisions of the appropriate system.

2. CCS Process

CCS measures employee contributions by breaking down the jobs in each career track using a common set of "elements." The elements for each career track shown in Figure 5 and described in detail in Appendix E have been initially identified for evaluating the contributions of ONR personnel covered by this initiative. They are designed to capture the highest level of the primary content of the jobs in each pay band of each career track. Within specific parameters, elements may be weighted or even determined to be not applicable for certain categories of positions. All elements applicable to the position are critical as defined by 5 CFR part 430.

CCS ELEMENTS

S&E Technical

Scientific and Technical Leadership

Program Execution and Liaison

Cooperation and Supervision

Administrative Specialist and Professional

Problem Solving and Leadership

Cooperation and Customer Relations

Supervision and Resources Management

Administrative Support

Problem Solving

Cooperation/Customer Relations/Supervision

Figure 5. CCS Elements

For each element, "Discriminators" and "Descriptors" are provided to assist in distinguishing low to high contributions. The discriminators (two to four for each element) break down aspects of work to be measured within the element. The descriptors (one for each pay band for each discriminator) define the expected level of contribution at the top of the related pay band for that element.

Scores currently range between 0 and 92; specific relationships between scores and pay bands are different for each career track. (*See* Figure 6.) Basic pay adjustments are based on a comparison of the employee's level of contribution to the normal pay range for that contribution and the employee's present rate of basic pay.

CCS Pay Band Scores and Basic Pay Ranges*

LEVEL	SCORE	CCS $K
S&E Professional		
I	0 – 21	17,803 – 31,871
II	18 – 47	27,431 – 59,505
III	44 – 66	50,287 – 93,175
IV	66 – 80	84,697 – 129,517
V	81 – 92	119,554 – 155,500**
Administrative Specialist and Professional		
I	0 – 21	17,803 – 31,871
II	18 – 47	27,431 – 59,505
III	44 – 59	50,287 – 78,355
IV	59 – 66	71,674 – 93,175
V	66 - 80	84,697 – 129,517
Administrative Support		
I	0 – 21	17,803 – 31,871
II	18 – 35	27,431 – 44,176
III	31 - 47	37,631 – 59,505

* Basic pay based on 2010 GS with no locality adjustment

** Proposed basic pay range minimum is the equivalent of 120 percent of the minimum base pay of GS-15; basic pay range maximum is Level IV of the Executive Schedule; and maximum adjusted base pay is Level III of the Executive Schedule

Figure 6. CCS Pay Band Scores and Basic Pay Ranges

Supervisors and pay pool panels determine an employee's contribution level for each element considering the discriminators as appropriate to the position. A contribution score, available to that level, is assigned accordingly. For example, a scientist whose contribution in the Technical Problem Solving element for S&E Professionals is determined to be at Pay Band II may be assigned a score of 18 to 47. Eighteen reflects the lowest level of responsibility, exercise of independent judgment, and scope of contribution; and 47 reflects the highest. For Pay Band III contributions, a value of 44 to 66 may be assigned. Each higher pay band equates to a higher range of values with the total points available to S&E Professionals to be determined based on the salary range for pay band V under the proposed DoD above GS–15 position initiative. Each element is judged separately and level of work may vary for different elements. The scores for each element are then averaged to determine the Overall Contribution Score (OCS).

The CCS process will be carried out within pay pools made up of combined ONR organizations. The organizations in each pay pool will be combined based on criteria such as similarity of work and chain of command. To facilitate equity and consistency, element weights and applicability and CCS score adjustments are determined by a pay pool panel, rather than by individual supervisors. Basic pay adjustments, contribution awards, and DCA's may be recommended by the pay pool panel or by individual supervisors. Pay pool panels will consist of Department heads and Directors, or other individuals who are familiar with the organization's work and the contributions of its employees. The Executive Director, or designee, will function as the pay pool manager, with final authority to decide weights, scores, basic pay adjustments, and awards.

3. Pay Pool Annual Planning

Prior to the beginning of each annual appraisal period, the pay pool manager and panel will review pay pool-wide expectations in the areas described below.

a. Element Weights and Applicability.

As written, all elements are weighted equally. If the pay pool manager and panels decide that some elements are more important than others or that some do not apply at all to the effective accomplishment of the organization's mission, they may establish element weights including a weight of zero which renders the element not applicable. Element weights are not intended for application to individual employees. Instead, they may be established only for subcategories of

positions, not to exceed a maximum of five subcategories in each career track. Subcategories for S&E Professionals might be: Supervisor, Program Manager, and Support S&E. Subcategories should include a minimum of five positions, when possible. Weights must be consistent within the subcategory.

b. Supplemental Criteria.

The CCS Pay Band descriptors are designed to be general so that they may be applied to all employees in the career track. Supervisors and pay pool panels may establish supplemental criteria to further inform employees of expected contributions. This may include (but is not limited to) examples of contributions which reflect work at each level for each element, taskings, objectives, and/or standards.

4. Annual CCS Appraisal Process (*See* Figure 7.)

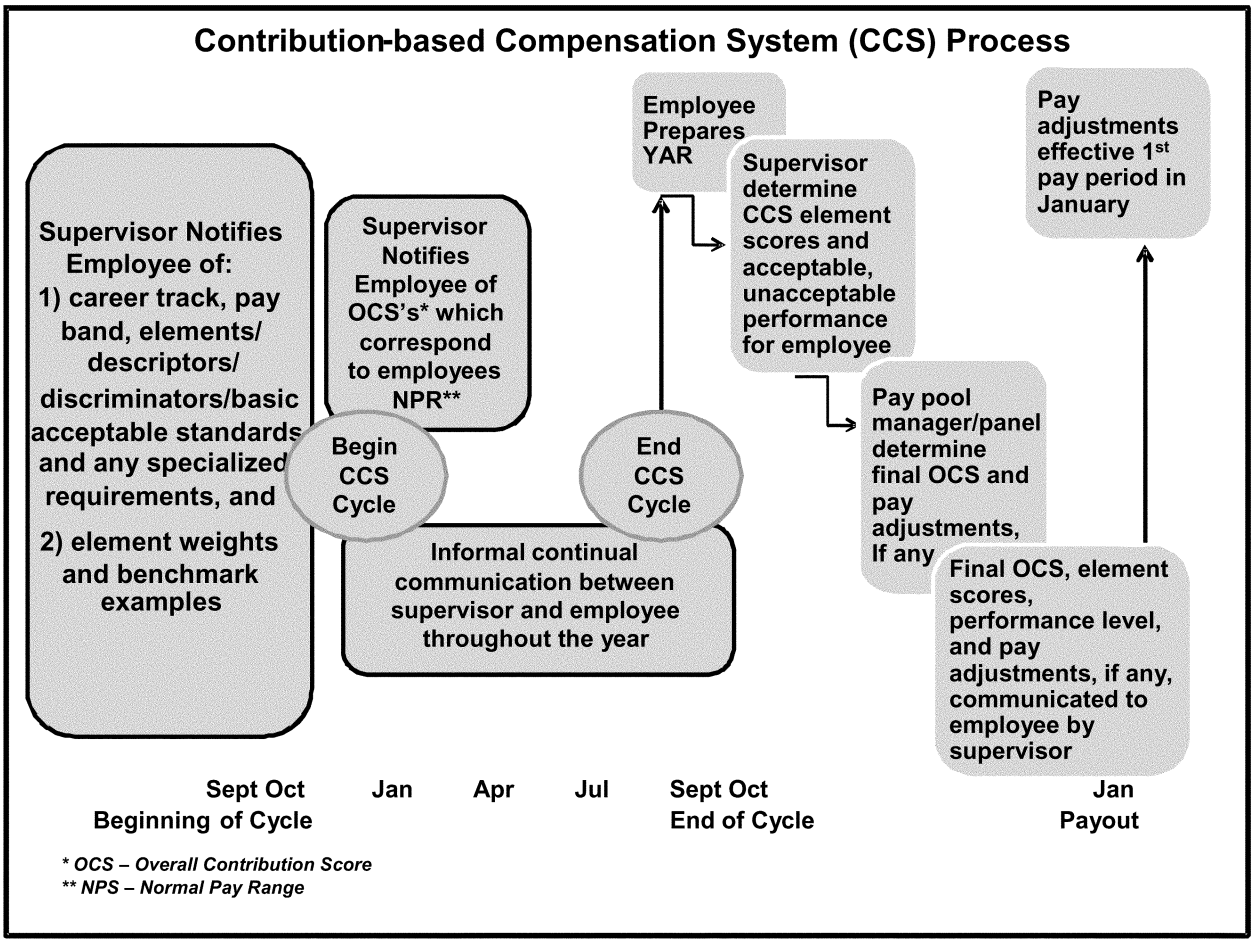

Figure 7. Annual CCS Appraisal Process

The ONR appraisal period will normally be one year, with a minimum appraisal period of 90 days. Employees who serve less than 90 days during an appraisal cycle will receive a presumptive performance rating of acceptable. At the beginning of the appraisal period, or upon an employee's arrival at ONR or into a new position, the following information will be communicated to employees so that they are informed of the basis on which their performance and contributions will be assessed: their career track and pay band; applicable elements, descriptors and discriminators; element weights; any established supplemental criteria and basic acceptable performance standards. OCS's, which correspond to each employee's NPR (*see* section IV.C.6), will be available after pay adjustments have been processed, normally early-to-mid January. All employees will be provided this information; however, employees in some situations may not receive CCS scores. These situations are described in section IV.C.5, Exceptions. The communication of information described by this paragraph constitutes performance planning as required by 5 CFR 430.206(b).

Supervisor and employee discussion of organizational objectives, specific work assignments, and individual performance expectations (as needed), should be conducted on an ongoing basis. Either the supervisor or the employee may request a formal review during the appraisal period; otherwise, a documented review is required only at the end of the appraisal period.

At the end of the appraisal period, employees will provide input describing their contributions by preparing a Yearly Accomplishment Report (YAR). Pay pool managers may exempt groups of positions from the requirement to submit YARs; in cases where YARs are not required, employees may submit them at their own discretion. Standard operating procedures will provide guidance for pay pools and employees on the content and format of YARs, and on other types of information about employee contributions which should be developed and considered by

supervisors. This will include procedures for capturing contribution information regarding employees who serve on details, who change positions during the appraisal period, who are new to ONR, and other such circumstances.

Supervisors will review the employee's YAR and other available information about the employee's contributions during the appraisal period and determine an initial CCS score for each element considering the discriminators as appropriate to the position. In addition, supervisors will determine whether the employee's performance was acceptable or unacceptable in each element when compared against the basic acceptable performance standards. The rating of the elements (all that are applicable are designated critical as defined by 5 CFR part 430) will serve as the basis for assignment of a summary level of Acceptable or Unacceptable. If any element is rated unacceptable, the summary level will be Unacceptable; otherwise the summary level will be Acceptable. Unacceptable ratings must be reviewed and approved by a higher level than the first-level supervisor.

If an employee changes positions during the last 90 days of the appraisal period, the losing supervisor will conduct a performance rating (*i.e.,* rate each element Acceptable or Unacceptable and determine the summary level) at the time the employee moves to the new position. This will serve as the employee's rating of record. For employees who report to ONR during the last 90 days of the appraisal period, any close-out rating of Acceptable (or its equivalent) or better from another Government agency will serve as the employee's rating of record (the employee will be rated Acceptable). The determination of CCS scores and application of related pay adjustments for such employees is set forth in section IV.C.5, "Exceptions."

The pay pool panel will meet to compare scores, make appropriate adjustments, and determine the final OCS for each employee. Final approval of CCS scores and element and summary ratings will rest with the pay pool manager (unless higher level approval is requested or deemed necessary). To avoid conflict with state bar rules, the pay pool panel may not alter the CCS element scores or the Overall Contribution Score that ONR Counsel assigns to an attorney; however, the pay pool panel may make independent judgments, such as pay adjustments, after considering that score. Supervisors will communicate the element scores, ratings, summary level, and OCS to each employee, and discuss the results and plans for continuing growth. Employees rated Unacceptable will be provided assistance to improve their performance (*see* paragraph V.A.). The CCS process will be facilitated by an automated system, the Contribution-based Compensation System Data System (CCSDS). During the appraisal process, all scores and supervisory comments will be entered into the CCSDS. The CCSDS will provide supervisors, pay pool panel members, and pay pool managers with background information (*e.g.,* YARS, employees' prior year scores and current basic pay) and spreadsheets to assist them in comparing contributions and determining scores. Records of employee appraisals will be maintained in the CCSDS, and the system will be able to produce a hard copy document for each employee which reflects his or her final approved score.

5. Exceptions

All employees who have worked 90 days or more by the end of the appraisal period will receive a performance rating of record. Those employees who have performed less than 90 days will receive a presumptive performance rating of Acceptable. However, in certain situations ONR does not consider the actual determination of CCS scores to be necessary. In other situations, it may not be feasible to determine a meaningful CCS score. Therefore, the determination of CCS scores will not be required for the following types of employees: (a) Employees on intermittent work schedules; (b) Those on temporary appointments of one year or less; (c) Those who work less than six months in an appraisal period (*e.g.,* on extended absence due to illness); (d) Those on long-term training for all or much of the appraisal period; (e) Employees who have reported to ONR or to a new position during the 90 days prior to the end of the appraisal period; and (f) Student Educational Employment Program employees.

If supervisors believe that the nature of such an employee's contributions provide a meaningful basis to determine a CCS score, they may appraise employees in the categories listed above, provided that the employee has worked at least 90 days in an ONR position by the time the pay pool manager forwards final decisions. The employee will be retroactively assessed as of 30 September.

Those employees mentioned above who are not appraised under CCS will not be eligible for merit increases or contribution awards. (This will affect the calculation of service credit for RIF (see section V.C.)). All employees listed above will be given full general and locality increases (as described in sections IV.C.7.a, "General Increases," and IV.C.7.c, "Locality Increases"). All employees are eligible for awards under ONR's Incentive Awards Program, such as "On-the-Spot" and Special Act Awards, as appropriate.

6. Normal Pay Range (NPR)—Basic Pay Versus Contribution

The CCS assumes a relationship between the assessed contribution of the employee and a normal range of pay. For all possible contribution scores available to employees, the NPR spans a basic pay range of 12 percent. Employees who are compensated below the NPR for their assessed score are considered "undercompensated," while employees compensated above the NPR are considered "overcompensated."

The lower boundary of the NPR is initially established by fixing the basic pay equivalent to GS–1, step 1, (without locality pay), with a CCS score of zero. The upper boundary is fixed at the basic pay equivalent to GS–15, step 10, (without locality pay), with a CCS score of 80. The distance between these upper and lower boundaries for a given overall contribution score is 12 percent of basic pay for all available CCS scores. Using these constraints, the interval between scores is approximately 2.37 percent through the entire range of pay. The lines will be extended using the same interval so that the upper boundary of the normal range of basic pay accommodates the basic pay needed for the S&E Professional career track pay band V. (The actual end point will vary depending on any pay adjustment factors, *e.g.,* general increase.) The formula used to derive the NPR may be adjusted in future years of the demonstration project. See Appendix F for further details regarding the formulation of the NPR.

Each year the boundaries for the NPR plus the minimum and maximum rate of basic pay for each pay band will be adjusted by the amount of the across-the-board GS percentage increase granted to the Federal workforce. At the end of each annual appraisal period, employees' contribution scores will be determined by the CCS process described above, then their overall contribution scores and current rates of basic pay will be plotted as a point on a graph along with the NPR. The position of the point relative to the NPR gives a relative measure of the degree of over- or undercompensation of the employee, as shown in Figure 8. Points which fall below the NPR indicate

undercompensation; points which fall above the NPR indicate overcompensation.

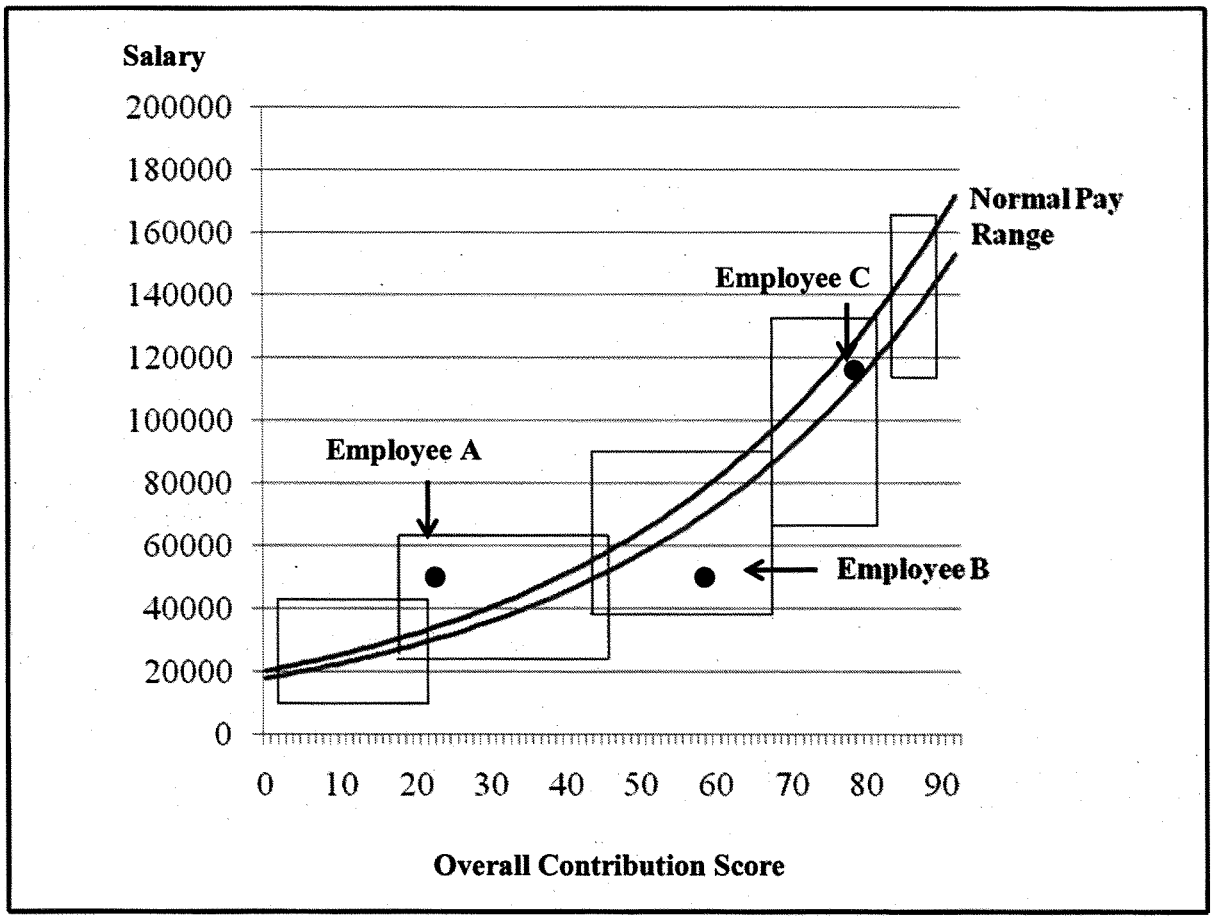

Figure 8. Notional Plotting of OCS and Basic Pay on the NPR for S&E Professionals

7. Compensation

Presently, employee pay is established, adjusted, and/or augmented in a variety of ways, including general pay increases, locality pay increases, special rate adjustments, within-grade increases (WGI's), quality step increases (QSI's), performance awards, and promotions. Multiple pay changes in any given year (averaging three per employee) are costly to process and do not consider comprehensively the employee's contributions to the organization. Under the demonstration project, ONR will distribute the budget authority from the sources listed above into four pay categories: (1) General increase, (2) locality increase, (3) merit increase, and (4) contribution awards. From these pay categories, a single annual pay action would be authorized based primarily on employees' contributions. Competitive promotions will still be processed under a separate pay action; most career promotions will be processed under the CCS.

In general, the goal of CCS is to pay in a manner consistent with employee contribution or, in other words, migrate employees' basic pay closer to the NPR. One result may be a wider distribution of pay among employees for a given level of duties.

After the CCS appraisal process has been completed and the employees' standing relative to the NPR has been determined, the pay pool manager, in consultation with the pay pool panel or other pay pool supervisory and staff officials, will determine the appropriate basic pay change and contribution award, if appropriate, for each employee. Standard operating procedures will provide guidance, including market salary reference data, to assist pay pool managers in making pay determinations. In most cases, the pay pool manager will approve basic pay changes and awards. In some cases, however, approval of a higher level official will be required. Figure 9 summarizes the eligibility criteria and applicable limits for each pay category.

Eligibility Chart for Pay Increases				
Range of Basic Pay	**General Increase**	**Merit Increase**	**Contribution Award**	**Locality Pay**
Over-compensated	Could be reduced or denied	No	No(f)	Yes-Full(d)
Normal Range	Yes-Full	Yes(c)-Up to 6%	Yes(a)	Yes-Full(d)
Under-Compensated	Yes-Full	Yes(b,e)	Yes(a)	Yes-Full(d)

(a) Up to $10K. Over $10K requires CNR approval
(b) Over 20% requires CNR approval
(c) May not exceed upper rail of normal pay range for employee's OCS score or maximum rate of the employee's pay band
(d) Employees will be entitled to the full locality pay approved for their area subject to applicable limitations
(e) May not exceed 6% above lower rail of normal pay range or maximum rate of the employees pay band
(f) Employees on maintained pay are eligible for a contribution award

Figure 10. Eligibility Chart for Pay Increases

The CCSDS will calculate each employee's OCS and his or her standing in relation to the NPR. The system will provide a framework to assist pay pool officials in selecting and implementing a payout scheme. It will alert management to certain formal limits in granting pay increases; e.g., an employee may not receive a permanent increase above the maximum rate of basic pay for his or her pay band until a corresponding level change has been effected. Once basic pay and award decisions have been finalized and approved, the CCSDS will prepare the data file for processing the pay actions, and maintain a consolidated record of CCS pay actions for all ONR demonstration project employees.

a. General Increases. General increase budget authority will be available to pay pools as a straight percentage of employee salaries, as derived under 5 U.S.C. 5303 or similar authority. Pay pool panels or managers may reduce or deny general pay increases for employees whose contributions are in the overcompensated category. (*See* Figure 9.) Such reduction or denial may not place an employee in the undercompensated category. An employee receiving maintained pay (except one receiving maintained pay for an occupational injury who receives a full general pay increase) will receive half of the across-the-board GS percentage increase in basic pay until the employee's basic pay is within the basic pay range assigned for their current position or for two years, whichever is less. ONR employees on pay retention at the time of demonstration project implementation or as a result of placement through the DON RPL, DoD PPP or the Federal Interagency Career Transition Assistance Plan will receive half of the across-the-board GS percentage increase until the employee's maintained pay is exceeded by the maximum rate for the employee's pay band or the maintained pay is ended due to a promotion. General increase authority not expended is available to either the merit increase or contribution award pay categories or both.

b. Merit Increases.

Merit increases will be calculated after the determination of employees' general increases. Merit increases may be granted to employees whose contribution places them in the "normal" or "undercompensated" categories. (*See* Figure 9.) In general, the higher the range in which the employee is contributing compared to his or her basic pay, the higher the merit increase should be. However, the following limitations apply: A merit increase may not place any employee's basic pay (1) in the "overcompensated" category (as established by the NPR for the upcoming year, which has been adjusted by the amount of the new general increase); (2) in excess of established basic pay caps; (3) in excess of the maximum rate of basic pay for the individual's pay band (unless the employee is being concurrently advanced to the higher pay band); or (4) above any outside-imposed dollar limit. Merit increases for employees in the NPR will be limited to six percent of basic pay, not to exceed the upper limit of the NPR for the employee's score. In addition, merit increases for employees in the undercompensated range may not exceed six percent above the lower rail of the NPR, or 20 percent of basic pay without CNR or designee approval.

The size of ONR's continuing pay fund is based on appropriate factors, including the following: (1) Historical spending for within-grade increases, quality step increases, and in-level career promotions (with dynamic adjustments to account for changes in law or in staffing factors, e.g., average starting salaries and the distribution of employees among job categories and pay bands); (2) Labor market conditions and the need to recruit and retain a skilled workforce to meet the business needs of the organization; and (3) The fiscal condition of the organization. ONR will periodically review or will review every two to three years its continuing pay fund to determine if any adjustments are necessary.

The amount of budget authority available to each pay pool will be determined annually by the CNR. Factors to be considered by the CNR in determining annual budget authority may include market salaries, mission priorities, and organizational growth. Because statistical variations will occur in year-to-year personnel growth, any unexpended merit increase authorities may be transferred to the Contribution Awards category.

c. Locality Increases.

All employees will be entitled to the locality pay increase authorized by law and regulation for their official duty station and/or position.

d. Contribution Awards.

Authority to pay contribution awards (lump-sum payments recognizing significant contributions) will be initially available to pay pools as a straight 1.5 percent of employees' basic pay (similar to the amount currently available for performance awards). The percentage rate may be adjusted in

future years of the demonstration project. In addition, unexpended general increase and merit increase budget authorities may be used to augment the award category. Contribution awards may be granted to those employees whose contributions place them in the "normal" or "undercompensated" category, and to employees in the "overcompensated" category who are on maintained pay. Standard operating procedures will provide guidance to pay pool managers in establishing and applying criteria to determine significant contributions which warrant awards. An award exceeding $10,000 requires CNR approval. (*See* Figure 9.) Pay pools may also grant time-off as a contribution award, in lieu of or in addition to cash.

8. Career Movement Based on CCS

Movement through the pay bands will be determined by contribution and basic pay at the time of the annual CCS appraisal process.

The ONR demonstration project is an integrated system that links level of work to be accomplished (as defined by a career track and pay band) with individual achievement of that work (as defined by an OCS) to establish the rate of appropriate compensation (as defined by the career track pay schedule), and to determine progression through the career track. This section addresses only changes in level which relate directly to the CCS determination.

When an employee's OCS falls within three scores of the top score available to his or her current pay band, supervisors should consider whether it is appropriate to advance the employee to the next higher pay band (refer to IV.A.1.a for other criteria). If progression to the next higher level is deemed warranted, supporting documentation would be included with the CCS appraisal and forwarded through the appropriate channels for approval. If advancement is not considered appropriate at this time, the employee would remain in his or her current pay band. Future basic pay raises would be capped by the top of the employee's current pay band unless the employee progresses to the next higher pay band through a CCS-related promotion, an accretion of duties promotion, or a competitive promotion.

a. Advancements in Pay Band Which May be Approved by the Pay Pool Manager.

Advancements to all pay bands except Pay Band V of the S&E Professional Career Track may be approved by the pay pool manager.

b. Advancements in Pay Band Which Must be Approved by the Executive Director.

Advancement to (1) pay bands outside target pay bands or established position management criteria; (2) Pay Band IV and V of the S&E Professional Career Track; and (3) Pay Bands IV and V of the Administrative Specialist and Professional Career Track require approval by the Executive Director or his or her designee. Details regarding the process for nomination and consideration, format, selection criteria, and other aspects of this process will be addressed in the standard operating procedures.

c. Advancement to Pay Band V of the Science and Engineering (S&E) Professional Career Track.

Vacancies in this pay band will be filled in accordance with guidance issued by DoD.

d. Regression to Lower Pay Band. (*See* Figure 8, "Employee A").

If an employee is contributing less than expected for the level at which he or she is being paid, the individual may regress into a lower pay band through reduction or denial of general increases and ineligibility for merit increases. (This is possible because the NPR plus the minimum and maximum pay rates for each pay band will be adjusted upwards each year by the across-the-board GS percentage increase in basic pay.) If the employee's basic pay regresses to a point below the pay overlap area between his or her current pay band and the next lower pay band, it will no longer be appropriate to designate him or her as being in the higher level. Therefore, the employee will be formally changed to the lower pay band. The employee will be informed of this change in writing, but procedural and appeal rights provided by 5 U.S.C. 4303 and 7512 (and related OPM regulations) will not apply (except in the case of employees who have veterans' preference). ONR is providing for waivers of the statute and regulations for such actions. Further, because a change to lower pay band under such circumstances is not discretionary, the change may not be grieved under ONR's administrative grievance procedures.

9. CCS Grievance Procedures

An employee may grieve the appraisal received under CCS using procedures specifically designed for CCS appraisals. Under these procedures, the employee's grievance will first be considered by the pay pool panel, which will recommend a decision to the pay pool manager. Any panel member's grievance will be considered by the pay pool manager, without reference to the panel. If the employee is not satisfied with the pay pool manager's decision, he/she may file a formal grievance under the provisions of the ONR's formal grievance procedures, unless the employee's pay pool manager is the CNR, in which case the first-step decision will be final. A CCS grievance from an ONR attorney will be handled in accordance with the Office of General Counsel's grievance procedures after ONR Counsel and the pay pool panel recommend a resolution.

The following are not grievable: Pay actions resulting from CCS (receipt, non-receipt or amount of general increase, merit increase, DCA, or contribution award); reductions in pay band without reduction in pay due to regression (*see* section IV.C.8.d); contents of CCS Plans, (element weights, descriptors/discriminators, performance standards and supplemental criteria); or any action for which another appeal or complaint process exists.

V. Separations

A. Performance-based Reduction-in-Pay or Removal Actions

This section applies to reduction in pay or removal of demonstration project employees based solely on unacceptable performance. Adverse action procedures under 5 CFR part 752 remain unchanged.

When a supervisor determines during or at the end of the appraisal period that the employee is not completing work assignments satisfactorily, the supervisor must make a determination as to whether the employee is performing unacceptably in one or more of the contribution elements. All CCS elements applicable to the employee's position are critical as defined by 5 CFR part 430.

Unacceptable performance determinations must be made by comparing the employee's performance to the acceptable performance standards established for elements. At any time during or at the end of the appraisal period that an employee's performance is determined to be unacceptable in one or more contribution elements, the employee will be provided assistance in improving his or her performance. This will normally include clarifying (or further clarifying) the meaning of terms used in the acceptable performance standards (*e.g.,* "timely" "thorough research," and "overall high quality") as they relate to the employee's specific responsibilities and assignments. An employee whose performance is unacceptable after he or she has been

given a reasonable opportunity to improve may be removed or reduced in grade or pay band, in accordance with the provisions of 5 U.S.C. 4303 and related OPM regulations. Employees may also be removed or reduced in grade or pay band based on unacceptable performance under the provisions of 5 U.S.C. 7512. All procedural and appeal rights set forth in the applicable statute and related OPM regulations will be afforded to demonstration project employees removed or reduced in grade or pay band for unacceptable performance.

B. Reduction-in-Force (RIF) Procedures

1. RIF Authority

Under the demonstration project, ONR would be delegated authority to approve RIF as defined in Secretary of the Navy Instruction 12351.5F and the use of separation pay incentives.

2. RIF Definitions

a. Competition in RIF.

When positions are abolished, employees are released from their retention levels in inverse order of their retention standing, beginning with the employee having the lowest standing. If an employee is reached for release from a retention level, he/she could have a right to be assigned to another position within their same career track and pay band or they could have a right to retreat to a position previously held.

b. Competitive Area.

A separate competitive area will be established by geographic location for all personnel included in the demonstration project.

c. Competitive Level.

Positions in the same occupational pay band, which are similar enough in duties and qualifications that employees can perform the duties and responsibilities including the selective placement factor, if any, of any other position in the competitive level upon assignment to it, without any loss of productivity beyond what is normally expected.

d. Service Computation Date (SCD).

The employee's basic Federal SCD would be adjusted for CCS results credit.

(1). Federal SCD.

An employee's basic Federal SCD may be credited with up to 20 years credit based on the results of the CCS process. The CCS RIF Assessment Category would be used to determine the number of RIF years credited. The CCS RIF Assessment Category is the combination of the employee's standing under the CCS relative to the NPR and any merit increase, DCA, contribution award or promotion. Figure 10 shows the RIF years available for each CCS RIF Assessment Category [proposed revisions to the RIF Assessment Category are depicted].

Figure 10. CCS RIF Assessment Categories

Assessment Category	Rif Years Available
0= Employees within the overcompensated range without any portion of a general increase.	0
1= Employees receiving maintained pay or any portion of a general increase but no merit increase or contribution (cash/time off).	12
2= Employees (without a capped salary** or career promotion) receiving a total compensation increase* of 6% or less or with a capped salary receiving a total compensation increase of 3% or less.	16
3= Employees receiving (1) a total compensation increase* greater than 6% (2) a career promotion or (3) with a capped salary** receiving a total compensation increase greater than 3%.	20
Final RIF Credit: Average of the three most recent CCS Process Results received during the 4-year period prior to the cutoff date.	

*Total compensation includes merit increase, contribution award (cash/time off), and distinguished contributions allowance

** Capped means the employee has the maximum salary for the assigned pay band

(2). CCS Process Results.

If an employee has fewer than three CCS process results, the value (RIF years available) of the actual number of process results on record will be divided by the number of actual process results on record. In cases where an employee has no actual CCS process results, the employee will be given the additional RIF CCS process results credit for the most common, or "modal" ONR demonstration project CCS RIF Assessment Category for the most recent CCS appraisal period.

(3). Credit from Other Rating Systems.

Employees who have been rated under different patterns of summary rating levels will receive RIF appraisal credit as follows:

—If there are any ratings to be credited for the RIF given under a rating system which includes one or more levels above fully successful (Level 3), employees will receive credit as follows: 12 years for Level 3, 16 years for Level 4, or 20 years for Level 5; or

—If an employee comes from a system with no levels above Fully Successful (Level 3), they will receive credit based on the demonstration project's modal CCS RIF assessment category.

(4). RIF Cutoff Date.

To provide adequate time to properly determine employee retention standing, the cutoff date for use of new CCS

process results is set at 30 days prior to the date of issuance of RIF notices.

3. Displacement Rights

a. Displacement Process.

Once the position to be abolished has been identified, the incumbent of that position may displace another employee within the incumbent's current career track and pay band when the incumbent has a higher retention standing and is fully qualified for the position occupied by an employee with a lower standing. If there are no displacement rights within the incumbent's current career track and pay band, the incumbent may exercise his or her displacement rights to any position previously held in the next lower pay band, regardless of career track, when the position is held by an employee with a lower retention standing. In the case of all preference eligibles, they may displace up to the equivalent of three grades or intervals below the highest equivalent grade of their current pay band in the same or a different career track regardless of whether they previously held the position provided they are fully qualified for the position and the position is occupied by an employee with a lower retention standing. Preference eligibles with a compensable service connected disability of 30 percent or more may displace an additional two GS grades or intervals (total of five grades) below the highest equivalent grade of their current pay band provided they have previously held the position and the position is occupied by an employee in the same subgroup with a later RIF service computation date.

b. Retention Standing.

Retention is based on tenure, veteran preference, length of service, and CCS process results. Competing employees are listed on a retention register in the following order: Tenure I (career employees), Tenure II (career-conditional employees), and Tenure III (contingent employees). Each tenure group has three subgroups (30% or higher compensable veterans, other veterans, and non-veterans) and employees appear on the retention register in that order. Within each subgroup, employees are in order of years of service adjusted to include CCS process results.

c. Vacant Positions.

Assignment may be made to any available vacant position including those with promotion potential in the competitive area.

d. Ineligible for Displacement Rights.

Employees who have been notified in writing that their performance is considered to be unacceptable are ineligible for displacement rights.

e. Change to Lower Pay Band due to an Adverse or Performance-based Action.

An employee who has received a written decision to change him or her to a lower pay band level due to an adverse or performance-based action will compete from the position to which he or she will be or has been demoted.

4. Notice Period

The notice period and procedures in 5 CFR subpart H, section 351.801 will be followed.

5. RIF Appeals

Under the demonstration project, employees affected by a RIF action, other than a reassignment, maintain their right to appeal to the Merit Systems Protection Board if they feel the reason for the RIF is not valid or if they think the process or procedures were not properly applied.

6. Separation Incentives

ONR will have delegated authority to approve separation incentives and will use the current calculation methodology of a lump sum payment equal to an employee's severance pay calculation or $25,000, whichever is less.

7. Severance Pay

Employees will be covered by the severance pay rules in 5 CFR part 550, subpart G, except that ONR will establish rules for determining a "reasonable offer" according to the provisions of 5 CFR 536.104.

8. Outplacement Assistance

All outplacement assistance currently available would be continued under the demonstration project.

VI. Demonstration Project Transition

A. Initial Conversion or Movement to the Demonstration Project

1. Placement Into Career Tracks and Pay Bands

Conversion or movement of GS employees into the demonstration project will be into the career track and pay band which corresponds to the employee's current GS grade and basic pay. If conversion into the demonstration project is accompanied by a simultaneous change in the geographic location of the employee's duty station, the employee's overall GS pay entitlements (including locality rate) in the new area will be determined before converting the employee's pay to the demonstration project pay system. Employees will be assured of placement within the new system without loss in total pay. Once under the demonstration project, employee progression through the career tracks and pay bands up to their target pay band is dependent upon contribution score, not upon previous methods (*e.g.,* WGI's, QSI's, or career promotions as previously defined).

ONR proposes the addition of language to clarify procedures for non-competitive placements into the demonstration project. Specifically, employees who enter the demonstration project after initial implementation by lateral transfer, reassignment, or realignment will be subject to the same pay conversion rules.

2. Conversion of Retained Grade and Pay Employees

ONR's workforce will be grouped into career tracks and associated pay band with designated pay ranges rather than the traditional grade and step. Therefore, grade and pay retention will be eliminated. ONR will grant "maintained pay" (as defined in section III.G.2, "Maintained Pay"), which is related to the current meaning of "retained pay" but does not provide for indefinite retention of pay except in certain situations. Employees' currently on grade or pay retention will be immediately placed on maintained pay at their current rate of basic pay if this rate exceeds the maximum rate for their pay band and "grandfathered" in the appropriate pay band. Employees on grade retention will be placed in the pay band encompassing the grade of their current position. Employees will receive half of the across-the-board GS percentage increase in basic pay and the full locality pay increase until their basic pay is within the appropriate basic pay range for their current position without time limitation.

3. WGI Buy-In

The participation of all covered ONR employees in the demonstration project is mandatory. However, acceptance of the system by ONR employees is essential to the success of the demonstration project. Therefore, on the date that employees are converted to the project pay plans, they will be given a prorated permanent increase in pay equal to the earned (time spent in step) portion of their next WGI based on the value of the WGI at the time of conversion so that they will not feel they are losing a pay entitlement accrued under the GS system. Employees will not be eligible for this basic pay increase if their current rating of record is unacceptable at the time of conversion. There will be no prorated payment for employees who are at step 10 or receiving a retained rate at the

time of conversion into the demonstration project.

4. Career Promotion Eligibility

ONR proposes to adopt MRMC's provisions for compensating employees who would have become eligible for career promotions during the first 12 months of the demonstration project but for conversion to the demonstration project pay bands. Employees who qualify under this provision will receive pay increases for noncompetitive promotion equivalents when the grade level of the promotion is encompassed within the same pay band or another, the employee's performance warrants the promotion, and the promotion would have otherwise occurred during that period. Employees who receive an in-level promotion at the time of conversion will not receive a WGI Buy-In equivalent as defined above. For example if a GS–11 employee converts in to the demonstration project at a Pay Band III within the Administrative Specialists and Professional Career Track and would have become eligible for promotion to GS–12 within the next 12 months, that employee will receive a pay increase equivalent to the GS–12 but still remain in Pay Band III.

During the first 12 months of the demonstration project an exception will also be made for employees whose target career promotion would place them in a different pay band from their initial pay band level at conversion. If the employee's performance warrants it and the promotion would have occurred otherwise except for the demonstration project, the non-competitive target career promotion can happen outside the CCS process. For example if an employee's career ladder position has a full performance level of GS–13 and the employee is a GS–12 at conversion, the employee would initially convert in to the demonstration project at a Pay Band III but may be eligible for a non-competitive promotion into Pay Band IV within the first 12 months of the demonstration project if all requirements are met and the promotion is recommended by their supervisor.

5. Conversion of Special Salary Rate Employees

Employees who are in positions covered by a special salary rate prior to entering the demonstration project will no longer be considered special salary rate employees under the demonstration project. These employees will, therefore, be eligible for full locality pay. The adjusted salaries of these employees will not change. Rather, the employees will receive a new basic rate of pay computed by dividing their basic adjusted pay (higher of special salary rate or locality rate) by the locality pay factor for their area. A full locality adjustment will then be added to the new basic pay rate. Adverse action will not apply to the conversion process as there will be no change in total salary. However, if an employee's new basic pay rate after conversion to the demonstration project pay schedule exceeds the maximum basic pay authorized for the pay band, the employee will be granted maintained pay under paragraph III.G.2 until the employee's salary is within the range of the pay band. For example, an Electronics Engineer, GS–855–9, step 5, is paid $59,568 per annum in accordance with special GS salary rates as of January 2010 per Table Number: 0422. The employee is located in the locality area of Washington-Baltimore, DC-MD-VA-WV. Under the demonstration project, the computation of the engineer's new basic rate of pay with a full locality adjustment and WGI buy-in is computed as follows:

a. Basic adjusted pay divided by locality pay factor = new basic rate of pay.

b. New basic rate of pay multiplied by the full locality adjustment for current area = full locality adjustment amount for special rate employees.

c. New basic rate of pay + WGI buy-in amount × locality pay factor = demonstration special rate for conversion.

6. Conversion of Employees on Temporary Promotions

Employees who are on temporary promotions at the time of conversion will be returned to their grade and step of record prior to conversion. These employees will be converted to a pay band following the procedures described in Section IV.A.1. After conversion, the temporary promotion may be reinstated for the remainder of the original 120-day timeframe. If the grade of the temporary position is associated with a higher pay band, the employee will be temporarily placed in the appropriate higher band while on the temporary promotion, following the procedures described in Section II.A.5.b.i. After the temporary promotion has ended, the employee will be returned to the salary and pay band established upon conversion, following the procedures described in Section II.A.5.b.iv.

7. Non-Competitive Movement Into the Demonstration Project

Employees who enter the demonstration project after initial implementation by lateral transfer, reassignment, or realignment will be subject to the same pay conversion rules and will, therefore, be eligible for full locality pay. Specifically, adjustments to the employee's basic pay for a step increase or a non-competitive career ladder promotion will be computed as a prorated share of the current value of the step or promotion increase based upon the number of full weeks an employee has completed toward the next higher step or grade at the time the employee moves into the project.

B. CCS Start-Up

ONR expects to place employees on CCS elements, descriptors, discriminators, and standards around October 2010 with conversion to demonstration project pay plans before the end of April 2011. The CCS process will be used to appraise ONR employees at the end of the 2010–2011 cycle which would occur on September 30, 2011. ONR expects the first CCS payout to occur at the beginning of the first full pay period in January 2012.

C. Training

An extensive training program is planned for everyone in the demonstration project including the supervisors, managers, and administrative staff. Training will be tailored, as discussed below, to fit the requirements of every employee included in the demonstration project and will address employee concerns and as well as the benefits to employees. In addition, leadership training will be provided, as needed, to managers and supervisors as the new system places more responsibility and decision making authority on them. ONR training personnel will provide local coordination and facilities, supplemented by contractor support as needed. Training will be provided at the appropriate stage of the implementation process.

1. Types of Training

Training packages will be developed to encompass all aspects of the project and validated prior to training the workforce. Specifically, training packages will be developed for the following groups of employees:

a. Employees.

ONR demonstration project employees will be provided an overview of the demonstration project and employee processes and responsibilities.

b. Supervisors and Managers.

Supervisors and managers under the demonstration project will be provided training in supervisory and managerial

processes and responsibilities under the demonstration project.

c. Support Personnel.

Administrative support personnel, HRO personnel, financial management personnel, and Management Information Systems Staff will be provided training on administrative processes and responsibilities under the demonstration project.

D. New Hires Into the Demonstration Project

The following steps will be followed to place employees (new hires) entering the system:

1. The career track and pay band will be determined based upon the employee's education and experience in relation to the duties and responsibilities of the position in which he or she is being placed, consistent with OPM qualification standards.

2. Basic pay will be set based upon available labor market considerations relative to special qualifications requirements, scarcity of qualified candidates, programmatic urgency, and education and experience of the new candidate.

3. Employees placed through the DOD Reemployment Priority List (RPL), or DOD Priority Placement Program (PPP), or the Interagency Career Transition Assistance Plan (ICTAP) who are eligible for maintained pay will receive one half of the across-the-board GS percentage increase in basic pay and the full locality pay increase until the employee's basic pay is within the basic pay range of the career track and pay band to which assigned. Federal employees on retained pay and Federal employees on special salary rates hired into the Demonstration Project by promotion or reassignment are eligible for maintained pay and will receive one half of the across-the-board GS percentage increase in basic pay and the full locality pay increase until the employee's basic pay is within the basic pay range of the career track and pay band to which assigned. Employees are eligible for maintained pay as long as there is no break in service and if the employee's rate of pay exceeds the maximum rate of his or her pay band.

4. New employees will be provided training and an overview of the demonstration project outlining the CCS process and their responsibilities. If the employee is a manager, training will also include supervisory and managerial responsibilities under the demonstration project.

E. Conversion or Movement From Demonstration Project

In the event the demonstration project is terminated or employees leave the demonstration project through promotion, change to lower grade, reassignment or transfer, conversion back to the GS system may be necessary. The converted GS grade and GS rate of pay must be determined before movement or conversion out of the demonstration project and any accompanying geographic movement, promotion, or other simultaneous action. An employee will not be converted at a level which is lower than the GS grade held immediately prior to entering the demonstration project; unless, since that time, the employee has undergone a reduction in pay band. The converted GS grade and rate will become the employee's actual GS grade and rate after leaving the demonstration project and will be used to determine the pay action and GS pay administration rules for employees who leave the project to accept a position in the traditional Civil Service system. The following procedures will be used to convert the employee's demonstration project pay band to a GS equivalent grade and the employee's demonstration project rate of pay to the GS equivalent rate of pay.

1. Grade Determination

Employees will be converted to a GS grade based on a comparison of the employee's current adjusted rate of basic pay to the highest GS applicable rate range considering only those grade levels that are included in the employee's current pay band. The highest GS applicable rate range includes GS basic rates, locality rates, and special salary rates. An employee in a pay band corresponding to a single GS grade is converted to that grade. An employee in a pay band corresponding to two or more grades is converted to one of those grades using the following procedures identified in a–f below:

a. Identify the highest GS grade within the current pay band that accommodates the employee's adjusted rate of basic pay (including any locality payment).

b. If the employee's adjusted rate of basic pay equals or exceeds the applicable step 4 rate of the identified highest GS grade, the employee is converted to that grade.

c. If the employee's adjusted rate of basic pay is lower than the applicable step 4 of the highest grade and there are only two GS grades in the pay band, the employee is converted to the next lower grade. If there are more than two GS grades in the pay band, this process is used for each successively lower grade in the pay band until a grade is found in which the employee's adjusted rate of basic pay equals or exceeds the applicable step 4 of the grade. If the step 4 cannot be matched at any of the GS grades, the employee will be converted to the lowest GS grade in the pay band.

d. If under the above-described "step 4" rule, the employee's adjusted project rate exceeds the maximum rate of the grade assigned but fits in the rate range for the next higher applicable grade (*i.e.,* between step 1 and step 4), then the employee shall be converted to the next higher applicable grade.

e. For two-grade interval occupations, conversion should not be made to an intervening (even) grade level below GS–11.

f. Employees in Level IV of the Administrative Specialist and Professional Career Track will convert to the GS–13 level.

2. Pay Setting

Pay conversion will be done before any geographic movement or other pay-related action that coincides with the employee's movement or conversion out of the demonstration project. The employee's pay within the converted GS grade is set by converting the employee's demonstration project rate of pay to a GS rate of pay as follows:

a. The employee's demonstration project adjusted rate of pay (including locality) is converted to a rate on the highest applicable adjusted rate range for the converted GS grade. For example, if the highest applicable GS rate range for the employee is a special salary rate range, the applicable special rate salary table is used to convert the employee's pay.

b. When converting an employee's pay, if the rate of pay falls between two steps of the conversion grade, the rate must be set at the higher step.

c. Employees whose basic pay exceeds the maximum basic pay of the highest GS grade for their pay band will be converted to the highest grade and step in their pay band. Upon conversion, the maximum basic pay will be at the step 10 level with no provision for retained pay.

3. Employees in Positions Classified Above GS–15

Conversion and pay retention instructions for employees and positions in Pay Band V of the S&E Professional Career Track will be contingent on guidance provided by DoD.

4. Determining Date of Last Equivalent Increase

The last equivalent increase will be the date the employee received a CCS pay increase, was eligible to receive a CCS pay increase, or received a promotion, whichever occurred last.

F. Personnel Administration

All personnel laws, regulations, and guidelines not waived by this plan will remain in effect. Basic employee rights will be safeguarded and Merit System Principles will be maintained. Servicing CPACs will continue to process personnel-related actions and provide consultative and other appropriate services.

G. Automation

ONR will continue to use the Defense Civilian Personnel Data System (DCPDS) for the processing of personnel-related data. Payroll servicing will continue from the respective payroll offices.

An automated tool will be used to support computation of performance related pay increases and awards and other personnel processes and systems associated with this project.

H. Experimentation and Revision

Many aspects of a demonstration project are experimental. Modifications may be made from time to time as experience is gained, results are analyzed, and conclusions are reached on how the new system is working. DoDI 1400.37, July 28, 2009, provides instructions for adopting other STRL flexibilities, making minor changes to an existing demonstration project, and requesting new initiatives.

VII. Demonstration Project Duration

Section 342 of the National Defense Authorization Act for Fiscal Year 1995 (Public Law 103–337) does not require a mandatory expiration date for this demonstration project. The project evaluation plan addresses how each intervention will be comprehensively evaluated. Major changes and modifications to the interventions may be made using the procedures in DoDI 1400.37, if formal evaluation data warrant a change. At the 5-year point, the entire demonstration will be examined for either: (a) Permanent implementation, (b) modification and another test period, or (c) termination of the project.

VIII. Demonstration Project Evaluation Plan

Consistent with guidance from OSD, ONR proposes following the same evaluation plan as is being used by NRL and the other STRL Demonstration Projects. Accordingly, standard language for Evaluation Plan, Evaluation, and Method of Data Collection (sections V.B., V.C, and V.D., respectively) provided by OSD is used in this document to describe ONR's plans and procedures for the demonstration project evaluation. The use of parallel evaluation methodologies will facilitate comparisons across demonstration projects to derive higher-order conclusions about the benefits, challenges, and overall effectiveness of these programs.

A. Overview

Chapter 47 of title 5 U.S.C. requires that an evaluation be performed to measure the effectiveness of the proposed laboratory demonstration project, and its impact on improving public management. A comprehensive evaluation plan for the entire laboratory demonstration program, originally covering 24 DoD laboratories, was developed by a joint OPM/DoD Evaluation Committee in 1995. This plan was submitted to the Office of Defense Research & Engineering and was subsequently approved. The main purpose of the evaluation is to determine whether the waivers granted result in a more effective personnel system and improvements in ultimate outcomes (*i.e.,* laboratory effectiveness, mission accomplishment, and customer satisfaction).

B. Evaluation Model

Appendix G shows an intervention model for the evaluation of the demonstration project. The model is designated to evaluate two levels of organizational performance: Intermediate and ultimate outcomes. The intermediate outcomes are defined as the results from specific personnel system changes and the associated waivers of law and regulation expected to improve human resource (HR) management (*i.e.,* cost, quality, timeliness). The ultimate outcomes are determined through improved organizational performance, mission accomplishment, and customer satisfaction. Although it is not possible to establish a direct causal link between changes in the HR management system and organizational effectiveness, it is hypothesized that the new HR system will contribute to improved organizational effectiveness.

Organizational performance measures established by the organization will be used to evaluate the impact of a new HR system on the ultimate outcomes. The evaluation of the new HR system for any given organization will take into account the influence of three factors on organizational performance: Context, degree of implementation, and support of implementation. The context factor refers to the impact which intervening variables (*i.e.,* downsizing, changes in mission, or the economy) can have on the effectiveness of the program. The degree of implementation considers the extent to which the:

(1) HR changes are given a fair trial period;

(2) Changes are implemented; and

(3) Changes conform to the HR interventions as planned.

The support of implementation factor accounts for the impact that factors such as training, internal regulations and automated support systems have on the support available for program implementation. The support for program implementation factor can also be affected by the personal characteristics (*e.g.,* attitudes) of individuals who are implementing the program.

The degree to which the project is implemented and operated will be tracked to ensure that the evaluation results reflect the project as it was intended. Data will be collected to measure changes in both intermediate and ultimate outcomes, as well as any unintended outcomes, which may happen as a result of any organizational change. In addition, the evaluation will track the impact of the project and its interventions on veterans and other protected groups, the Merit Systems Principles, and the Prohibited Personnel Practices. Additional measures may be added to the model in the event that changes or modifications are made to the demonstration plan.

The intervention model at Appendix D will be used to measure the effectiveness of the personnel system interventions implemented. The intervention model specifies each personnel system change or "intervention" that will be measured and shows:

(1) The expected effects of the intervention,

(2) The corresponding measures, and

(3) The data sources for obtaining the measures.

Although the model makes predictions about the outcomes of specific interventions, causal attributions about the full impact of specific interventions will not always be possible for several reasons. For example, many of the initiatives are expected to interact with each other and contribute to the same outcomes. In addition, the impact of changes in the HR system may be mitigated by context variables (*e.g.,* the

job market, legislation, and internal support systems) or support factors (*e.g.,* training and automation support systems).

C. Evaluation

A modified quasi-experimental design will be used for the evaluation of the STRL Personnel Demonstration Program. Because most of the eligible laboratories are participating in the program, a 5 U.S.C. comparison group will be compiled from the Civilian Personnel Data File (CPDF). This comparison group will consist of workforce data from Government-wide research organizations in civilian Federal agencies with missions and job series matching those in the DoD laboratories. This comparison group will be used primarily in the analysis of pay banding costs and turnover rates.

D. Method of Data Collection

Data from several sources will be used in the evaluation. Information from existing management information systems and from personnel office records will be supplemented with perceptual survey data from employees to assess the effectiveness and perception of the project. The multiple sources of data collection will provide a more complete picture as to how the interventions are working. The information gathered from one source will serve to validate information obtained through another source. In so doing, the confidence of overall findings will be strengthened as the different collection methods substantiate each other.

Both quantitative and qualitative data will be used when evaluating outcomes. The following data will be collected:

(1) Workforce data;
(2) Personnel office data;
(3) Employee attitude surveys;
(4) Focus group data;
(5) Local site historian logs and implementation information;
(6) Customer satisfaction surveys; and
(7) Core measures of organizational performance.

The evaluation effort will consist of two phases, formative and summative evaluation, covering at least five years to permit inter- and intra-organizational estimates of effectiveness. The formative evaluation phase will include baseline data collection and analysis, implementation evaluation, and interim assessments. The formal reports and interim assessments will provide information on the accuracy of project operation, and current information on impact of the project on veterans and protected groups, Merit System Principles, and Prohibited Personnel Practices. The summative evaluation will focus on an overall assessment of project outcomes after five years. The final report will provide information on how well the HR system changes achieved the desired goals, which interventions were most effective, and whether the results can be generalized to other Federal installations.

IX. Demonstration Project Costs

A. Cost Discipline

An objective of the demonstration project is to ensure in-house cost discipline. A baseline will be established at the start of the project and labor expenditures will be tracked yearly. Implementation costs (including project development, automation costs, step buy-in costs, and evaluation costs) are considered one-time costs and will not be included in the cost discipline.

The CNR or designee will track personnel cost changes and recommend adjustments if required to achieve the objective of cost discipline.

B. Implementation Costs

Current cost estimates associated with implementing the ONR demonstration project are shown in Figure 11. These include automation of systems such as the CCSDS, training, and project evaluation. The automation and training costs are startup costs. Transition costs are one-time costs. Costs for project evaluation will be ongoing for at least five years.

Figure 11. Projected Implementation Costs (Then Year Dollars)*

	FY 10	FY 11	FY 12	FY 13	FY 14
Training	$200K	$200K	$56K	$25K	$25K
Project Evaluation	$100K	$50K	$100K	$50K	$100K
Automation	$97K	$25K	$25K	$25K	$25K
Transition	$0	$500K	$0	$0	$0
TOTALS	$397K	$775K	$181K	$100K	$150K

X. Automation Support

A. General

One of the major goals of the demonstration project is to streamline the personnel processes to increase cost effectiveness. Automation must play an integral role in achieving that goal. Without the necessary automation to support the interventions proposed for the demonstration project, optimal cost benefit cannot be realized. In addition, adequate information to support decision-making must be available to managers if line management is to assume greater authority and responsibility for human resources management.

Automation to support the demonstration project is required at two distinct levels. At the DON and DoD level, automation support [in the form of changes to the DCPDS] is required to facilitate processing and reporting of demonstration project personnel actions. At the ONR level, automation support (in the form of local processing applications) is required to facilitate management processes and decision-making.

B. Defense Civilian Personnel Data System (DCPDS)

ONR will continue to use the Defense Civilian Personnel Data System (DCPDS) for the processing of personnel-related data. Efforts have been made to minimize changes to DCPDS; and, therefore, the resources required to make the necessary changes. The following is a compendium of the proposed DCPDS modifications. The detailed specifications for required changes to DCPDS will be provided in the System Change Request (SCR), Form 804.

C. Requirements Document Writer (RDWriter)

The RDWriter application is a DoD system which will require modification to accommodate the interventions in this demonstration project. Specifically, there will be an RD that will replace the position description in the basic application; career tracks and pay bands will replace GS grades; and a CCS Assessment Summary that will replace performance elements.

D. RIF Support System (RIFSS)

ONR expects to adopt an existing RIF support system or pursue automation of the RIF process, as appropriate. Under the demonstration project, RIF rules will be modified to increase the credit for contributions and limit the rounds of competition. The AutoRIF application, developed by DoD, could be used if it were modified to accommodate these process changes.

E. Contribution-based Compensation System Data System (CCSDC)

This automated system is required as an internal control and as a mechanism to equate contribution scores to appropriate rates of basic pay. This system will allow pay pool managers to develop a spreadsheet that will assist them in determining an appropriate merit increase or contribution award or both based on the overall contribution score for each individual. It will also be used as an internal control to ensure that the permanent and nonpermanent money allotted to each pay pool is not exceeded. It will further allow pay pool managers to visualize the effects of giving large basic pay increases or awards to high contributors, and the effects of withholding either the general or merit increase or both of those who are low contributors, or in the overcompensated range.

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Appendix A. Summary of Demonstration Project Features Adopted by ONR

ONR Demonstration Project Features (ONR FR Section)	Modification	Originating Lab Demo	Originating FR Notice Reference
Flexibilities			
Hiring Authority (Section III.A.-C.)	• No substantive changes made.	NRL	Pages 33981-33982 Section III.A-C.
Noncitizen Hiring (Section III.D.)	• No substantive changes made.	NRL	Page33982 Section III.D.
Expanded Detail Authority (Section III.E)	• No substantive changes made.	NRL	Page 33982 Section III.E.
Extended Probationary Period for New Employees (Section III.F)	• No substantive changes made.	NRL	Page 33982 Section III.F.
Definitions (Section III.G)	• No substantive changes made.	NRL	Page 33982 - 33983 Section III.G.
Pay Setting Determinations Outside CCS (Section III.H.)	• Added procedures for Restoration to Duty for deployed individuals.	NRL	Page 33983 - 33984 Section III.H.
Pay Setting Determinations Outside CCS – Supervisory Pay Adjustments and Differentials (Section III.H.2.l-m)	• Removed stipulation that differentials could only be given if supervisor was in the same pay band as subordinates.	CERDEC	Page 54885 - 54886 Section III.D.7-8.
Priority Placement Program (Section III.I)	• No substantive changes made.	NRL	Page 33984 Section III.I.
Expanded Temporary Promotion (Section III.J.)	• No substantive changes made.	NRL	Page 33984 Section III.J.

ONR Demonstration Project Features (ONR FR Section)	Modification	Originating Lab Demo	Originating FR Notice Reference
Voluntary Emeritus Program (Section III.K.)	• Expanded eligibility for the Voluntary Emeritus Program to all retired employees, not just engineers and scientists.	AMRDEC	Page 34889 Section III.D.2.
Position Classification (Section IV.A.)	• Adopting 3 of NRL's 4 career tracks/pay plans • ONR chooses not to adopt the Science & Engineering Technical career track because the types of positions that fall into this career track do not exist at ONR.	NRL	Pages 33984 – 33989 Section IV.A.
Integrated Pay Schedule (Section IV.B.)	• The ASARE designations will not be adopted but instead will be rolled into the new above GS-15 levels initiative to be established by DoD. • Position management methods established by the new DoD above GS-15 level initiative, rather than the DoD 40-position limit.	NRL	Pages 33989 – 33991 Section IV.B.
Contribution-based Compensation System (CCS) (Section IV.C.)	• Revised critical elements to ensure applicability to ONR personnel and also referred to as contribution elements by ONR. • Described a more general approach for in annual budgeting for merit increases, to provide greater flexibility in establishing and amending internal procedures. • Clarified the use of merit increase funds during each payout cycle; funds may not be carried over to the next payout cycle	NRL	Page 33991 - 34001 Section IV.C.
Performance-based Reduction-in-Pay or Removal Actions (Section V.A.)	• No substantive changes made.	NRL	Page 34001 Section V.A.

ONR Demonstration Project Features (ONR FR Section)	Modification	Originating Lab Demo	Originating FR Notice Reference
Reduction-in-Force (RIF) Procedures (Section V.B.)	• Amended the CCS RIF assessment categories • Added a definition for Competition in RIF so employees released from retention level will have the right to be assigned to another position within the same career track/level, or retreat to a previously held position.	NRL	Page 34001 Section.V.B.
Administrative Procedures			
Initial Conversion or Movement to the Demonstration Project (Section VI.A. – all sections with the exception of 4)	• Added procedures for converting employees who are on Temporary Promotions • Clarified procedures for non-competitive movement into the demonstration project (e.g., lateral transfer, reassignment, realignment).	NRL	Page 34003 Section VI.A.
Initial Conversion or Movement to the Demonstration Project – Career Promotion Eligibility (Section VI.A.4)	• Added provision for employees whose target career promotion would place them in a higher pay band and who are eligible for promotion within 12 months of conversion.	MRMC	Page 10454 Section V.d.
CCS Startup (Section VI.B.)	• No substantive changes made.	NRL	Page 34003 Section VI.B.
Training (Section VI.C.)	• No substantive changes made.	NRL	Page 34004 Section VI.C.
New Hires into the Demonstration Project (Section VI.D.)	• Added provision to provide personnel demonstration project training to new hires.	NRL	Page 34004 Section VI.D.
Conversion or Movement from the Demonstration Project (Section VII.E.)	• Clarified procedures for setting pay for employees whose basic pay exceeds the maximum basic pay of the highest GS grade for their pay band.	NRL	Page 34004-34005 Section VI.E.
Demonstration Project Duration (Section VII)	• No substantive changes made.	NRL	Page 34005 Section VII.

ONR Demonstration Project Features (ONR FR Section)	Modification	Originating Lab Demo	Originating FR Notice Reference
Demonstration Project Evaluation Plan (Section VIII.)	• Used standard STRL evaluation language provided by DoD; which is virtually identical to NRL's original section.	NRL	Page 34005-34007 Section VIII.
Cost Containment and Controls (Section IX.)	• Described a more general approach to cost discipline, to enable ONR to develop internal procedures and make modifications over time, as needed.	NRL	Page 34007-34008 Section IX.
Automation Support (Section X.)	• No substantive changes made.	NRL	Page 34008 Section X.

Appendix B: Required Waivers to Laws and Regulations

In adopting flexibilities without changes from other STRL Demonstration Projects, ONR also adopts the associated waivers as published in the **Federal Register** Notices of the applicable organizations. Additional waivers, specified below, are required to enact ONR's proposed modifications to adopted flexibilities.

Waivers of Law and Regulation

Title V, United States Code	Title 5, Code of Federal Regulations
Chapter 31, subchapter 1, section 3111- Acceptance of Volunteer Service. Waive to the extent that the acceptance of retired or separated engineers and scientists are included as volunteers under current statute.	Part 308, sections 308.101-308.103. – Volunteer Service. Waive to the extent that the acceptance of retired or separated engineers and scientists are included as volunteers under current statute.
	Part 300, Subpart F, sections 300.601 to 300.605 – Time-in-grade Restrictions. Waive in entirety. Part 315, subpart H, section 315.801(a) – Career and Career-conditional Employment, Probationary Period Information. Waive to allow for the first three years to be the probationary period. Part 315, subpart H, section 315.802 – Length of Probationary Period Waive to allow probationary period to be extended to three years.
	Part 316, subpart C, section 316.304(a) – Trial Period. Waive to the extent necessary to allow for up to a three-year trial period.
Chapter 33, subchapter 1, section 3318(a) – Competitive Service; Selection from Certificate. Waive.	Part 332, subpart D, section 332.404 – Order of Section of Certificates. Waive in entirety.
	Part 335, subpart A, section 335.103(c)(I), (ii) – Agency Promotion Program. Waive to allow temporary promotions and details to a higher level position without competition. Part 335, subpart A, section 335.104 – Eligibility for Career Ladder Promotion. Waive in entirety. Part 337, subpart A, section 337.101(a) – Rating Applicants. Waive when 15 or fewer qualified candidates.

Title V, United States Code	Title 5, Code of Federal Regulations
Chapter 33, subchapter III, section 3341(b) Details – Within Executive or Military Departments. Waive in entirety.	
	Part 351, subpart G, section 351.701 – Assignment Involving Displacement. (a) Waive to allow minimally successful or equivalent to be defined as an employee whose current CCS RIF Assessment Category score is 12 or better and does not have a current written notification of unacceptable performance. (b) and (c) Assignment rights (bump and retreat). Waive to the extent that the distinction between bump and retreat is eliminated and to allow displacement to be limited to the employee's current career track and pay band or, if there are no displacement rights in the employee's current pay band, to any position previously held in the next lower pay band regardless of career track. Preference eligibles may displace up to the equivalent of 3 grades or intervals below the highest equivalent grade of their current pay band in the same or different career track regardless of whether they previously held the position provided they are fully qualified or the position and the position is occupied by an employee with a lower retention standing. Preference eligibles with a compensable service connected disability of 30 percent or more may displace an additional 2 GS grades or intervals (total of 5 grades) below the highest equivalent grade of their current pay band provided they previously held the position and the position is occupied by an employee in the same subgroup with a later RIF service computation date. (d) Limitation. Waive. (e)(I) Waive

Title V, United States Code	Title 5, Code of Federal Regulations
	Part 430, subpart B, section 430.207(b) – Waive to the extent this section requires one or more progress reviews during each appraisal period. Part 430, subpart B, section 430.210 – OPM Responsibilities. Waive in entirety.
	Part 430, subpart B, sections 430.208(a) (1) and (2) – Rating Performance. Waive to allow employees who serve less than 90 days during an appraisal cycle to receive a presumptive performance rating of Acceptable.
Chapter 43, subchapter I, section 4303 – Actions Based on Unacceptable Performance. Waive to allow coverage of "reduction in pay level based on unacceptable performance." Waive to exclude from coverage (procedural and appeal rights) reductions in pay band with no reduction in pay, when such actions result from regression of pay into a lower pay band through reductions and denials of general increase ("slippage"). This exclusion will not apply to employees with veterans' preference. Chapter 43, subpart I, section 4303(f)(3) – Waive to allow exclusion of employees in the excepted service who have not completed a trial period, except those with veterans' preference. Chapter 43, subchapter I, section 4304(b) (1) and (3) – Responsibilities of OPM. Waive in entirety.	Part 432, section 432.101 to 432.107 – Performance Reduction in Grade and Removal Actions. Waive to allow coverage of "reduction in pay level based on unacceptable performance." Waive to exclude from coverage (procedural and appeal rights) reduction in pay band with no reduction in pay, when such action results from regression of pay into a lower pay band through reductions and denials of general increase ("slippage"). This exclusion will not apply to employees with veterans' preference.
Chapter 45, subchapter I, section 4502(a) and (b) – Waive to permit ONR to approve awards up to $25,000 for individual employees.	Part 451, subpart A, section 451.103(c)(2) – Waive with respect to contribution awards under the ONR CCS. Part 451, subpart A, sections 451.106(b) and 451.107(b) – Waive to permit ONR to approve awards up to $25,000 for individual employees.

Title V, United States Code	Title 5, Code of Federal Regulations
Chapter 51, sections 5101 to 5113 – Classification. Waive in entirety except section 5104 to the extent needed to permit classification of pay bands and CCS descriptors into logically defined level groupings.	Part 511 – Classification Under the GS. Waive in entirety with an exception for appeal rights and time constraints under subpart F, section 511.603, 604, and 605.
Chapter 52, subpart I, section 5301 – Pay Policy. Waive in entirety. Chapter 53, subchapter I, section 5302(8) and (9) – Pay Definition and section 5304 – Locality-Based Comparability Payments. Waive to the extent necessary to allow demonstration project employees to be treated as GS employees and basic rates of pay under the demonstration project to be treated as scheduled rates of basic pay. Employees in Pay Band V for the S&E Professional Track to be treated as ST employees for the purposes of these provisions. Chapter 53, subchapter I, section 5303 – Annual Adjustments to Pay Schedules. Waive in entirety. Chapter 53, subpart I, section 5303 – Special Pay Authority. Waive in entirety.	
Chapter 53, subchapter III, sections 5331 to 5336 – GS Pay Rates. Waive in entirety.	Part 520, subpart C – Specialty Salary Rate Schedules. Waive in entirety. Part 531, subpart B – Determining Rate of Basic Pay. Waive in entirety. Part 531, subpart D – Within Grade Increases. Waive in entirety. Part 531, subpart E – Quality Step Increases. Waive in entirety. Part 531, subpart F – Locality-Based

Title V, United States Code	Title 5, Code of Federal Regulations
	Comparability Payments. Waive to the extent necessary to allow the demonstration project employees to be treated as GS employees, employees in Pay Band V of the S&E Professional Career to be treated as ST employees, and basic rates of pay under the demonstration project to be treated as scheduled annual rates of pay.
Chapter 53, subchapter VI, sections 5361 to 5366 – Grade and Pay Retention. Waive to entirety.	Part 536 – Grade and Pay Retention. Waive in entirety.
Chapter 55, section 5455 (d) – Hazardous Duty Differential. Waive to the extent necessary to allow demonstration project employees to be treated as GS employees. This waiver does not apply to employees in Pay Band V of the S&E Professional Career Track.	Part 550, subpart G – Severance Pay. Waive to the extent necessary to allow ONR to define reasonable offer. Part 550, subpart I – Pay for Duty Involving Physical Hardship or Hazard. Waive to the extent necessary to allow demonstration project employees to be treated as GS employees. This waiver does not apply to employees in Pay Band V of the S&E Professional Career Track.
Chapter 57, subchapter IV, section 5753 to 5755 – Recruitment and Relocation Bonuses, Retention Allowances, and Supervisory Differential. Waive to the extent necessary to allow (1) employees and positions under the demonstration project to be treated as employees and positions under the GS and (2) employees in Level V of the S&E Professional career track to be treated as ST employees for these purposes.	Part 575, subparts A, B, C, and D – Recruitment and Relocation Bonuses, Retention Allowances, and Supervisory Differential, Waive to the extent necessary to allow (1) employees and positions under the demonstration project to be treated as employees and positions under the GS and (2) employees in Level V of the S&E Professional career track to be treated as ST employees for these purposes. Subpart D is waived in its entirety.
Chapter 59, subchapter III, section 5924 – Cost-of-living Allowances. Waive to the extent necessary to provide that COLA's paid to employees under the demonstration project are paid in accordance with regulations prescribed by the President (as delegated to OPM).	Part 591, subpart B – Cost-of-living Allowances and Post Differential – non-foreign areas. Waive to the extent necessary to allow demonstration project employees to be treated as GS employees and employees in Pay Band V of the S&E Professional Career Track to be treated as ST employees.
Chapter 75, subchapter II, section 7511	

Title V, United States Code	Title 5, Code of Federal Regulations
(a)(I)(A)(ii) – Removal Suspension for More Than 14 Days, Reduction in Grade or Pay, or Furlough. Waive except for employees with veterans' preferences to allow for a three-year probationary period. 7511(a)(I)(C)(ii) – Waive.	
Chapter 75, subchapter II, section 7512 – Adverse Actions. Waive to replace "grade" with "pay band", provide that adverse action provision do not apply to conversion from General Schedule special rates to demonstration project pay, as long as total pay is not reduced; and exclude from coverage (procedural and appeal rights) reductions in pay band with no reduction in pay, when such actions result from regression of pay into a lower pay band through reductions or denials of general increase ("slippage"). This exclusion will not apply to employees with veterans' preference.	Part 572, subpart A – Adverse Actions, Waive to exclude from coverage (procedural and appeal rights) reductions in pay band with no reduction in pay, when such actions result from regression of pay into a lower pay band through reductions and denials of general increase ("slippage"). This exclusion will not apply to employees with veterans' preference. Part 572, section 752.401(a)(3) – Adverse Actions. Waive to replace "grade" with "pay band." Part 572, section 752.401(a)(4) – Adverse Actions. Waive to provide that adverse action provision do not apply to conversion from General Schedule special rates to demonstration project pay, as long as total pay is not reduced.
	Part 351, subpart B, section 351.403(a) Competitive Level. Waive to allow establishing competitive levels consisting of all positions in a competitive area, which are in the same pay band level and career track, and which are similar enough in duties, qualifications, and requirements, including any selective placement factors, pay schedules, and working conditions so that the incumbent of one position may be reassigned to any other position in the level without undue interruption. Part 351, subpart E, section 351.504 - Performance Credit for RIF. Waive in entirety.

Title V, United States Code	Title 5, Code of Federal Regulations
Chapter 75, section 7512(4): Adverse actions. Waived to the extent necessary to provide that adverse action provisions do not apply to: 1) reductions in pay due to the removal of a supervisory pay adjustment upon voluntary movement to a non-supervisory position; and 2) reduction in supervisory pay due to a performance review.	Part 752, section 752.401(a)(4): Coverage. Waived to the extent necessary to provide that adverse action provisions do not apply to: reductions in pay due to the removal of a supervisory pay adjustment upon voluntary movement to a non-supervisory position or decreases in the amount of a supervisory pay adjustment based on the annual review.

Appendix C: Definitions of Career Tracks and Pay Bands

ONR's pay band definitions may be modified as experience is gained through their application in classification actions and performance appraisal.

Career Track: S&E Professional – Includes professional positions in S&E occupations such as physics, electronics engineering, chemistry, and student positions associated with these professions.	
Pay Band I	This includes student trainees. The education and employment must be part of a formal student employment program. Specific, clear, and detailed instructions and supervision are given to complement education. The level of education and experience completed is a major consideration in establishing the level of on-the-job training and work assignments.
Pay Band II	This is the entry or developmental stage, preparing S&E's for the full and independent performance of their work. S&E's at this level perform supporting work in science or engineering requiring professional training but little experience, and conduct activities with objectives and priorities identified by supervisor or team leader. Assistance is given on new or unusual projects; completed work is reviewed for technical soundness.
Pay Band III	This is the advanced developmental pay band of this career track. S&Es at this level conceive and define solutions to technical problems of moderate complexity; plan, analyze, interpret, and report findings of projects; and guide technical and programmatic work of a program's research efforts. Completed work and reports are reviewed to evaluate overall results.
Pay Band IV	S&E's at this level are authorities within their professional areas or key program administrators. They direct technical activities or assist higher levels on challenging and innovative projects or technical program development with only general guidance on policy, resources and planning; develop solutions to complex problems requiring various disciplines; responsible for fulfilling program objectives.
Pay Band V	S&Es at this level are renowned experts in their fields. They independently define and lead most challenging technical programs consistent with general guidance and/or independently direct overall R&D program managerial and/or supervisory aspects; conceive and develop elegant solutions to very difficult problems requiring highly specialized areas of technical expertise; are recognized within DoD and other agencies for broad technical area expertise and have established professional reputation in technical community nationally and internationally. The primary requirement for Level V positions is the knowledge of and expertise in specific scientific and technology areas related to the mission of their organization. However, the ability to manage and/or supervise R&D operations or programs is also considered a necessity. They may direct the work of an organizational unit; may be held accountable for the success of one or more specific programs or projects; monitor progress toward organizational goals and periodically evaluate and make appropriate adjustments to such goals; supervise the work of employees; or otherwise exercise important policy-making, policy-determining, or other managerial functions.

Career Track: Administrative Specialist and Professional – Professional and specialist positions in areas such as the following: safety and health, personnel, finance, budget, procurement, librarianship, legal, business, facilities management and student positions associated with these professions.	
Pay Band I	Includes student trainees. The education and employment must be part of a formal student employment program. Specific, clear, and detailed instructions and supervision are given to complement education. The level of education and experience completed is a major consideration in establishing the level of on-the-job training and work assignments.
Pay Band II	This is the developmental stage preparing Administrative Specialists and Professionals for the full and independent performance of their work. Specific, clear and detailed instruction and supervision are given upon entry; recurring assignments are carried out independently. Situations not covered by instructions are referred to supervisor. Finished work is reviewed to ensure accuracy.
Pay Band III	This is the advanced developmental pay band of this career track. Employees at this level plan and carry out assignments independently, resolve conflicts that arise, coordinate work with others and interpret policy on own initiative. Completed work is reviewed for feasibility, compatibility with other work or effectiveness in meeting requirements or expected results.
Pay Band IV	At this level, Administrative Specialists and Professionals are authorities within their professional areas or key program administrators or supervisors. They conduct or direct activities in an administrative and professional area with only general guidance on policy, resources and planning; develop solutions to complex problems requiring various disciplines; and are responsible for fulfilling program objectives.
Pay Band V	Administrative Specialists and Professionals at this level are experts within their broad administrative area or professional field who serve as leaders, heads of branches or divisions, or key program administrators. They receive general guidance on policy, resources and planning that have an effect on public policies or programs; and are responsible for fulfilling program objectives. Results are authoritative and affect administrative programs or the well-being of substantial numbers of people.

Career Track: Administrative Support – Includes clerical, secretarial and assistant work in nonscientific and engineering occupations.	
Pay Band I	This includes student trainees as well as advanced entry level which requires a fundamental knowledge of a clerical or administrative field. Developmental assignments may be given which lead to duties at a higher group level. Performs repetitive tasks, specific, clear and detailed instruction and supervision; with more experience utilizes knowledge of standardized procedures and operations, assistance is given on new or unusual projects. Completed work is reviewed for technical soundness.
Pay Band II	This level requires knowledge of standardized rules, procedures or operations requiring considerable training. General guidance is received on overall objectives and resources. Completed assignments may be reviewed for overall soundness or meeting expected results.
Pay Band III	This is the senior level which requires expert knowledge of procedures and operations, which is gained through extensive training. Employees at this level receive general guidance on overall resources and objectives, and are skilled in applying knowledge of basic principles, concepts, and methodology of profession or administrative occupation and technical methods. Results are accepted as authoritative and are normally accepted without significant change.

Appendix D: Table of Occupational Series Within Career Tracks

Definitions for ONR's three career tracks are provided below along with the breakdown of their respective series. Some series may appear in two career tracks depending on the purpose of the position. The breakdown of occupational series reflects only those occupations that currently exist in ONR. Additional series may be added as a result of changes in mission requirements or OPM-recognized occupations. These additional series will be placed in the appropriate career track consistent with the definitions provided below.

S&E Professional Career Track: Includes professional positions in S&E occupations such as physics, electronics, engineering, chemistry, and student positions associated with these professions.	
0180 – Psychology Series	0855 – Electronics Engineering Series
0190 – General Anthropology Series	0861 – Aerospace Engineering Series
0401 – Gen natural Resources Management and Biological Sciences Series	0871 – Naval Architecture Series
0403 – Microbiology Series	0854 – Computer Engineering Series
0405 – Pharmacology Series	0893 – Chemical Engineering Series
0413 – Physiology Series	0896 – Industrial Engineering Series
0440 – Genetics Series	1301 – General Physical Sciences Series
0601 – General Health Science Series	1310 – Physics Series
0602 – Medical Officer Series	1313 – Geophysics Series
0801 – General Engineering Series	1320 – Chemistry Series
0806 – Materials Engineering Series	1321 – Metallurgy Series
0810 – Civil Engineering Series	1340 – Meteorology Series
0830 – Mechanical Engineering Series	1360 – Oceanography Series
0840 – Nuclear Engineering Series	1515 – Operations Research Series
0850 – Electrical Engineering Series	1520 – Mathematics Series
	1530 – Statistics Series
	1550 – Computer Science Series

Administrative Specialist and Professional Career Track: Professional and specialist positions in areas such as the following: safety and health, finance, budget, procurement, librarianship, legal, business, facilities management, and student positions associated with these professions.	
0080 – Security Administration Series	0802 – Engineering Technical Series
0110 – Economist Series	0905 – General Attorney Series
0201 – Human Resource Management Series	0950 – Paralegal Specialist Series
0260 – Equal Employment Opportunity Series	1035 – Public Affairs Series
0301 – Miscellaneous Administration and Program Series	1084 – Visual Information Series
0340 – Program Management Series	1101 – General Business and Industry Series
0341 – Administrative Officer Series	1102 – Contracting Series
0343 – Management and Program Analysis Series	1150 – Industrial Specialist Series
0391 – Telecommunications Series	1222 – Patent Attorney Series
0501 – Financial Administration and Program Series	1412 – Technical Information Services Series
0505 – Financial Management Series	1720 – Education Specialist Series
0510 – Accounting Series	1801 – General Inspection, Investigation, and Compliance Series
0560 – Budget Analysis Series	2210 – Information Technology Management

Administrative Support – Includes clerical, secretarial, and assistant work in nonscientific and engineering occupations.	
0086 – Security Clerical and Assistance Series	0335 – Computer Clerk and Assistant Series
0203 – Human Resource Assistance Series	0503 – Financial Clerical and Assistance Series
0303 – Miscellaneous Clerk and Assistant Series	0525 – Accounting Technician Series
0305 – Mail and File Series	0561 – Budget Clerical and Assistance Series
0318 – Secretary Series	0986 – Legal Assistance Series
0326 – Office Automation and Clerical Assistance Series	

Appendix E: Classification and CCS Elements

The CCS Summaries shown in this appendix are draft templates intended to provide an understanding of the information covered by the CCS process. Under the demonstration project, the summaries will be generated by the CCSDS. They may be changed during the project to require additional information, to make them easier to use, or for other reasons.

The contents of the CCS elements, descriptors, discriminators, and basic acceptable standards may similarly be changed during the life of the demonstration project.

OFFICE OF NAVAL RESEARCH
CONTRIBUTION-BASED COMPENSATION SYSTEM (CCS) SUMMARY
Science & Engineering Professional

Employee Name: Click here to enter text.	**Pay Pool Code:** Click here to enter text.	**Appraisal Period Ending:** Click here to enter text.
Title: Click here to enter text.	**Pay Plan/Series:** Click here to enter text.	**Pay Band:** Click here to enter text.
SSN: Click here to enter text.	**Supervisor:** Click here to enter text.	

Most Recent OCS: Click here to enter text. **Present Salary:** Click here to enter text.
Scores within NPR Equivalent to Present Salary: Click here to enter text.

Contribution Elements	***Weight**	**Score**	**Net Score**	**Rating of Record Acceptable or Unacceptable**
1. Scientific and Technical Leadership	Click here to enter text.	Click here to enter text.	Click here to enter text.	Click here to enter text.
2. Program Execution and Liaison	Click here to enter text.	Click here to enter text.	Click here to enter text.	Click here to enter text.
3. Cooperation and Supervision	Click here to enter text.	Click here to enter text.	Click here to enter text.	Click here to enter text.

*If zero, then element not applicable.

Basic Pay Increase %:
Click here to enter text.

Summary Rating A (Acceptable) or U (Unacceptable)
Must be U if any contribution element is rated U
Click here to enter text.

Contribution Award $:
Click here to enter text.

Overall Contribution Score (Weighted Average):
Click here to enter text.

Hours Click here to enter text.

SUPPLEMENTAL CRITERIA (OPTIONAL). FOR EXAMPLE, SPECIFIC OBJECTIVES, STANDARDS, TASKINGS, AND/OR EXAMPLES:

REMARKS:

Signatures and Date	**CCS Plan**	**Interim Review**	**Appraisal**
Employee			
Supervisor			

NOTE: Employee's signature under "CCS Plan" signifies that he or she has been given a copy of this summary and has a copy of Elements, Descriptors, Discriminators, and Standards applicable to his or her career track.

Science & Engineering Professional

ELEMENT 1. SCIENTIFIC AND TECHNICAL LEADERSHIP

		DISCRIMINATORS				
Pay Band	**Point Range**	**Planning & Scope of Impact**	**Complexity and Creativity**	**Communications and Reporting**	**Technical Credibility and Recognition**	**DESCRIPTORS**
I	0 - 21	Performs tasks specifically assigned by researcher under close supervision.	Performs tasks which are non-complex or include detailed instructions, requiring limited knowledge of subject matter.	Writes in-house documents to convey information about his/her tasks or for similar purposes as assigned.	Recognized by personnel in own unit for providing high quality support and increasing subject matter knowledge.	
II	18 - 47	Conducts in-house technical activities and/or may provide contract technical direction with guidance from supervisor or higher-level scientist or engineer.	Works closely with peers in collectively solving problems of moderate complexity, involving limited variables, precedents established in related projects, and minor adaptations to well-established methods and techniques.	Provides data & written analysis for input to scientific papers, journal articles & reports and/or assists in preparing contractual documents or reviews technical reports. Presents technical results of own work orally or in writing, within own organization or to limited external contacts. Work acknowledged in team publications.	Recognized within own organization for technical ability in assigned areas.	
III	44 - 66	Defines, leads and molds highly challenging and innovative programs consistent with general guidance. Program delivers understanding, applications or other outcomes that significantly expand the future capabilities of the Navy and Marine Corps. Individual's contributions are evident across ONR and DON, and usually outside DOD. Requires some direction and oversight.	Formulates and guides programs to address difficult problems in advancing technology and research. Efforts deliver significant new scientific and/or technical results. Works with international research community, initiating new sub-disciplines, and/or draws on multidisciplinary expertise to address critical technical challenges. Formulates strategic research objectives based on naval strategic guidance.	Effectively prepares and delivers communications at appropriate level for multiple/ various audiences. Ensures overall quality of reporting of all technical products. With minimal supervision prepares and delivers invited or contributes presentations and papers at national and international conferences on technical area.	Leads a program this is recognized nationally for its quality in an area of major importance to ONR's corporate agenda.	
IV	66 - 80	Defines, leads, and molds highly challenging and innovative programs consistent with general guidance. Program delivers understanding, applications or other outcomes that significantly expand the future capabilities of the Navy and Marine Corps. Individual's contributions are evident across ONR and DON, and usually outside DOD. Requires minimal direction and oversight.	Addresses difficult problems in advancing technology and research. Efforts deliver significant new scientific and/or technical results. Leads international research community, initiating new sub-disciplines, and/or draws on multidisciplinary expertise to address critical technical challenges. Recognizes scientific opportunities and external trends and drivers to formulate strategic research objectives.	Effectively prepares and delivers communications at appropriate level for multiple/ various audiences. Ensures overall quality of reporting of all technical products. Prepares and delivers invited or contributes presentations and papers at national and international conferences on technical area; or gives policy-level briefings.	Leads a program this is recognized nationally/ internationally for its quality in an area of major importance to ONR's corporate agenda.	
V	81 - 89	Leads a community of experts in the conceptualization and definition of major program areas that integrate a broad range of technical disciplines and specialties together with a range of anticipated Naval needs. Programs deliver understanding, applications or other outcomes that significantly expand the future capabilities of the Navy and Marine Corps. Results may drive technological trends and applications beyond DON and DOD.	Formulates and guides integrated programs that are so complex they must be subdivided into areas at least some of which have a major impact on advancing the field or are accepted as definitive of important areas of the field. Leads international research community, initiating new sub-disciplines, and/or draws on multidisciplinary expertise to address critical technical challenges that may require novel programmatic and organizational concepts. Recognizes scientific opportunities, external trends and drivers to formulate strategic research objectives.	Uses diplomacy when appropriate and effectively prepares and delivers communications, including those that may be sensitive, at appropriate level for multiple/ various audiences such that senior decision makers in DON and DOD (and beyond) are influenced to accept and endorse ONR research and technology programs. Ensures overall quality of reporting of all technical products. Prepares and delivers invited or contributes presentations and papers at national and international conferences on technical area; or gives policy-level briefings.	Leads a collection of multidisciplinary programs recognized nationally/ internationally for its quality in an area of major importance to ONR's corporate agenda and the DON. Knows the breadth of international S&T to allow command priorities to be set. Exhibits depth of S&T expertise to set standards for risk and promise.	

ACCEPTABLE PERFORMANCE STANDARDS: With minor exceptions, makes and/or meets time and budget estimates on assigned projects or takes appropriate corrective action; communications are logical, clear, complete and appropriately influence the decision process; decisions and strategies contribute to the appropriate outcome of business dealings; and work products demonstrate thorough research, completion of established objectives, adherence to instructions and guidance of supervisor and team leader, and overall high quality as deemed by supervisor or appropriate peer group.

SPECIFIC OBJECTIVES, TASKINGS, STANDARDS, AND/OR EXAMPLES MAY BE COMMUNICATED TO EMPLOYEES USING THE CCS SUMMARY OR OTHER APPROPRIATE MEANS

Science & Engineering Professional

ELEMENT 2. PROGRAM EXECUTION AND LIASION

		DISCRIMINATORS					
Pay Band	**Point Range**	**Resource Management**	**Program Assessment and Documentation**	**Stakeholder Liaison**	**Performer/ Peer Liaison**	**Teamwork**	**DESCRIPTORS**
I	0 - 21	Uses personal and assigned resources efficiently under guidance of supervisor or team leader.	Accurately reports on work progress and thoroughly documents works accomplishments.	Not applicable	Through effective collaboration within his/her team supports the achievement of project/program goals.	Provides assistance to team members consistent with his/her level of education/experience.	
II	18 - 47	Manages elements of in-house work units or assists in managing a scientific or support contract. Aware of and makes appropriate use of available resources. Uses assigned resources efficiently under guidance of supervisor or team leader.	Applies program assessment and documentation processes to effectively monitor and document program progress and results.	Not applicable	Through effective collaboration within his/her team supports the achievement of project/program goals. Written documents and oral presentations are recognized within own work unit as providing high quality support and increasing subject matter knowledge.	Contributes as a technical researcher or team member to all aspects of team's responsibilities. May technically guide or mentor technician and/or less experienced and more junior level personnel.	
III	44 - 66	Implements program plans including resource allocations (people, contracts, scheduling and funding) to ensure successful program execution. Tracks/monitors corporate business activities to ensure timely execution of program goals using all appropriate management information systems.	Implements effective processes for monitoring and assessing the quality and progress of a program's research efforts. Defines scientific/ technological objectives and metrics with minimal oversight. Maintains documentation on program performance and accomplishment.	Through effective collaboration within ONR and DON enables the achievement of project/program goals. Within scope of program responsibilities, serves as a trusted partner with the DON (acquisition, requirements and operational commands), DoD and other Federal Agencies effectively.	Actively engages with a wide variety of S&T experts in government, industry and academia to significantly increase ONR's ability to ensure wide access to diverse perspectives. Works effectively with world-class PI's, effectively translates ONR program objectives into specific S&T challenges, and guides and optimizes the number, quality and impact of S&T outputs.	Fosters successful working relationships with officials in DON, DoD and other agencies to effectively carry out integrated program work. Effectively and professionally collaborates across ONR business units and support providers to plan and execute S&T programs. Contributes to ONR diversity goals through effective liaison with university campuses and other outreach assignments.	
IV	66 - 80	Implements program plans including resource allocations (people, contracts, scheduling and funding) to ensure successful program execution, adjusting when necessary, with minimal guidance. Tracks/monitors corporate business activities to ensure timely execution of program goals using all appropriate management information systems.	Establishes and implements effective processes for monitoring and assessing the quality and progress of a program's research efforts. Independently defines scientific/ technological objectives and metrics. Maintains documentation on program performance and accomplishment.	Based on widely recognized capabilities is called upon across ONR and/or across agencies, academia, and industry to advise, consult and speak in ways that can lead to new alliances, enhance integration, and/or set new S&T directions. Serves as a trusted partner with the DON (acquisition, requirements and operational commands), DoD and other Federal Agencies effectively.	Actively engages with a wide variety of S&T experts in government, industry and academia to significantly increase ONR's ability to ensure wide access to diverse perspectives. Specifically, attracts and motivates world-class PI's, effectively translates ONR program objectives into specific S&T challenges, and guides and optimizes the number, quality and impact of S&T outputs.	Fosters successful working relationships with officials in DON, DoD and other agencies to resolve highly complex problems and to effectively carry out integrated advisory and program work. Effectively and professionally collaborates across ONR business units and support providers to properly plan and execute S&T programs. Successfully impacts ONR diversity goals by reinvigorating the S&T workforce, allocation of university funding, or developing S&T talent.	
V	81 - 89	Develops new and innovative ways to implement program plans and strategies for most effective utilization of available resources. Actively works to improve ONR's business functions to support science and technology programs.	For all programs within area of responsibility establishes and implements effective processes for monitoring and assessing quality and progress relative to program plan. Independently defines scientific/technological objectives and metrics. Maintains documentation on program performance and accomplishment.	Based on widely recognized capabilities is called upon across ONR, other government agencies, academia, and industry to advise, consult and speak in ways that can lead to new alliances, enhance integration, and/or set new S&T directions. Serves as a trusted partner with the DON (acquisition, requirements and operational commands), DoD and other Federal Agencies effectively. Advocacy leads to adoption of ONR technology and/or transition to programs of record, or the enhancement of basic and applied research in emerging areas of importance to ONR.	Employ and develop innovative techniques to identify and engage a wide variety of S&T experts in government, industry and academia to significantly increase ONR's ability to ensure wide access to diverse perspectives. Uses diplomacy appropriately when dealing with potentially sensitive communications. Specifically, attracts and motivates world-class PI's, effectively translates ONR program objectives into specific S&T challenges, and guides and optimizes the number, quality and impact of S&T outputs. Represents the quality of ONR in such a way as to serve as a recruiting attraction for S&E's seeking to work with him/her.	Fosters successful working relationships with high level officials throughout the S&T community, in DON, DoD and other agencies to resolve highly complex problems and to effectively carry out integrated policy, advisory and program work. Leads teams that effectively and professionally collaborate across ONR business units and support providers to properly plan and execute S&T programs. Successfully impacts ONR diversity goals by reinvigorating the S&T workforce, allocation of university funding, or developing S&T talent.	

ACCEPTABLE PERFORMANCE STANDARDS: With minor exceptions, makes and/or meets time and budget estimates on assigned projects or takes appropriate corrective action; communications are logical, clear, complete and appropriately influence the decision process; decisions and strategies contribute to the appropriate outcome of business dealings; and work products demonstrate thorough research, completion of established objectives, adherence to instructions and guidance of supervisor and team leader, and overall high quality as deemed by supervisor or appropriate peer group.

SPECIFIC OBJECTIVES, TASKINGS, STANDARDS, AND/OR EXAMPLES MAY BE COMMUNICATED TO EMPLOYEES USING THE CCS SUMMARY OR OTHER APPROPRIATE MEANS

Science & Engineering Professional

ELEMENT 3. COOPERATION AND SUPERVISION

		DISCRIMINATORS			
Pay Band	**Point Range**	**Organization Development**	**Performance Management**	**Workforce Development**	**DESCRIPTORS**
I	0 - 21	Not applicable	Not applicable	Not applicable	
II	18 - 47	Not applicable	Not applicable	Not applicable	
III	44 - 66	Not applicable	Not applicable	Not applicable	
IV	66 - 80	Establishes an organization, position structure, and working environment that is fully responsive to mission and program goals and that attracts and retains high performing scientists, engineers and other personnel reflecting diversity. Within organizational unit, promotes adaptation of best practices in organizational development, human resources, and enterprise management to enhance ONR's attractiveness as an employer of choice for a diverse group of top scientists, engineers, technicians and support personnel.	Establishes internal controls, performance management and incentive techniques that effectively monitor progress and achievements, and provides appropriate individual and team recognition for contributions. Provides support and resources necessary to enable high performance of workforce. Takes timely and effective action to fulfill all program and personnel administrative requirements.	Develops the workforce structure with a long-term view to encompass developing individuals, planning for succession and retirements, and recruiting to enable all work unit or team members to function optimally. Ensures continuous learning activities of workforce. Provides timely informative and responsive feedback to subordinates and successfully coaches subordinates to promote competency and professional progression. Carries out full range of supervisory duties with respect to subordinates. Identifies and resolves developmental needs and problems, completes appropriate administrative actions, complies with Safety and other regulations and policies. Adheres to EEO regulations and demonstrates a commitment to ONR's EEO objectives and goals, ensuring the workplace is free of discrimination.	
V	81 - 89	Establishes an organization, position structure, and working environment that is fully responsive to mission and program goals and that attracts and retains high performing scientists, engineers and other personnel reflecting diversity. Within the ONR S&E community, promotes adaptation of best practices in organizational development, human resources, and enterprise management to enhance ONR's attractiveness as an employer of choice for a diverse group of top scientists, engineers, technicians and support personnel.	Establishes organizational goals and objectives that encourage mission identification, promote continuous improvement, and significantly increase individual, work unit or team contributions. Leads subordinates through organizational change using collaborative and appropriate techniques that maintain a positive work environment. Takes timely and effective action to fulfill all program and personnel administrative requirements.	In the context of enhancing the Naval Research Enterprise, develops the workforce structure with a long-term view to encompass developing individuals, planning for succession and retirements, and recruiting to enable the optimal capability of Naval S&E personnel. Ensures continuous learning activities of workforce. Provides timely informative and responsive feedback to subordinates and successfully coaches subordinates to promote competency and professional progression. Carries out full range of supervisory duties with respect to subordinates. Identifies and resolves developmental needs and problems, completes appropriate administrative actions, complies with Safety and other regulations and policies. Adheres to EEO regulations and demonstrates a commitment to ONR's EEO objectives and goals, ensuring the workplace is free of discrimination.	

ACCEPTABLE PERFORMANCE STANDARDS: With minor exceptions, makes and/or meets time and budget estimates on assigned projects or takes appropriate corrective action; communications are logical, clear, complete and appropriately influence the decision process; decisions and strategies contribute to the appropriate outcome of business dealings; and work products demonstrate thorough research, completion of established objectives, adherence to instructions and guidance of supervisor and team leader, and overall high quality as deemed by supervisor or appropriate peer group. SPECIFIC OBJECTIVES, TASKINGS, STANDARDS, AND/OR EXAMPLES MAY BE COMMUNICATED TO EMPLOYEES USING THE CCS SUMMARY OR OTHER APPROPRIATE MEANS

OFFICE OF NAVAL RESEARCH
CONTRIBUTION-BASED COMPENSATION SYSTEM (CCS) SUMMARY
Administrative Specialist and Professional

Employee Name: Click here to enter text.	**Pay Pool Code:** Click here to enter text.	**Appraisal Period Ending:** Click here to enter text.
Title: Click here to enter text.	**Pay Plan/Series:** Click here to enter text.	**Pay Band:** Click here to enter text.
SSN: Click here to enter text.	**Supervisor:** Click here to enter text.	

Most Recent OCS: Click here to enter text. **Present Salary:** Click here to enter text.
Scores within NPR Equivalent to Present Salary: Click here to enter text.

Contribution Elements	*Weight	Score	Net Score	Rating of Record Acceptable or Unacceptable
1. Problem Solving and Leadership	Click here to enter text.	Click here to enter text.	Click here to enter text.	Click here to enter text.
2. Cooperation and Customer Relations	Click here to enter text.	Click here to enter text.	Click here to enter text.	Click here to enter text.
3. Supervision and Resources Management	Click here to enter text.	Click here to enter text.	Click here to enter text.	Click here to enter text.

*If zero, then element not applicable.

Basic Pay Increase %:
Click here to enter text.

Summary Rating A (Acceptable) or U (Unacceptable)
Must be U if any contribution element is rated U
Click here to enter text.

Contribution Award $:
Click here to enter text.

Overall Contribution Score (Weighted Average):
Click here to enter text.

Hours Click here to enter text.

SUPPLEMENTAL CRITERIA (OPTIONAL). FOR EXAMPLE, SPECIFIC OBJECTIVES, STANDARDS, TASKINGS, AND/OR EXAMPLES:

REMARKS:

Signatures and Date	CCS Plan	Interim Review	Appraisal
Employee			
Supervisor			

NOTE: Employee's signature under "CCS Plan" signifies that he or she has been given a copy of this summary and has a copy of Elements, Descriptors, Discriminators, and Standards applicable to his or her career track.

Administrative Specialist and Professional

ELEMENT 1: PROBLEM SOLVING AND LEADERSHIP

		DISCRIMINATORS			
Pay Band	**Point Range**	**Complexity/Scope**	**Applicability of Guidelines**	**Level of Oversight**	**DESCRIPTORS**
I (Student)	0	Applies standardized rules, procedures, and operations; and assists supervisor or other personnel in the resolution of standard or recurring problems.	Locates and selects the most appropriate guidelines and procedures from established sources.	Independently carries out assigned work following supervisor's direction.	
II	18-47	Applies knowledge to analyze and resolve problems which are difficult but for which there are established patterns and methods for solution.	Uses judgment in selecting, interpreting, and adapting guidelines which are available but not completely applicable, or which have gaps in specificity.	Consults with supervisor to develop deadlines, priorities and overall objectives. Completed work is evaluated for technical soundness, appropriateness, and conformity to policy and requirements.	
III	44-59	Applies expertise to analyze and resolve challenging and complex issues and/or problems. Participates as an effective team member and provides competent technical or subject matter expertise. Includes refinement of methods or development of new ones.	Uses initiative and resourcefulness in interpreting and applying policies, precedents, and guidelines which are applicable but are scarce, conflicting, of limited use, or slated only in general terms.	Independently plans and carries out work, based on guidelines and precedents and supervisor's definition of objectives, priorities, and deadlines. Completed work is evaluated for technical soundness, appropriateness, and conformity to policy and requirements.	
IV	59-66	Identifies and resolves challenging and complex problems involving multiple disciplines or subject matter areas within a business management functional area. Participates as an active and integral part of a team, serving as technical/subject matter expert. Results impact work products, schedules, and tasks of the Division/Department and its customers.	Uses initiative and resourcefulness in interpreting guidelines, in deviating from traditional methods or researching trends and patterns to develop new methods, criteria, or propose new policies. Uses considerable judgment and originality in developing innovative approaches to define and resolve complex situations.	Supervisor outlines overall objectives. Employee then independently plans and carries out the work. Complex issues are resolved without reference to supervisor except for matters of a policy nature. Results of work are considered technically authoritative and are normally accepted without significant changes.	
V	66-80	Initiates or leads ONR-wide activities to address ONR/Navy business management requirements or issues; results have far reaching and direct impact on the mission and programs of ONR and/or Navy/DoD and government.	Guidelines are broadly stated and non-specific. Applies considerable judgment and ingenuity in interpreting guidelines that do exist. Develops and applies effective business management concepts, approaches, techniques, or hypotheses to resolve highly complex business management issues.	Independently plans, designs, and carries out functional area requirements such that overall objectives are met. Supervisor provides only broadly defined missions and functions. Results of work are considered technically authoritative and are normally accepted without changes.	

ACCEPTABLE PERFORMANCE STANDARDS: With minor exceptions, work is performed in a timely, efficient, and cooperative manner; and work products demonstrate completion of established objectives for the assignment, adherence to instructions and guidance of supervisor and team leader, and acceptable quality as deemed by supervisor.

SPECIFIC OBJECTIVES, TASKINGS, STANDARDS, AND/OR EXAMPLES MAY BE COMMUNICATED TO EMPLOYEES USING THE CCS SUMMARY OR OTHER APPROPRIATE MEANS

Administrative Specialist and Professional

ELEMENT 2: COOPERATION AND CUSTOMER RELATIONS

		DISCRIMINATORS			
Pay Band	**Point Range**	**Cooperation**	**Level and Purpose of Customer Interactions**	**Effectiveness in Developing and Executing Customer-Oriented Support Services**	**DESCRIPTORS**
I (Student)	0	Develops and maintains successful working relationships with colleagues and customers to effectively carry out assigned work.	Interacts with customers to carry out requests within area of responsibility; refers deviations or non-recurring problems to appropriate personnel.	Carries out services in a manner which fosters customer satisfaction and confidence in employee's organization.	
II	18-47	Seeks, builds, and nurtures collaborative relationships with customers and colleagues to improve customer service.	Interacts with customers to understand customer needs, communicate information and coordinate actions; independently carries out actions or refers to appropriate personnel.	Contributes ideas for improvement of established services based on knowledge and an understanding of customer needs.	
III	44-59	Seeks, builds, and nurtures collaborative relationships with customers and colleagues in other business management functional areas to improve customer service.	Works jointly with customers to define and understand customer needs or requirements and solve difficult customer problems. Develops and carries out strategies, techniques, or process for solving customer problems and meeting needs.	Generates ideas and/or strategies for the development and implementation of new and improved programs or services applicable to a specific administrative or technical functional area serving customers, or to a range of programs serving customers at division-wide level. OR effectively carries out and maintains such programs and services at high level of customer awareness and satisfaction.	
IV	59-66	Leads and facilitates the development and maintenance of collaborative relationships with customer organizations across ONR functional and organizational areas to improve customer service.	Works jointly with customers to define complex or controversial problems or program needs; develops and carries out unique strategies, techniques, or criteria for resolving problems and meeting needs.	Generates key ideas and/or strategies for development and implementation of complex new and improved programs or services which affect a broad administrative or functional area serving ONR's customers; AND effectively carries out and maintains such programs and services at a high level of customer awareness and satisfaction.	
V	66-80	Fosters successful working relationships with high-level officials both inside and outside ONR, thereby enhancing ONR's ability to meet organizational goals. Seeks and builds coalitions with other support organizations to establish integrated approaches to meeting ONR's needs. Sets and maintains, throughout own organization, a tone of cooperation, cohesion, and teamwork.	Works at senior executive level to understand political, fiscal, and other factors affecting customer and program needs; to develop and establish concepts, theories, or programs to meet service needs or resolve unyielding problems. Negotiates and resolves conflicts among senior managers regarding activity-wide policy decisions.	Generates strategic objectives and plans for development and implementation of broadly-based programs and services to meet ONR's needs. Ensures overall effectiveness and customer-oriented focus of programs and services.	

ACCEPTABLE PERFORMANCE STANDARDS: With minor exceptions, work is performed in a timely, efficient, and cooperative manner; and work products demonstrate completion of established objectives for the assignment, adherence to instructions and guidance of supervisor and team leader, and acceptable quality as deemed by supervisor.

SPECIFIC OBJECTIVES, TASKINGS, STANDARDS, AND/OR EXAMPLES MAY BE COMMUNICATED TO EMPLOYEES USING THE CCS SUMMARY OR OTHER APPROPRIATE MEANS

Administrative Specialist and Professional

ELEMENT 3: SUPERVISION AND RESOURCES MANAGEMENT

		DISCRIMINATORS		
Pay Band	**Point Range**	**Resources Management: Size and Complexity of Area of Responsibility; Level of Efficiency, Creativity, and Initiative**	**Supervision and Subordinate Development (consider only if employee is a supervisor)**	**DESCRIPTORS**
I (Student)	0	Uses personal and assigned resources efficiently under guidance of supervisor. Contributes ideas for streamlining procedures or for more efficiently using resources.	Not applicable.	
II	18-47	Generates ideas for effectively streamlining handling of projects or programs which are difficult but for which there are established guidelines, patterns, or methods for solution. This streamlining results in savings of time, money, and administrative burden for organization or customer; AND/OR maintains an organization/program already so streamlined.	Not applicable.	
III	44-59	Generates ideas for effectively streamlining handling of moderately complex projects or programs involving analysis and resolution of issues or problems which result in savings of time, money, and administrative burden for organization or customer; AND/OR maintains an organization/program already so streamlined.	Not applicable.	
IV	59-66	Generates and implements ideas for effectively streamlining handling of complex or controversial projects or programs involving analysis and resolution of issues or problems which result in savings of time, money, and administrative burden for organization or customer; AND maintains an organization/program already so streamlined.	Carries out full range of supervisory duties with respect to lower level staff including one or more subordinate professionals. Identifies and resolves developmental needs and problems, completes appropriate administrative actions, complies with Safety and other regulations and policies. Nurtures and maintains an organization and working environment that is effective in accomplishing its assigned goals and function. Adheres to EEO regulations and demonstrates a commitment to ONR's EEO objectives and goals, ensuring the workplace is free of discrimination	
V	66-80	Defines near-term through to long-range asset requirements (e.g., people, funding, equipment) needed to meet ONR business management objectives and devises innovative, effective strategies for acquiring long-term assets for dramatically improving asset utilization in a way that meets strategic goals. Defines and monitors broad (corporate) metrics for measuring business management success in meeting ONR goals and DON needs; integrates new information technologies or business practices to achieve major enhancements in efficiency and effectiveness of business management performance, assessment, and documentation.	Establishes the overall infrastructure necessary for achieving mission goals. Successfully mentors the career growth, assignment, and full utilization of top business management leaders and professionals, whose continuing achievements sustain or advance Navy and government business management policies and practices. Carries out full range of supervisory duties with respect to subordinates. Identifies and resolves developmental needs and problems, completes appropriate administrative actions, complies with Safety and other regulations and policies. Adheres to EEO regulations and demonstrates a commitment to ONR's EEO objectives and goals, ensuring the workplace is free of discrimination. Provides leadership in developing, implementing, evaluating and improving processes for enhancing performance of subordinates.	

ACCEPTABLE PERFORMANCE STANDARDS: With minor exceptions, work is performed in a timely, efficient, and cooperative manner; and work products demonstrate completion of established objectives for the assignment, adherence to instructions and guidance of supervisor and team leader, and acceptable quality as deemed by supervisor.

SPECIFIC OBJECTIVES, TASKINGS, STANDARDS, AND/OR EXAMPLES MAY BE COMMUNICATED TO EMPLOYEES USING THE CCS SUMMARY OR OTHER APPROPRIATE MEANS

OFFICE OF NAVAL RESEARCH
CONTRIBUTION-BASED COMPENSATION SYSTEM (CCS) SUMMARY
Administrative Support

Employee Name: Click here to enter text.	**Pay Pool Code:** Click here to enter text.	**Appraisal Period Ending:** Click here to enter text.
Title: Click here to enter text.	**Pay Plan/Series:** Click here to enter text.	**Pay Band:** Click here to enter text.
SSN: Click here to enter text.	**Supervisor:** Click here to enter text.	

Most Recent OCS: Click here to enter text. **Present Salary:** Click here to enter text.
Scores within NPR Equivalent to Present Salary: Click here to enter text.

Contribution Elements	*Weight	Score	Net Score	Rating of Record Acceptable or Unacceptable
1. Problem Solving	Click here to enter text.	Click here to enter text.	Click here to enter text.	Click here to enter text.
2. Cooperation/Customer Relations/Supervision	Click here to enter text.	Click here to enter text.	Click here to enter text.	Click here to enter text.

*If zero, then element not applicable.

Basic Pay Increase %:
Click here to enter text.

Summary Rating A (Acceptable) or U (Unacceptable)
Must be U if any contribution element is rated U
Click here to enter text.

Contribution Award $:
Click here to enter text.

Overall Contribution Score (Weighted Average):
Click here to enter text.

Hours Click here to enter text.

SUPPLEMENTAL CRITERIA (OPTIONAL). FOR EXAMPLE, SPECIFIC OBJECTIVES, STANDARDS, TASKINGS, AND/OR EXAMPLES:

REMARKS:

Signatures and Date	CCS Plan	Interim Review	Appraisal
Employee			
Supervisor			

NOTE: Employee's signature under "CCS Plan" signifies that he or she has been given a copy of this summary and has a copy of Elements, Descriptors, Discriminators, and Standards applicable to his or her career track.

Administrative Support

ELEMENT 1: PROBLEM SOLVING

		DISCRIMINATORS		
Pay Band	**Point Range**	**Complexity**	**Level of Oversight/Applicability of Guidelines**	**DESCRIPTORS**
I	0 - 21	Performs clerical or technical work involving application of a body of standardized rules, procedures or operations to resolve a full range of standard or recurring clerical/technical problems in a professional and cooperative manner.	Independently carries out recurring and non-complex work, following supervisor's direction regarding work to be done, priorities, and specific procedures/guidelines to be followed. Locates/selects the most appropriate guidelines and procedures from established sources; makes minor deviations applicable to specific cases.	
II	18 - 35	Performs clerical or technical work involving application of an extensive body of rules, procedures or operations to resolve a wide-variety of interrelated or nonstandard problems in a professional and cooperative manner.	Independently plans and carries out steps required to complete assignments; handles problems/deviations. Supervisor defines objectives, overall priorities and deadlines. Selects, interprets & applies guidelines which are available but not completely applicable or have gaps in specificity.	
III	31 - 47	Performs clerical or technical work involving: - application of principles, concepts and methodologies of a professional/administrative occupation to accomplishment of particularly challenging assignments, operations or procedures; or application of a wide range of highly technical principles, processes and methods, including refinement of methods or development of difficult but well precedence projects. All work is performed in a in a professional and cooperative manner.	Independently determines the approach and methodology used to accomplish work, plans and carries out work and resolves related conflicts. Supervisor sets overall objectives, broad priorities and resources available. Applies considerable judgment and analysis in selecting, interpreting and applying guidelines which are available but not completely applicable or have gaps in specificity.	

ACCEPTABLE PERFORMANCE STANDARDS: With minor exceptions, work is performed in a timely, efficient, and cooperative manner; and work products demonstrate completion of established objectives for the assignment, adherence to instructions and guidance of supervisor and team leader, and acceptable quality as deemed by supervisor.

SPECIFIC OBJECTIVES, TASKINGS, STANDARDS, AND/OR EXAMPLES MAY BE COMMUNICATED TO EMPLOYEES USING THE CCS SUMMARY OR OTHER APPROPRIATE MEANS

Administrative Support

ELEMENT 2: COOPERATION/CUSTOMER RELATIONS/SUPERVISION

DISCRIMINATORS					
Pay Band	**Point Range**	**Supervision and Subordinate Development (consider only if employee is a supervisor)**	**Cooperation**	**Customer Relations**	**DESCRIPTORS**
I	0 - 21	Not applicable	Interacts under established circumstances to obtain or give factual information within the immediate organization, office, project, or in related support units.	Independently carries out customer requests within area of responsibility or refers to other appropriate personnel.	
II	18 - 35	Not applicable	Initiates/engages in/facilitates cooperative interactions with others inside and outside to: coordinate joint actions, work out problems between own group and others, or gain understanding of other functions sufficient to recommend options to customers.	Interacts with customers to understand customer needs; determines appropriate services to meet needs; and independently carries out such actions or delegates/refers to appropriate personnel. Actively promotes rapport with customers.	
III	31 - 47	Carries out full range of supervisory duties with respect to lower level staff including one or more who is a senior Pay Band II. Identifies and resolves developmental needs and problems, completes necessary administrative actions, complies with Safety and other regulations/policies. Adheres to EEO regulations and demonstrates a commitment to ONR's EEO objectives and goals, ensuring the workplace is free of discrimination. Develops/maintains resources and processes which enhance ability of subordinates to effectively carry out their duties.	Meets descriptor for Pay Band II. In addition, is relied upon & consulted by team leader/members as a critical contributor to meeting overall goals. Serves as an example of high level administrative/ technical knowledge, and ability to gain cooperation /compliance by persuasion or negotiation.	Works jointly with customers to define organizational needs and problems; establishes customer alliances and translates customer needs to programs/services **OR** applies knowledge of protocol to assisting particularly high-level customers of his/her organization.	

ACCEPTABLE PERFORMANCE STANDARDS: With minor exceptions, personal interactions foster cooperation and teamwork; timely, accurate and acceptable quality service is provided to customers; customer interactions demonstrate appropriate knowledge for level of interaction required by the position; and i**f employee is a supervisor**, treatment of subordinates is based on merit and fitness considerations, is consistent with law/rules/regulations/policies, is judged fair and equitable by superiors, and fosters commitment/cooperation/teamwork amongst subordinates

SPECIFIC OBJECTIVES, TASKINGS, STANDARDS, AND/OR EXAMPLES MAY BE COMMUNICATED TO EMPLOYEES USING THE CCS SUMMARY OR OTHER APPROPRIATE MEANS

Appendix F: Computation of the IPS and the NPR

The ONR demonstration project will use an IPS which links basic pay to contribution scores determined by the CCS process. The area where basic pay and level of contribution are assumed to be properly related is called the NPR. An employee whose CCS score and rate of basic pay plot within the NPR is considered to be contributing at a level consistent with pay. Employees whose pay plots below the NPR for their assessed score are considered "undercompensated," while employees whose score and pay plot above the NPR are considered "overcompensated."

The purpose of this scoring and pay structure is to spread the full range of basic pay provided by the GS, between GS–1, step 1, and GS–15, step 10, into 80 intervals (scores and pay above those points are related using the same parameters). Each interval is a fixed percentage of the pay associated with the previous point.

For each possible contribution score available to employees, the NPR spans a basic pay range of 12 percent. The lower boundary (or "rail") is established by fixing the basic pay equivalent to GS–1, step 1, with a CCS score of zero. The upper boundary is fixed at the basic pay equivalent to GS–15, step 10, with a CCS score of 80. The distance between these upper and lower rails for a given overall contribution score is then computed to ensure the range of 12 percent of basic pay is maintained for each available CCS score. The middle rail of the NPR is computed as 6 percent above the lower rail. This point is used in connection with certain limits established for pay increases (see section IV.C.7).

From the above considerations, five variables, or inputs, were identified. They are as follows:

1. Variable A: GS–1, step 1 (lowest salary)
2. Variable B: GS–15, step 10 (highest salary)
3. Variable C: Current C-values
4. Variable M: 6 percent (middle rail computation above the low rail)
5. Variable H: 12 percent (high rail computation above low rail)

Other variables are as follows:

1. Variable N: Number of C-value steps at GS–15, step 10
2. Variable P (step increase): Salary value for each C-value equal to 1 + percentage increase

From these variables, the following formula definitions were developed:

Low rail = $A*(P \cdot C)$
Mid rail = $(1+M)*A*(P \cdot C)$
High rail = $(1+H)*A*(P \cdot C)$
Where $P = (B/(A*(1+H))) \cdot (1/N)$

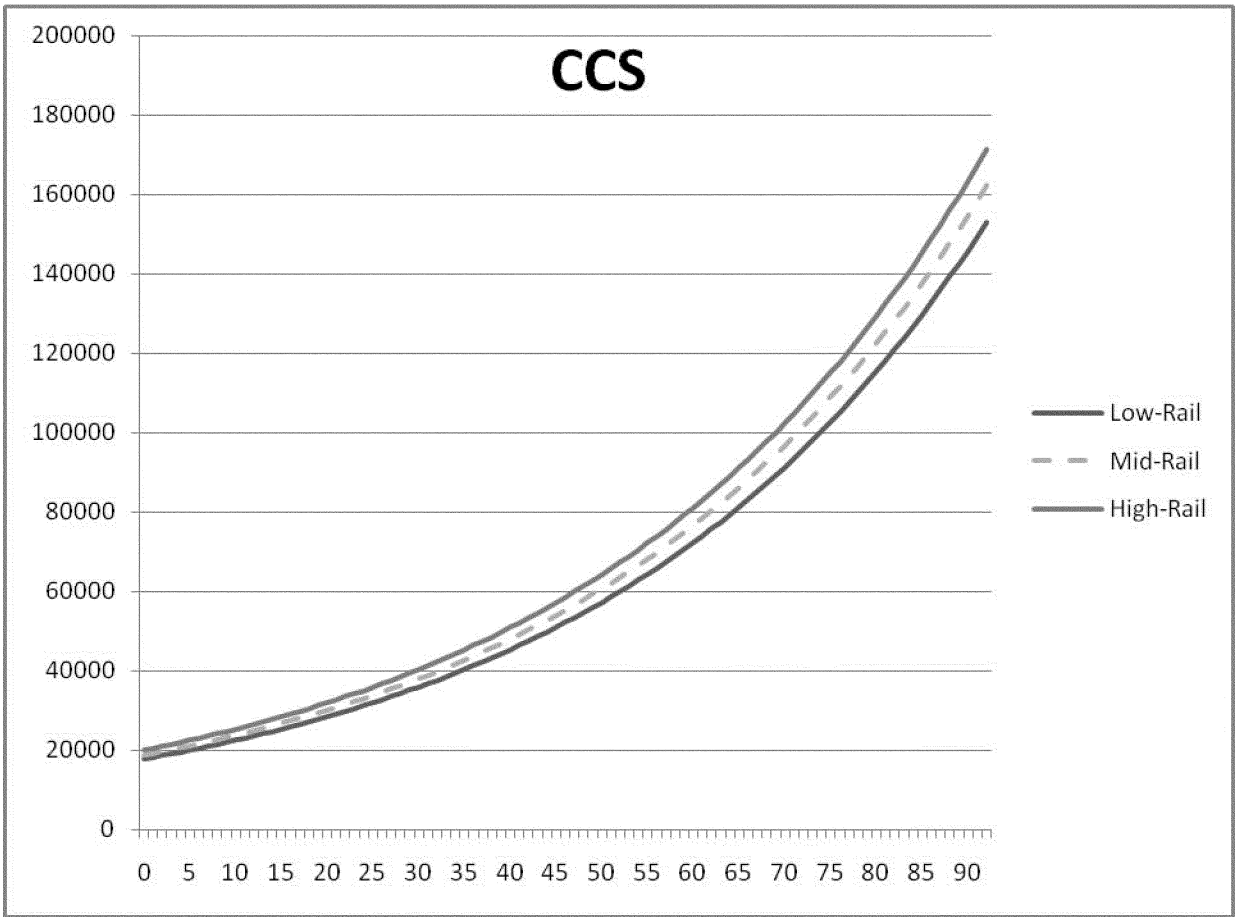
As an example, a result of the above computation, using the 2010 GS Salary Table, P (step increase) equals 1.023664623. Attachment (1) is a complete list of CCS pay band scores and basic pay ranges. Attachment (2) contains graphic representations of these tables for each career track. Once the C-values (0–80) are determined, the CCS pay bands and scores are extended at the same percentage increments as were computed for the step increase above. These C-values are extended to encompass the equivalent of ES–4 effective January 2010. In the example, SES Level ES–4 is equal to basic pay of $155,500 and is encompassed by the C-value 89 ($142,734 to $159,862).

Salary Ranges Associated with Each C-Value Using 2010 Inputs

GS 1-Step 1: 17,803 Hi%: 12.00% # C values: 80
GS 15-Step 10: 129,517 Mid%: 6.00%

Cvalue	Low Rail	Mid Rail	High Rail	Cvalue	Low Rail	Mid Rail	High Rail
0	17803	18871	19939	48	54709	57992	61275
1	18224	19318	20411	49	56004	59364	62725
2	18656	19775	20894	50	57329	60769	64209
3	19097	20243	21389	51	58686	62207	65728
4	19549	20722	21895	52	60075	63679	67284
5	20012	21212	22413	53	61497	65186	68876
6	20485	21714	22943	54	62952	66729	70506
7	20970	22228	23486	55	64442	68308	72175
8	21466	22754	24042	56	65967	69925	73883
9	21974	23293	24611	57	67528	71579	75631
10	22494	23844	25193	58	69126	73273	77421
11	23026	24408	25790	59	70762	75007	79253
12	23571	24986	26400	60	72436	76782	81128
13	24129	25577	27025	61	74150	78599	83048
14	24700	26182	27664	62	75905	80459	85014
15	25285	26802	28319	63	77701	82363	87025
16	25883	27436	28989	64	79540	84312	89085
17	26496	28085	29675	65	81422	86308	91193
18	27123	28750	30377	66	83349	88350	93351
19	27764	29430	31096	67	85322	90441	95560
20	28422	30127	31832	68	87341	92581	97822
21	29094	30840	32585	69	89408	94772	100136
22	29783	31570	33357	70	91523	97015	102506
23	30487	32317	34146	71	93689	99311	104932
24	31209	33081	34954	72	95906	101661	107415
25	31947	33864	35781	73	98176	104066	109957
26	32703	34666	36628	74	100499	106529	112559
27	33477	35486	37495	75	102877	109050	115223
28	34270	36326	38382	76	105312	111631	117949
29	35081	37185	39290	77	107804	114272	120741
30	35911	38065	40220	78	110355	116977	123598
31	36761	38966	41172	79	112967	119745	126523
32	37630	39888	42146	80	115640	122579	129517
33	38521	40832	43143	81	118377	125479	132582
34	39433	41798	44164	82	121178	128449	135719
35	40366	42788	45210	83	124046	131488	138931
36	41321	43800	46279	84	126981	134600	142219
37	42299	44837	47375	85	129986	137785	145585
38	43300	45898	48496	86	133062	141046	149030
39	44324	46984	49643	87	136211	144384	152556
40	45373	48096	50818	88	139435	147801	156167
41	46447	49234	52021	89	142734	151298	159862
42	47546	50399	53252	90	146112	154879	163645
43	48671	51592	54512	91	149570	158544	167518
44	49823	52813	55802	92	153109	162296	171482
45	51002	54062	57123				
46	52209	55342	58474				
47	53445	56651	59858				

Normal Pay Range (using 2010 Salaries)



ONR Integrated Pay Schedules for Each Career Track and Pay Band

ONR Integrated Pay					
S&E Professional					
Pay Band	I	II	III	IV	V
GS Equivalent	1-4	5-10	11-13	14-15	SSTM
Score Range	0-21	18-47	44-66	66-80	81-92
Salary Range	$17,803 – $31,871	$27,431 – $59,505	$50,287 – $93,175	$84,697 – $129,517	$119,554 – $155,500*

ONR Integrated Pay Schedule in Relation to S&E Professional Career Track

*Proposed basic pay range minimum is the equivalent of 120 percent of the minimum basic pay of GS-15; basic pay range maximum is Level IV of the Executive Schedule; and maximum adjusted basic pay is Level III of the Executive Schedule

ONR Integrated Pay					
Administrative Specialists and Professional					
Pay Band	I	II	III	IV[a]	V[a]
GS Equivalent	1-4	5-10	11-12	13	14-15
Score Range	0 – 21	18 - 47	44 - 59	59 - 66	66 -80
Salary Range	$17,803 – $31,871	$27,431 – $59,505	$50,287 – $78,355	$71,674 – $93,175	$84,697 – $129,517

ONR Integrated Pay Schedule in Relation to Administrative Specialists and Professional Career Track

ONR Integrated Pay			
Administrative Support			
Pay Band	I	II	III
GS Equivalent	1-4	5-7	8-10
Score Range	0 – 21	18 – 35	31 - 47
Salary Range	$17,803– $31,871	$27,431– $44,176	$37,631– $59,505

ONR Integrated Pay Schedule in Relation to Administrative Support Career Track

Appendix G: Intervention Model

Intervention	Expected Effects	Measures	Data Sources
1. COMPENSATION			
a. Pay banding	Increased organizational flexibility	Perceived flexibility	Attitude survey
	Reduced administrative workload, paper work reduction	Actual/perceived time savings	Personnel office data, PME results, attitude survey
	Advanced in-hire rates	Starting salaries of banded v. non-banded employees	Workforce data
	Slower pay progression at entry levels	Progression of new hires over time by band, career path	Workforce data
	Increased pay potential	Mean salaries by band, group, demographics Total payroll costs	Workforce data Personnel office data
	Increased satisfaction with advancement	Employee perceptions of advancement	Attitude survey
	Increased pay satisfaction	Pay satisfaction, internal/external equity	Attitude survey
	Improved recruitment	Offer/acceptance ratios; Percent declinations	Personnel office data
b. Conversion buy-in	Employee acceptance	Employee perceptions of equity, fairness Cost as a percent of payroll	Attitude survey Workforce data
c. Pay differentials/ adjustments	Increased incentive to accept supervisory/team leader positions	Perceived motivational power	Attitude survey
2. PERFORMANCE MANAGEMENT			
a. Cash awards/ bonuses	Reward/motivate performance	Perceived motivational power	Attitude survey

Intervention	Expected Effects	Measures	Data Sources
	To support fair and appropriate distribution of awards	Amount and number of awards by group, demographics	Workforce data
		Perceived fairness of awards	Attitude survey
		Satisfaction with monetary awards	Attitude survey
b. Performance based pay progression	Increased pay-performance link	Perceived pay-performance link	Attitude survey
		Perceived fairness of ratings	Attitude survey
	Improved performance feedback	Satisfaction with ratings	Attitude survey
		Employee trust in supervisors	Attitude survey
		Adequacy of performance feedback	Attitude survey
	Decreased turnover of high performers/Increased turnover of low performers	Turnover by performance rating scores	Workforce data
	Differential pay progression of high/low performers	Pay progression by performance scores, career path	Workforce data
	Alignment of organizational and individual performance objectives and results	Linkage of performance objectives to strategic plans/goals	Performance objectives, strategic plans
	Increased employee involvement in performance planning and assessment	Perceived involvement	Attitude survey/focus groups
		Performance management	Personnel regulations
c. New appraisal process	Reduced administrative burden	Employee and supervisor perceptions of revised procedures	Attitude survey
	Improved communication	Perceived fairness of process	Focus groups

Intervention	Expected Effects	Measures	Data Sources
d. Performance development	Better communication of performance expectations	Feedback and coaching procedures used Time, funds spent on training by demographics	Focus groups Personnel office data Training records
	Improved satisfaction and quality of workforce	Perceived workforce quality	Attitude survey
3. "WHITE COLLAR" CLASSIFICATION			
a. Improved classification systems with generic standards	Reduction in amount of time and paperwork spent on classification	Time spent on classification procedures Reduction of paperwork/number of personnel actions (classification/promotion)	Personnel office data Personnel office data
	Ease of use	Managers' perceptions of time savings, ease of use	Attitude survey
b. Classification authority delegated to managers	Increased supervisory authority/accountability	Perceived authority	Attitude survey
	Decreased conflict between management and personnel staff	Number of classification disputes/appeals pre/post Management satisfaction with service provided by personnel office	Personnel records Attitude survey
	No negative impact on internal pay equity	Internal pay equity	Attitude survey
c. Dual career ladder	Increased flexibility to assign employees	Assignment flexibility	Focus groups, surveys
	Improved internal mobility	Perceived internal mobility	Attitude survey
	Increased pay equity	Perceived pay equity	Attitude survey
	Flatter organization	Supervisory/non-supervisory ratios	Workforce data Attitude survey

Intervention	Expected Effects	Measures	Data Sources
	Improved quality of supervisory staff	employee perceptions of quality or supervisory	Attitude survey
4. Modified RIF			
	Minimize loss of high performing employees with needed skills	Separated employees by demographics, performance scores	Workforce dataAttitude survey/focus group
	Contain cost and disruption	Satisfaction with RIF Process Cost comparison of traditional vs. Modified RIF Time to conduct RIF - personnel office data Number of Appeals/reinstatements	Attitude survey/focus group Personnel office/budget Data Personnel office data Personnel office data
5. Hiring Authority			
a. Delegated Examining	Improved ease and timeliness of hiring process	Perceived flexibility in authority to hire	Attitude survey
	Improved recruitment of employees in shortage categories	Offer/accept ratios Percent declinations Timeliness of job offers GPAs of new hires, educational levels	Personnel office data Personnel office data Personnel office data Personnel office data
	Reduced administrative workload/paperwork reduction	Actual/perceived skills	Attitude survey
b. Term Appointment Authority	Increased capability to expand and contract workforce	Number/percentage of conversions from modified term to permanent appointments	Workforce data Personnel office data

Intervention	Expected Effects	Measures	Data Sources
c. Flexible Probationary Period	Expanded employee assessment	Average conversion period to permanent status	Workforce data Personnel office data
		Number/percentage of employees completing probationary period	Workforce data Personnel office data
		Number of separations during probationary period	Workforce data Personnel office data
6. Expanded Development Opportunities			
a. Sabbaticals	Expanded range of professional growth and development	Number and type of opportunities taken	Workforce data
	Application of enhanced knowledge and skills to work product	Employee and supervisor perceptions	Attitude survey
b. Critical Skills Training	Improved organizational effectiveness	Number and type of trainingPlacement of employees, skills imbalances correctedEmployee and supervisor perceptionsApplication of knowledge gained from training	Personnel office dataPersonnel office dataAttitude surveyAttitude survey/ focus group
7. Combination Of All Interventions			
All	Improved organizational effectiveness	Combination of personnel measures	All data sources
	Improved management of workforce	Employee/Management job satisfaction (intrinsic/extrinsic)	Attitude survey
	Improved planning	Planning procedures	Strategic planning documents
		Perceived effectiveness of planning procedures	Attitude survey
	Improved cross functional coordination	Actual/perceived coordination	Organizational charts

Intervention	Expected Effects	Measures	Data Sources
	Increased product success	Customer satisfaction	Customer satisfaction surveys
	Cost of innovation	Project training/ development costs (staff salaries, contract cost, training hours per employee)	Demo project office records Contract documents
8. Context:			
Regionalization	Reduced servicing ratios/ costs	HR servicing ratios Average cost per employee served	Personnel office data, workforce data Personnel office data, workforce data
	No negative impact on service quality	Service quality, timeliness	Attitude survey/focus groups

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Federal Register

Friday,
December 10, 2010

Part VI

Department of the Treasury
Office of the Comptroller of the Currency
Office of Thrift Supervision

Federal Reserve System
Federal Deposit Insurance Corporation

National Credit Union Administration
Interagency Appraisal and Evaluation Guidelines; Notice

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

[Docket ID OCC–2010–0012]

FEDERAL RESERVE SYSTEM

[Docket No. OP–1338]

FEDERAL DEPOSIT INSURANCE CORPORATION

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

[Docket No. 2010–0018]

NATIONAL CREDIT UNION ADMINISTRATION

RIN 3133–AD38

Interagency Appraisal and Evaluation Guidelines

AGENCY: Office of the Comptroller of the Currency, Treasury (OCC); Board of Governors of the Federal Reserve System (FRB); Federal Deposit Insurance Corporation (FDIC); Office of Thrift Supervision, Treasury (OTS); and National Credit Union Administration (NCUA) (collectively, the Agencies).

ACTION: Final guidance.

SUMMARY: The Agencies are issuing final Interagency Appraisal and Evaluation Guidelines (Guidelines) to provide further clarification of the Agencies' appraisal regulations and supervisory guidance to institutions and examiners about prudent appraisal and evaluation programs. The Guidelines, including their appendices, update and replace existing supervisory guidance documents to reflect developments concerning appraisals and evaluations, as well as changes in appraisal standards and advancements in regulated institutions' collateral valuation methods. The Guidelines clarify the Agencies' longstanding expectations for an institution's appraisal and evaluation program to conduct real estate lending in a safe and sound manner. Further, the Guidelines promote consistency in the application and enforcement of the Agencies' appraisal regulations and safe and sound banking practices. The Agencies recognize that revisions to the Guidelines may be necessary to address future regulations implementing the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

DATES: The Guidelines are effective on December 10, 2010.

FOR FURTHER INFORMATION CONTACT:

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OTS: Deborah S. Merkle, Senior Project Manager, Credit Risk, Risk Management, (202) 906–5688; or Marvin L. Shaw, Senior Attorney, Regulations and Legislation Division (202) 906–6639.

NCUA: Vincent H. Vieten, Member Business Loan Program Officer, Office of Examination and Insurance, (703) 518–6396; or Sheila A. Albin, Staff Attorney, Office of General Counsel, (703) 518–6547.

SUPPLEMENTARY INFORMATION:

I. Background

The Agencies' appraisal regulations [1] implementing Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) [2] set forth, among other requirements, minimum standards for the performance of real estate appraisals in connection with "federally related transactions," [3] which are defined as those real estate-related financial transactions that an Agency engages in, contracts for, or regulates and that require the services of an appraiser.[4] These regulations also specify the requirement for evaluations of real estate collateral in certain transactions that do not require an appraisal.

In October 1994, the OCC, FRB, FDIC and OTS jointly issued the *Interagency Appraisal and Evaluation Guidelines* [5] (1994 Guidelines) to provide further guidance to regulated financial institutions on prudent appraisal and evaluation policies, procedures and practices. Further, under the Agencies' real estate lending regulations,[6] federally regulated institutions must adopt and maintain written real estate lending policies that are consistent with safe and sound lending practices and should reflect consideration of the *Interagency Guidelines for Real Estate Lending Policies* (Lending Guidelines). The Lending Guidelines state that an institution is responsible for establishing a real estate appraisal and evaluation program, including the type and frequency of collateral valuations.

Since the issuance of the 1994 Guidelines, the Agencies have issued additional supervisory guidance documents [7] to promote sound practices in regulated institutions' appraisal and evaluation programs, including independence in the collateral valuation function, the appraisal of residential tract developments, and compliance with revisions to the Uniform Standards of Professional Appraisal Practice (USPAP). There also have been significant industry developments, such as advancements in information technology that have affected the

[1] OCC: 12 CFR part 34, subpart C: FRB: 12 CFR part 208, subpart E and 12 CFR part 225; subpart G; FDIC: 12 CFR part 323; OTS: 12 CFR part 564; and NCUA: 12 CFR part 722.

[2] Public Law 101–73, Title XI, 103 Stat. 511 (1989); 12 U.S.C. 3331, *et seq.*

[3] 12 U.S.C. 3339.

[4] 12 U.S.C. 3350(4).

[5] *See* OCC: *Comptroller's Handbook, Commercial Real Estate and Construction Lending* (1998) (Appendix E); FRB: 1994 *Interagency Appraisal and Evaluation Guidelines* (SR letter 94–55); FDIC: FIL–74–94; and OTS: 1994 *Interagency Appraisal and Evaluation Guidelines* (Thrift Bulletin 55a).

[6] OCC: 12 CFR part 34, subpart D; FRB: 12 CFR part 208, Appendix C; FDIC: 12 CFR part 365; and OTS: 12 CFR 560.100 and 560.101. NCUA's general lending regulation addresses residential real estate lending by Federal credit unions, and its member business loan regulation addresses commercial real estate lending. 12 CFR 701.21; 12 CFR part 723.

[7] The 2003 *Interagency Statement on Independent Appraisal and Evaluation Functions,* OCC: Advisory Letter 2003–9; FRB: SR letter 03–18; FDIC: FIL–84–2003; OTS: CEO Memorandum No.184; and NCUA: NCUA Letter to Credit Unions 03–CU–17. The 2005 *Frequently Asked Questions on the Appraisal Regulations and the Interagency Statement on Independent Appraisal and Evaluation Functions,* OCC: OCC Bulletin 2005–6; FRB: SR letter 05–5; FDIC: FIL–20–2005; OTS: CEO Memorandum No. 213; and NCUA: NCUA Letter to Credit Unions 05–CU–06. The 2006 *Interagency Statement on the 2006 Revisions to the Uniform Standards of Professional Appraisal Practice,* OCC: OCC Bulletin 2006–27; FRB: SR letter 06–9; FDIC: FIL–53–2006; OTS: CEO Memorandum No. 240; and NCUA: Regulatory Alert 06–RA–04. The 2005 *Interagency FAQs on Residential Tract Development Lending,* OCC: OCC Bulletin 2005–32; FRB: SR letter 05–14; FDIC: FIL–90–2005; OTS: CEO Memorandum No. 225; and NCUA: NCUA Letter to Credit Unions 05–CU–12.

development and delivery of appraisals and evaluations.

In response to these developments, the Agencies published for comment the *Proposed Interagency Appraisal and Evaluation Guidelines* (Proposal) on November 19, 2008.[8] After considering the comments on the Proposal, the Agencies made revisions to the Proposal and are now issuing the Guidelines. The Guidelines apply to all real estate lending functions and real estate-related financial transactions originated or purchased by a regulated institution for its own portfolio or for assets held for sale. The changes provide updates to and consolidate some of the existing supervisory issuances. The Guidelines track the format and substance of the 1994 Guidelines and existing interpretations as reflected in supervisory guidance documents and the preamble that accompanies and describes amendments to the Agencies' appraisal regulations as published in June 1994.[9] The Guidelines also reflect refinements made by the Agencies in the supervision of institutions' appraisal and evaluation programs. Since the issuance of the Proposal, changes in market conditions underscore the importance of institutions following sound collateral valuation practices when originating or modifying real estate loans and monitoring portfolio risk.

In implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the Dodd-Frank Act),[10] the Agencies will determine whether future revisions to the Guidelines may be necessary. However, the Agencies are issuing the Guidelines to promote consistency in the application and enforcement of the Agencies' current appraisal requirements and related supervisory guidance. In finalizing the Guidelines, the Agencies considered the Dodd-Frank Act, other Federal statutory and regulatory changes affecting appraisals,[11] and the public comment process. The Guidelines are also responsive to the majority of comments, which expressed support for the Proposal and confirmed that additional clarification of existing regulatory and supervisory standards serve to strengthen the real estate collateral valuation and risk management practices across insured depository institutions.

The Guidelines contain four appendices that clarify current regulatory requirements and supervisory guidance. Appendix A provides further clarification on real estate-related financial transactions that are exempt from the Agencies' appraisal regulations. Appendix B addresses an institution's use of analytical methods or technological tools in the development of an evaluation. Appendix C clarifies the minimum appraisal standards required by the Agencies' appraisal regulations for analyzing and reporting appropriate deductions and discounts in appraisals. Based on comments on the Proposal, the Agencies added this additional appendix. Appendix D (previously Appendix C in the Proposal) provides a glossary of terms.

II. Comments on the Proposal

The Agencies requested comment on all aspects of the Proposal, and specifically requested comment on: (1) The clarity of the Proposal regarding interpretations of the appraisal exemptions discussed in Appendix A; (2) the appropriateness of risk management expectations and controls in the evaluation process, including those discussed in Appendix B; and (3) the expectations in the Proposal on reviewing appraisals and evaluations. In particular, the Agencies requested comment on whether automated tools or sampling methods used to review appraisals and evaluations supporting lower risk single-family residential mortgages are appropriate for other low risk mortgage transactions, and whether appropriate constraints can be placed on the use of these tools and methods to ensure the overall integrity of an institution's appraisal process for those low risk mortgage transactions.

The Agencies collectively received 157 unique comments on the Proposal. Comments were received from financial institutions, appraisers, collateral valuation service providers, industry-related trade associations (industry groups), consumer groups, government officials, and individuals.

The majority of financial institution and industry group commenters supported the Proposal and the Agencies' efforts to update existing guidance in this area. Many commenters recognized that additional clarification of existing regulatory and supervisory expectations strengthen the real estate collateral valuation and risk management practices across federally regulated institutions. These commenters were in general agreement that the Proposal adequately addressed developments in collateral valuation practices, but also raised technical issues and requested that the Agencies provide further clarification on a variety of topics.

Some commenters did not support the Proposal for various reasons, including the need to study the effect of the recent market challenges on appraisal practices or a request to require appraisals on all real estate lending activity conducted by federally regulated institutions. Other commenters recommended revisions to the Agencies' appraisal regulations that cannot be changed with the issuance of the Guidelines. Some commenters encouraged the Agencies to incorporate additional safeguards for consumers in the Guidelines. In response, the Agencies note that these commenters' suggestions address statutes and regulations that are generally beyond the scope of the Guidelines, such as the Real Estate Settlement Procedures Act (RESPA) and the FRB's Regulation B (implementing the Equal Credit Opportunity Act).

Other commenters urged the Agencies to work with other Federal agencies and government-sponsored enterprises (such as Freddie Mac and Fannie Mae) in an effort to harmonize standards for appraisals and other collateral valuations across all channels of mortgage lending, not just lending by federally regulated institutions. A few commenters recommended broad initiatives for the Agencies to undertake in the context of mitigating mortgage fraud and promoting appraisal quality through, for example, information sharing in the form of national data bases. While the Agencies recognize the significance of these issues in the ongoing public debate on appraisal reform through various initiatives, such matters are beyond the scope of the Guidelines.

A few commenters questioned the timing of the Proposal given the stress in the current real estate market. For example, one commenter suggested that the Agencies withdraw the Proposal to allow additional time to study the lessons learned from the recent stress in the residential mortgage markets. The Agencies believe that the timing of the release of the Guidelines is appropriate to emphasize existing requirements, clarify expectations, and ensure consistency in the application of the Agencies' appraisal regulations, thereby promoting safe and sound collateral valuation practices across federally regulated institutions.

Virtually all of the commenters either offered suggestions for strengthening or clarifying technical aspects of the

[8] 73 FR 69647 (Nov. 19, 2008).

[9] 59 FR 29481 (Jun. 7, 1994).

[10] Public Law 111–203, 124 Stat. 1376 (2010).

[11] *See,* for example, Title IV of Division A of the Housing and Economic Recovery Act of 2008, Public Law 110–289, Title IV, Division A, 122 Stat. 2800 (2008); 12 U.S.C. 1707, *et seq.,* and FRB Regulation Z, 12 CFR 226.36 and 226.42.

Proposal. The following discussion summarizes significant comments on specific provisions of the Proposal, the Agencies' responses, and major changes to the Proposal as reflected in the Guidelines.

Discussion on the Comments and Guidelines

Supervisory Policy. The Proposal addressed the supervisory process for assessing the adequacy of an institution's appraisal and evaluation program to conduct its real estate lending activities consistent with safe and sound underwriting practices. It also reaffirmed that, when examining an institution's real estate lending activity, supervisory staff will review an institution's appraisal and evaluation program for compliance with the Agencies' appraisal regulations and consistency with related guidance.

Appraisers and appraisal groups asked for further explanation on the enforceability of the Guidelines and the distinction between supervisory guidance and regulatory requirements. These commenters expressed the view that the Proposal gave too much discretion to regulated institutions in the development and implementation of their appraisal and evaluation programs. In particular, these commenters raised concerns over the enforcement of the Guidelines by the Agencies. Conversely, financial institutions found the Proposal to be an improvement over existing guidance and indicated that it would promote consistent application of the Agencies' appraisal requirements.

The Agencies believe that the Proposal adequately addressed the issue of enforceability and their supervisory process. The Agencies note that their appraisal regulations and guidance have been in place since the early 1990s and that financial institutions are familiar with the regulatory and supervisory framework. The Agencies believe that the Proposal reaffirmed existing guidance addressing their supervisory expectations for prudent appraisal and evaluation policies, procedures, and practices. Moreover, an institution's compliance with the regulatory requirements and consistency with supervisory expectations is considered during an Agency's on-site review of an institution's real estate lending activities. However, to address commenters' concerns, the Agencies incorporated minor edits to better distinguish between regulatory requirements and prudent banking practices in the Guidelines. In addition, the Agencies expanded certain sections to provide further clarification in an effort to promote consistency in the application and enforcement of their regulatory requirements and supervisory expectations.

Independence of the Appraisal and Evaluation Program. The Proposal reaffirmed that an institution's collateral valuation function should be independent of the loan production process. The Proposal addressed longstanding supervisory expectations that an institution should implement procedures to affirm its program's independence. In response to commenters, the Agencies expanded this section in the Guidelines to further detail their expectations for appropriate communication and information sharing with persons performing collateral valuation assignments. The Guidelines address the types of communications that would not be construed as coercion or undue influence on appraisers and persons performing evaluations, as well as examples of actions that would compromise independence. The Guidelines also reference the FRB's Regulation Z (implementing the Truth in Lending Act), which was amended in 2008 and 2010 to include provisions regarding appraiser independence.[12]

Some commenters did not support the longstanding flexibility afforded to small and rural institutions when absolute lines of independence cannot be achieved. The Agencies believe that small and rural institutions can have acceptable risk management practices to support their appraisal function and conduct their real estate lending activity in a safe and sound manner. Therefore, the Guidelines, like the Proposal, allow for some flexibility to exist so long as an institution can demonstrate the independence of its collateral valuation function from the final credit decision.

A few commenters asked the Agencies to provide further clarification on the types of employees who would be considered as loan production staff. The Agencies note that both the Proposal and Guidelines include a definition in Appendix D for loan production staff. The Agencies believe that the definition adequately describes loan production staff for purposes of the Guidelines. During the supervisory review of an institution's real estate lending activities, the Agencies' examiners assess the adequacy of risk management practices, including the independence of the collateral valuation function.

Selection of Appraisers and Individuals Who Perform Evaluations. In the Proposal, this section addressed the competency and qualifications of appraisers and persons who perform an evaluation. Several commenters asked for clarification on the factors institutions should consider in assessing an appraiser's competency. A few commenters also noted that certain factors, such as cost and turnaround time, should not influence the selection of appraisers. Other commenters asked the Agencies to clarify certain aspects of the process for engaging an appraiser and when the appraiser/client relationship is established. To address these comments, the Agencies incorporated clarifying edits in the Guidelines to emphasize the importance of appraiser competency for a particular assignment relative to both the property type and geographic market. Moreover, the Guidelines stress that an institution should not select a valuation method or tool solely because it provides the highest value, the lowest cost, or the fastest response or turnaround time.

To eliminate redundancies, the Guidelines incorporate the discussion in the Proposal's section on qualifications of persons who perform evaluations into a new section that addresses both the qualifications and selection of an appraiser and a person who performs an evaluation. Further, the Guidelines no longer refer to "a nonpreferential and unbiased process" for selecting appraisers or persons who perform evaluations, which could be misconstrued in a way that would not ensure that a competent person is selected for a valuation assignment.

A few institution commenters asked the Agencies to address whether loan production staff can recommend an appraiser for a particular assignment or inclusion on the institution's list of approved appraisers. Staff performing the collateral valuation function is responsible for selecting an appraiser. The Guidelines provide further clarification on an institution's procedures for the selection of an appraiser for an assignment, including the development, administration, and maintenance of an approved appraiser list, if used.

Minimum Appraisal Standards. To promote the quality of appraisals, the Proposal and the Guidelines provide further clarification of the minimum appraisal standards in the Agencies' appraisal regulations and contain guidance on appraisal development and reporting to reflect revisions to USPAP. Most commenters found the Proposal's additional explanation on these standards helpful, particularly the discussion on deductions and discounts in an appraisal for a residential tract development. While this section in the Guidelines generally tracks the Proposal, the detailed discussion on

[12] 73 FR 44522, 44604 (Jul. 30, 2008); 75 FR 66554 (Oct. 28, 2010).

analyzing deductions and discounts has been moved to a new appendix. Given the importance of these concepts, the appendix contains an expanded discussion of the appraisal standard for deductions and discounts in a discounted cash flow analysis.

Further, several commenters addressed the topic of assessment of an appraiser's competency in the context of ensuring compliance with the minimum appraisal standards. The Guidelines reaffirm that a state certification or license is a minimum credentialing requirement and that an appraiser must be selected based on his or her competency to perform a particular assignment, including knowledge of the specific property type and market. Further, the Agencies revised the Guidelines to confirm that the result of an automated valuation model (AVM), in and of itself, does not meet the Agencies' minimum appraisal standards, regardless of whether the results are signed by an appraiser.

Transactions that Require Evaluations. Financial institutions appreciated the flexibility contained in the Proposal that permitted the use of evaluations for low-risk transactions, consistent with the Agencies' appraisal regulations. These commenters contended that appropriate risk management practices provide sufficient safeguards to elevate their collateral valuation methods (that is, obtaining an appraisal instead of an evaluation) when warranted. Several appraiser and appraisal organization commenters expressed their longstanding opposition to institutions' use of evaluations in lieu of appraisals for exempt transactions. This section in the Guidelines references Appendix A, *Appraisal Exemptions,* which has been revised in response to comments on the Proposal. The Agencies note that the Guidelines do not expand the categories of appraisal exemptions set forth in the Agencies' appraisal regulations.

For further clarity, this section incorporates certain technical edits to address specific comments. For instance, the dollar amount of the appraisal threshold and of the business loan threshold from the Agencies' appraisal regulations were incorporated in the text of this section. This section also addresses the factors that an institution should consider in determining whether to obtain an appraisal, even though an evaluation is permitted. This topic was moved from the *Evaluation Content* section in the Proposal to this section, as it relates to the regulatory requirement that evaluations reflect safe and sound banking practices. In particular, comments from appraisers and appraisal organizations noted that the Agencies should not permit evaluations, even detailed ones, to substitute for appraisals in higher risk real estate loans. The Agencies believe that the Guidelines adequately address an institution's responsibility to maintain policies and procedures for obtaining an appropriate appraisal or evaluation to support its credit decision.

Evaluation Development and Evaluation Content. As noted above, some appraiser and appraisal group commenters expressed their views that evaluations generally do not provide an adequate assessment of a property's market value and requested that the Agencies provide additional guidance on the content of evaluations and the level of detail to be included in evaluations supporting higher risk transactions. Comments provided by financial institutions support the approach taken in the Proposal, which establishes minimum supervisory expectations for an evaluation and is designed to ensure an institution obtains a more detailed evaluation, or possibly an appraisal, when additional information is necessary to assess collateral risk in the credit decision.

In response to comments, the Agencies revised the Guidelines to stress that an institution should consider transaction risk when it is evaluating the appropriate collateral valuation method and level of documentation for an evaluation. The Guidelines also now provide additional clarification on the Agencies' supervisory expectations for the development and content of evaluations. A new section on *Evaluation Development* provides guidance on the requirement in the Agencies' appraisal regulations that evaluations must be consistent with safe and sound banking practices. These revisions incorporate and clarify certain supervisory expectations from the *Evaluation Content* section of the Proposal, and emphasize an institution's responsibility to establish criteria addressing the appropriate level of analysis and information necessary to support the estimate of market value in an evaluation.

Clarifying edits also reaffirm that valuation methods used to develop an evaluation must be consistent with safe and sound banking practices. For example, an AVM may be used for a transaction provided the resulting evaluation meets all of the supervisory expectations in the *Evaluation Development* and *Evaluation Content* sections in the Guidelines, is consistent with safe and sound banking practices, and produces a credible market value conclusion. In response to comments, the Guidelines clarify how institutions can use analytical methods or technological tools to develop an evaluation. The Guidelines, for instance, emphasize the importance of considering the property's condition in the development of an evaluation, regardless of the method or tool used. Further, technical edits were incorporated in the *Evaluation Content* section of the Guidelines to address commenters' questions regarding the appropriate level of documentation in an evaluation.

The Guidelines also address questions from several commenters on the appropriate use of broker price opinions (BPOs) in the context of the Agencies' appraisal regulations. The Proposal did not specifically address the use of BPOs or similar valuation methods. The Guidelines confirm that BPOs and other similar valuation methods, in and of themselves, do not comply with the minimum appraisal standards in the Agencies' appraisal regulations and are not consistent with the Agencies' minimum supervisory expectations for evaluations. A BPO or other valuation method may provide useful information in developing an appraisal or evaluation, for monitoring collateral values for existing loans, or in modifying loans in certain circumstances. Further, the Dodd-Frank Act provides, "[i]n conjunction with the purchase of a consumer's principal dwelling, broker price opinions may not be used as the primary basis to determine the value of a piece of property for the purpose of a loan origination of a residential mortgage loan secured by such piece of property."[13]

Reviewing Appraisals and Evaluations. This section in the Proposal and the Guidelines provides the Agencies' expectations for an institution to establish an effective, risk-focused process for reviewing appraisals and evaluations prior to a final credit decision. In the Proposal, the Agencies specifically requested comment on the Agencies' expectations for reviewing appraisals and evaluations. In particular, the Agencies sought comment in the Proposal on whether the use of automated tools or sampling methods for reviewing appraisals or evaluations supporting lower risk residential mortgages are appropriate for other low risk mortgage transactions. The Agencies also requested comment on whether appropriate constraints can be placed on the use of these tools and

[13] Dodd-Frank Act, Section 1473(r).

methods to ensure the overall integrity of the institution's appraisal review process for other low risk mortgage transactions. Commenters requested further clarification on the process for institutions to obtain approval to use automated tools and sampling methods in the review process. The Proposal noted that each Agency would address the approval process through established processes for communicating with its regulated institutions.

Several commenters requested further clarification on appropriate policies and procedures for the review function. Some commenters also asked the Agencies to address the expectations for reviews by property type and risk factors. In response to these comments, the Guidelines were expanded to clarify the Agencies' expectations for an appropriate depth of review, the educational and training qualifications for reviewers, the resolution of valuation deficiencies, and related documentation standards. Further, the Guidelines now discuss the appropriate depth of review by property type, including factors to consider in the review of appraisals and evaluations of commercial and single-family residential real estate. The Guidelines retain the possible use of automated tools and sampling methods in the review of appraisals and evaluations supporting lower risk residential mortgages. With prior approval from its primary Federal regulator, an institution may use such tools or methods for its review process.

This revised section also incorporates the section on *Accepting Appraisals from Other Financial Services Institutions* in the Proposal. The guidance addresses the authority as set forth in the Agencies' appraisal regulations for an institution to use an appraisal that was performed by an appraiser engaged directly by another regulated institution or financial services institution (including mortgage brokers), provided certain conditions are met. Some commenters contend that regulated institutions should not be allowed to accept appraisals from mortgage brokers so as to ensure compliance with applicable appraisal independence standards. In response to these comments, the Guidelines confirm that appraisals obtained from other financial services institutions must comply with the Agencies' appraisal regulations and be consistent with supervisory guidance, including the standards of independence. Moreover, the Guidelines remind institutions that they generally should not rely on evaluations prepared by another financial services institution.

With regard to relying on appraisals supporting underlying loans in a pool of 1-to-4 family mortgage loans, the Guidelines also confirm that an institution may use sampling and audit procedures to determine whether the appraisals in a pool of residential loans satisfy the Agencies' appraisal regulations and are consistent with supervisory guidance. When compliance cannot be confirmed, institutions are reminded that they must obtain an appraisal(s) prior to engaging in the transaction. Finally, minor edits were made to this section to reaffirm that small institutions should ensure that reviewers are independent and appropriately qualified, and may need to employ additional personnel or engage a third party to perform the review function.

Third Party Arrangements. This section in the Guidelines addresses the risk management practices that an institution should consider if it uses a third party to manage or conduct all or part of its collateral valuation function. In the Guidelines, this section was expanded to provide additional specificity on an institution's responsibilities for the selection, monitoring, and management of arrangements with third parties. Revisions to this section reflect requests from commenters for clarification on the relationship between regulated institutions and third parties. Commenters also asked the Agencies to reaffirm that an institution cannot outsource its responsibility to maintain an effective and independent collateral valuation function. The Proposal and Guidelines reference each Agency's guidance on third party arrangements. Revisions to this section summarize key considerations from those issuances and state that institutions should use caution in determining whether to engage a third party. In response to several comments regarding an institution's use of appraisal management companies, this section addresses the due diligence procedures for selecting a third party, including an effective risk management system and internal controls.

Program Compliance. A few commenters suggested that the Agencies incorporate certain clarifying edits with regard to the independence of the collateral valuation process, staff reporting relationships, and internal quality control practices. Several commenters asked the Agencies to clarify their expectations for demonstrating compliance and offered recommendations on sound practices, including appropriate staff reporting relationships and the depth of the process and procedures for verifying and testing compliance (such as sampling procedures). In response, the Agencies have revised the Guidelines to reflect a principles-based approach to ensure that an institution's collateral valuation program complies with the Agencies' appraisal regulations and is consistent with supervisory guidance and an institution's internal policies.

In the Guidelines, this section also was reorganized to list the minimum program compliance standards and to incorporate clarifying text. Institutions are reminded that the results of their review process and other relevant information should be used as a basis for considering persons for future collateral valuation assignments and that collateral valuation deficiencies should be reported to appropriate internal parties, and if applicable, to external authorities in a timely manner. The Guidelines should be considered by an institution in establishing effective internal controls over its collateral valuation function, including the verification and testing of its processes.

Monitoring Collateral Value. The majority of commenters agreed with the Proposal and the expectations for determining when an institution should obtain a new appraisal or evaluation for monitoring asset quality of its portfolio and collateral risk in a particular credit. While some commenters cautioned that the Agencies' examiners should not be overly aggressive in requiring institutions to obtain new appraisals on existing loans, a few commenters asked for clarification on what would constitute a change in market condition and when an institution should re-value collateral.

In addition to certain clarifying edits, language was added in the Guidelines to confirm that an institution may employ a variety of techniques for monitoring the effect of collateral valuation trends on portfolio risk and that such information should be timely and sufficient to understand the risk associated with its lending activity. In response to commenters, the Guidelines now provide examples of factors for an institution to consider in assessing whether a significant change in market conditions has occurred. The Guidelines also emphasize the importance of monitoring collateral values in the institution's lending markets, consistent with the Agencies' real estate lending regulations and guidelines.

To eliminate redundancies, the revised section incorporates from Appendix A of the Proposal the discussion of an institution's

responsibility to obtain current collateral valuation information for loan modifications and workouts of existing credits. As in the Proposal, the Guidelines address when an institution may modify an existing credit without obtaining either an appraisal or an evaluation. The revisions reflect clarifying text in response to comments from institutions on the regulatory requirements for reappraisals of real estate collateral for existing credits, particularly in modification and workout situations.

The Agencies also revised the Guidelines to reaffirm an institution's responsibility to maintain policies and procedures that establish standards for obtaining current collateral valuation information to facilitate its decision to engage in a loan modification or workout. In response to comments, the Guidelines address the Agencies' expectations for institutions to elevate the collateral valuation method as appropriate to address safety and soundness concerns, particularly in those loan workout situations where repayment becomes more dependent on the sale of collateral.

Referrals. The Proposal confirmed that an institution should make referrals to state appraiser regulatory authorities when it suspects that a state licensed or certified appraiser failed to comply with USPAP, applicable state laws, or engaged in unethical or unprofessional conduct. Some commenters referenced industry efforts to mitigate fraud in real estate transactions. In response to these comments, the Agencies revised the Guidelines to address an institution's responsibility to file a suspicious activity report (SAR) with the Financial Crimes Enforcement Network of the Department of Treasury when it suspects inappropriate appraisal-related activity that meets the SAR filing criteria. The revisions also confirm that examiners will forward such findings to their supervisory office for appropriate disposition if there are concerns with an institution's ability or willingness to make a referral or file a SAR. Institutions also should be aware of the recent amendments to Regulation Z, which address mandatory reporting provisions.[14]

Appendix A—Appraisal Exemptions. The Guidelines contain a new introduction to the Appendix in response to commenters' questions regarding the authority of the Agencies to establish exemptions from their appraisal regulations. The discussion of loan modifications in the Proposal was incorporated in the section on *Monitoring Collateral Value.* The revisions reflect clarifying text in response to comments from institutions on the regulatory requirements for reappraisals of real estate collateral for existing credits and subsequent transactions, particularly loan workout situations.

Notwithstanding the exemption on renewals, refinancings, and subsequent transactions, some industry groups and appraiser organizations recommended that the Agencies address the circumstances under which institutions are to obtain appraisals even though evaluations are permitted. The Agencies believe that the Proposal adequately addressed an institution's responsibility to maintain a risk-focused process for elevating its collateral valuation methods consistent with safe and sound banking practices.

Appendix B—Evaluations Based on Analytical Methods or Technological Tools. In response to commenters, the Appendix was revised to provide clarification on the appropriate use of analytical methods or technological tools to develop an evaluation. The Appendix clarifies that an institution may not rely solely on the results of a method or tool to develop an evaluation unless the resulting evaluation meets all of the supervisory expectations for an evaluation and is consistent with safe and sound banking practices.

As in the Proposal, the Appendix in the Guidelines provides guidance on the Agencies' supervisory expectations regarding an institution's process for selecting, using, validating, and monitoring a valuation method or tool. The Appendix also addresses the process that institutions are expected to establish for determining whether a method or tool may be used in the preparation of an evaluation and the supplemental information that may be necessary to comply with the minimum supervisory expectations for an evaluation, as set forth in the Guidelines.

The Appendix also has been revised to respond to comments regarding the appropriate use of an AVM or tax assessment value (TAV) to develop an evaluation. Some commenters did not agree that institutions should be permitted to use AVMs to develop an evaluation. Some small institutions noted that they could be placed at a competitive disadvantage with larger institutions that use AVMs. The Guidelines make it clear that an institution is responsible for meeting supervisory expectations regarding the selection, use, and validation of an AVM and maintaining an effective system of internal controls. Moreover, an AVM or TAV is not, in and of itself, an alternative to an evaluation. Therefore, when using an AVM or TAV, the resulting evaluation should be consistent with the supervisory expectations in the *Evaluation Development* and *Evaluation Content* sections in the Guidelines. The Appendix also addresses the expertise necessary to manage the use of a method or tool, which may require an institution to employ additional personnel or engage a third party. Recognizing that technology may change, the Guidelines address an institution's responsibility for ensuring that an evaluation based on an analytical method or technological tool is consistent with the Agencies' supervisory expectations in the *Evaluation Content* section.

Appendix C—Deductions and Discounts. This is a new Appendix in the Guidelines that is based on the discussion in the Proposal on the Agencies' minimum appraisal standards. Most commenters appreciated the additional explanation in the Proposal on the appraisal standard to analyze deductions and discounts for residential tract developments. However, these commenters provided technical comments on appraisal practices that might assist one in understanding this appraisal concept. In light of these comments, the Agencies have expanded the discussion in the Guidelines and moved the discussion to a separate Appendix.

Appendix D—Glossary of Terms. In response to commenters' suggestions, additional terms were incorporated in the Guidelines, including appraisal management company, broker price opinion, credit file, going concern value, presold unit, and unsold units.

Other Comments on the Proposal

Other Interagency Appraisal-Related Guidance Documents. Several commenters asked whether other guidance documents issued by the Agencies on appraisal-related issues would be rescinded with the issuance of the Guidelines. The following guidance documents have been incorporated in the Guidelines and are now being rescinded: (1) The 1994 *Interagency Appraisal and Evaluation Guidelines;* (2) the 2003 *Interagency Statement on Independent Appraisal and Evaluation Functions;* (3) and the *Interagency Statement on the 2006 Revisions to the Uniform Standards of Professional Appraisal Practice.* The following guidance documents continue to be in effect: The 2005 *Interagency FAQs on Residential Tract Development Lending*

[14] 75 FR 66554 (Oct. 28, 2010).

and the 2005 *Frequently Asked Questions on the Appraisal Regulations and the Interagency Statement on Independent Appraisal and Evaluation Functions.*

Agencies' Appraisal Regulations. In the notice for comment on the Proposal, the Agencies requested comment on the appraisal regulatory exemption for residential real estate transactions involving U.S. government sponsored enterprises (GSEs). In the Guidelines, the Agencies clarified their expectations that while a loan qualifying for sale to a GSE is exempted from the appraisal regulations, an institution is expected to have appropriate policies to confirm their compliance with the GSEs' underwriting and appraisal standards. Further, the Agencies recognize that the Dodd-Frank Act directs the Agencies to address in their safety and soundness regulations the appraisal requirements for 1-to-4 family residential mortgages. Any amendment to the Agencies' appraisal regulations is beyond the scope of the Guidelines. The information provided by commenters will be considered in assessing the need to revise these regulations.

III. Final Interagency Guidelines

The Guidelines are effective upon publication in the **Federal Register.** However, on a case-by-case basis, an institution needing to improve its appraisal and evaluation program may be granted some flexibility from its primary Federal regulator on the timeframe for revising its procedures to be consistent with the Guidelines. This timeframe should be commensurate with the level and nature of the institution's real estate lending activity.

The final Interagency Appraisal and Evaluation Guidelines appear below.

Interagency Appraisal and Evaluation Guidelines

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I. Purpose

The Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (FRB), the Federal Deposit Insurance Corporation (FDIC), the Office of Thrift Supervision (OTS), and the National Credit Union Administration (NCUA) (the Agencies) are jointly issuing these Interagency Appraisal and Evaluation Guidelines (Guidelines), which supersede the 1994 Interagency Appraisal and Evaluation Guidelines. These Guidelines, including their appendices, address supervisory matters relating to real estate appraisals and evaluations used to support real estate-related financial transactions.[15] Further, these Guidelines provide federally regulated institutions and examiners clarification on the Agencies' expectations for prudent appraisal and evaluation policies, procedures, and practices.

II. Background

Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA)[16] requires each Agency to prescribe appropriate standards for the performance of real estate appraisals in connection with "federally related transactions,"[17] which are defined as those real estate-related financial transactions that an Agency engages in, contracts for, or regulates and that require the services of an appraiser.[18] The Agencies' appraisal regulations must require, at a minimum, that real estate appraisals be performed in accordance with generally accepted uniform appraisal standards as evidenced by the appraisal standards promulgated by the Appraisal Standards Board, and that such appraisals be in writing.[19] An Agency may require compliance with additional appraisal standards if it makes a determination that such additional standards are required to properly carry out its statutory responsibilities.[20] Each of the Agencies has adopted additional appraisal standards.[21]

The Agencies' real estate lending regulations and guidelines,[22] issued pursuant to section 304 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA),[23] require each institution to adopt and maintain written real estate lending policies that are consistent with principles of safety and soundness and that reflect consideration of the real estate lending guidelines issued as an appendix to the regulations.[24] The real estate lending guidelines state that an institution's real estate lending program should include an appropriate real estate appraisal and evaluation program.

III. Supervisory Policy

An institution's real estate appraisal and evaluation policies and procedures will be reviewed as part of the examination of the institution's overall real estate-related activities. Examiners will consider the size and the nature of an institution's real estate-related activities when assessing the appropriateness of its program.

While borrowers' ability to repay their real estate loans according to reasonable terms remains the primary consideration in the lending decision, an institution also must consider the value of the underlying real estate collateral in accordance with the Agencies' appraisal regulations. Institutions that fail to comply with the Agencies' appraisal regulations or to maintain a sound appraisal and evaluation program consistent with supervisory guidance will be cited in supervisory letters or examination reports and may be criticized for unsafe and unsound banking practices. Deficiencies will require appropriate corrective action.

When analyzing individual transactions, examiners will review an

[15] These Guidelines pertain to all real estate-related financial transactions originated or purchased by a regulated institution or its operating subsidiary for its own portfolio or as assets held for sale, including activities of commercial and residential real estate mortgage operations, capital markets groups, and asset securitization and sales units.

[16] Public Law 101–73, Title XI, 103 Stat. 511 (1989); 12 U.S.C. 3331, *et seq.*

[17] 12 U.S.C. 3339.

[18] 12 U.S.C. 3350(4).

[19] *Supra* Note 3.

[20] *Id.*

[21] OCC: 12 CFR part 34, subpart C; FRB: 12 CFR part 208, subpart E, and 12 CFR part 225, subpart G; FDIC: 12 CFR part 323; OTS: 12 CFR part 564; and NCUA: 12 CFR part 722.

[22] OCC: 12 CFR part 34, subpart C; FRB: 12 CFR part 208, subpart E; FDIC: 12 CFR part 365; and OTS: 12 CFR 560.100 and 560.101.

[23] Public Law 102–242, § 304, 105 Stat. 2354; 12 U.S.C. 1828(o).

[24] NCUA's general lending regulation addresses residential real estate lending by Federal credit unions, and its member business loan regulation addresses commercial real estate lending. 12 CFR 701.21; 12 CFR part 723.

appraisal or evaluation to determine whether the methods, assumptions, and value conclusions are reasonable. Examiners also will determine whether the appraisal or evaluation complies with the Agencies' appraisal regulations and is consistent with supervisory guidance as well as the institution's policies. Examiners will review the steps taken by an institution to ensure that the persons who perform the institution's appraisals and evaluations are qualified, competent, and are not subject to conflicts of interest.

IV. Appraisal and Evaluation Program

An institution's board of directors or its designated committee is responsible for adopting and reviewing policies and procedures that establish an effective real estate appraisal and evaluation program. The program should:

- Provide for the independence of the persons ordering, performing, and reviewing appraisals or evaluations.
- Establish selection criteria and procedures to evaluate and monitor the ongoing performance of appraisers and persons who perform evaluations.
- Ensure that appraisals comply with the Agencies' appraisal regulations and are consistent with supervisory guidance.
- Ensure that appraisals and evaluations contain sufficient information to support the credit decision.
- Maintain criteria for the content and appropriate use of evaluations consistent with safe and sound banking practices.
- Provide for the receipt and review of the appraisal or evaluation report in a timely manner to facilitate the credit decision.
- Develop criteria to assess whether an existing appraisal or evaluation may be used to support a subsequent transaction.
- Implement internal controls that promote compliance with these program standards, including those related to monitoring third party arrangements.
- Establish criteria for monitoring collateral values.
- Establish criteria for obtaining appraisals or evaluations for transactions that are not otherwise covered by the appraisal requirements of the Agencies' appraisal regulations.

V. Independence of the Appraisal and Evaluation Program

For both appraisal and evaluation functions, an institution should maintain standards of independence as part of an effective collateral valuation program for all of its real estate lending activity. The collateral valuation program is an integral component of the credit underwriting process and, therefore, should be isolated from influence by the institution's loan production staff. An institution should establish reporting lines independent of loan production for staff who administer the institution's collateral valuation program, including the ordering, reviewing, and acceptance of appraisals and evaluations. Appraisers must be independent of the loan production and collection processes and have no direct, indirect or prospective interest, financial or otherwise, in the property or transaction.[25] These standards of independence also should apply to persons who perform evaluations.

For a small or rural institution or branch, it may not always be possible or practical to separate the collateral valuation program from the loan production process. If absolute lines of independence cannot be achieved, an institution should be able to demonstrate clearly that it has prudent safeguards to isolate its collateral valuation program from influence or interference from the loan production process. In such cases, another loan officer, other officer, or director of the institution may be the only person qualified to analyze the real estate collateral. To ensure their independence, such lending officials, officers, or directors must abstain from any vote or approval involving loans on which they ordered, performed, or reviewed the appraisal or evaluation.[26]

Communication between the institution's collateral valuation staff and an appraiser or person performing an evaluation is essential for the exchange of appropriate information relative to the valuation assignment. An institution's policies and procedures should specify methods for communication that ensure independence in the collateral valuation function. These policies and procedures should foster timely and appropriate communications regarding the assignment and establish a process for responding to questions from the appraiser or person performing an evaluation.

An institution may exchange information with appraisers and persons who perform evaluations, which may include providing a copy of the sales contract[27] for a purchase transaction. However, an institution should not directly or indirectly coerce, influence, or otherwise encourage an appraiser or a person who performs an evaluation to misstate or misrepresent the value of the property.[28] Consistent with its policies and procedures, an institution also may request the appraiser or person who performs an evaluation to:

- Consider additional information about the subject property or about comparable properties.
- Provide additional supporting information about the basis for a valuation.
- Correct factual errors in an appraisal.

An institution's policies and procedures should ensure that it avoids inappropriate actions that would compromise the independence of the collateral valuation function,[29] including:

- Communicating a predetermined, expected, or qualifying estimate of value, or a loan amount or target loan-to-value ratio to an appraiser or person performing an evaluation.
- Specifying a minimum value requirement for the property that is needed to approve the loan or as a condition of ordering the valuation.
- Conditioning a person's compensation on loan consummation.
- Failing to compensate a person because a property is not valued at a certain amount.[30]
- Implying that current or future retention of a person's services depends on the amount at which the appraiser or person performing an evaluation values a property.
- Excluding a person from consideration for future engagement because a property's reported market value does not meet a specified threshold.

[25] The Agencies' appraisal regulations set forth specific appraiser independence requirements that exceed those set forth in the Uniform Standards of Professional Appraisal Practice (USPAP). Institutions also should be aware of separate requirements on conflicts of interest under Regulation Z (Truth in Lending), 12 CFR 226.42(d).

[26] NCUA has recognized that it may be necessary for credit union loan officers or other officials to participate in the appraisal or evaluation function although it may be sound business practice to ensure no single person has the sole authority to make credit decisions involving loans on which the person ordered or reviewed the appraisal or evaluation. 55 FR 5614, 5618 (February 16, 1990), 55 FR 30193, 30206 (July 25, 1990).

[27] Refer to USPAP Standards Rule 1–5(a) and the Ethics Rule.

[28] For mortgage transactions secured by a consumer's principal dwelling, refer to 12 CFR 226.36(b) under Regulation Z (Truth in Lending) through March 31, 2011. Also refer to 12 CFR 226.42, which is mandatory beginning on April 1, 2011. Regulation Z also prohibits a creditor from extending credit when it knows that the appraiser independence standards have been violated, unless the creditor determines that the value of the property is not materially misstated.

[29] *See* 12 CFR 226.42(c).

[30] This provision does not preclude an institution from withholding compensation from an appraiser or person who provided an evaluation based on a breach of contract or substandard performance of services under a contractual provision.

After obtaining an appraisal or evaluation, or as part of its business practice, an institution may find it necessary to obtain another appraisal or evaluation of a property and would be expected to adhere to a policy of selecting the most credible appraisal or evaluation, rather than the appraisal or evaluation that states the highest value. (Refer to the *Reviewing Appraisals and Evaluations* section in these Guidelines for additional information on determining and documenting the credibility of an appraisal or evaluation.) Further, an institution's reporting of a person suspected of non-compliance with the Uniform Standards of Professional Appraisal Practice (USPAP), and applicable Federal or state laws or regulations, or otherwise engaged in other unethical or unprofessional conduct to the appropriate authorities would not be viewed by the Agencies as coercion or undue influence. However, an institution should not use the threat of reporting a false allegation in order to influence or coerce an appraiser or a person who performs an evaluation.

VI. Selection of Appraisers or Persons Who Perform Evaluations

An institution's collateral valuation program should establish criteria to select, evaluate, and monitor the performance of appraisers and persons who perform evaluations. The criteria should ensure that:

- The person selected possesses the requisite education, expertise, and experience to competently complete the assignment.
- The work performed by appraisers and persons providing evaluation services is periodically reviewed by the institution.
- The person selected is capable of rendering an unbiased opinion.
- The person selected is independent and has no direct, indirect, or prospective interest, financial or otherwise, in the property or the transaction.
- The appraiser selected to perform an appraisal holds the appropriate state certification or license at the time of the assignment. Persons who perform evaluations should possess the appropriate appraisal or collateral valuation education, expertise, and experience relevant to the type of property being valued. Such persons may include appraisers, real estate lending professionals, agricultural extension agents, or foresters.[31]

An institution or its agent must directly select and engage appraisers. The only exception to this requirement is that the Agencies' appraisal regulations allow an institution to use an appraisal prepared for another financial services institution provided certain conditions are met. An institution or its agents also should directly select and engage persons who perform evaluations. Independence is compromised when a borrower recommends an appraiser or a person to perform an evaluation. Independence is also compromised when loan production staff selects a person to perform an appraisal or evaluation for a specific transaction. For certain transactions, an institution also must comply with the provisions addressing valuation independence in Regulation Z (Truth in Lending).[32]

An institution's selection process should ensure that a qualified, competent and independent person is selected to perform a valuation assignment. An institution should maintain documentation to demonstrate that the appraiser or person performing an evaluation is competent, independent, and has the relevant experience and knowledge for the market, location, and type of real property being valued. Further, the person who selects or oversees the selection of appraisers or persons providing evaluation services should be independent from the loan production area. An institution's use of a borrower-ordered or borrower-provided appraisal violates the Agencies' appraisal regulations. However, a borrower can inform an institution that a current appraisal exists, and the institution may request it directly from the other financial services institution.

A. Approved Appraiser List

If an institution establishes an approved appraiser list for selecting an appraiser for a particular assignment, the institution should have appropriate procedures for the development and administration of the list. These procedures should include a process for qualifying an appraiser for initial placement on the list, as well as periodic monitoring of the appraiser's performance and credentials to assess whether to retain the appraiser on the list. Further, there should be periodic internal review of the use of the approved appraiser list to confirm that appropriate procedures and controls exist to ensure independence in the development, administration, and maintenance of the list. For residential transactions, loan production staff can use a revolving, pre-approved appraiser list, provided the development and maintenance of the list is not under their control.

B. Engagement Letters

An institution should use written engagement letters when ordering appraisals, particularly for large, complex, or out-of-area commercial real estate properties. An engagement letter facilitates communication with the appraiser and documents the expectations of each party to the appraisal assignment. In addition to the other information, the engagement letter will identify the intended use and user(s), as defined in USPAP. An engagement letter also may specify whether there are any legal or contractual restrictions on the sharing of the appraisal with other parties. An institution should include the engagement letter in its credit file. To avoid the appearance of any conflict of interest, appraisal or evaluation development work should not commence until the institution has selected and engaged a person for the assignment.

VII. Transactions That Require Appraisals

Although the Agencies' appraisal regulations exempt certain real estate-related financial transactions from the appraisal requirement, most real estate-related financial transactions over the appraisal threshold are considered federally related transactions and, thus, require appraisals.[33] The Agencies also reserve the right to require an appraisal under their appraisal regulations to address safety and soundness concerns in a transaction. (*See* Appendix A, *Appraisal Exemptions*.)[34]

[31] Although not required, an institution may use state certified or licensed appraisers to perform evaluations. Institutions should refer to USPAP Advisory Opinion 13 for guidance on appraisers performing evaluations of real property collateral.

[32] *See* 12 CFR 226.42.

[33] In order to facilitate recovery in designated major disaster areas, subject to safety and soundness considerations, the Depository Institutions Disaster Relief Act of 1992 provides the Agencies with the authority to waive certain appraisal requirements for up to three years after a Presidential declaration of a natural disaster. Public Law 102–485, § 2, 106 Stat. 2771 (October 23, 1992); 12 U.S.C. 3352.

[34] As a matter of policy, OTS uses its supervisory authority to require problem associations and associations in troubled condition to obtain appraisals for all real estate-related transactions over $100,000 (unless the transaction is otherwise exempt). NCUA requires a written estimate of market value for all real estate-related transactions valued at the appraisal threshold or less, or that involve an existing extension of credit where there is either an advancement of new monies or a material change in the condition of the property. 12 CFR 722.3(d).

VIII. Minimum Appraisal Standards

The Agencies' appraisal regulations include minimum standards for the preparation of an appraisal. (*See* Appendix D, *Glossary of Terms,* for terminology used in these Guidelines.) The appraisal must:

• *Conform to generally accepted appraisal standards as evidenced by the USPAP promulgated by the Appraisal Standards Board of the Appraisal Foundation unless principles of safe and sound banking require compliance with stricter standards.*

Although allowed by USPAP, the Agencies' appraisal regulations do not permit an appraiser to appraise any property in which the appraiser has an interest, direct or indirect, financial or otherwise in the property or transaction. Further, the appraisal must contain an opinion of market value as defined in the Agencies' appraisal regulations. (*See* discussion on the definition of market value below.) Under USPAP, the appraisal must contain a certification that the appraiser has complied with USPAP. An institution may refer to the appraiser's USPAP certification in its assessment of the appraiser's independence concerning the transaction and the property. Under the Agencies' appraisal regulations, the result of an Automated Valuation Model (AVM), by itself or signed by an appraiser, is not an appraisal, because a state certified or licensed appraiser must perform an appraisal in conformance with USPAP and the Agencies' minimum appraisal standards. Further, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) [35] provides "[i]n conjunction with the purchase of a consumer's principal dwelling, broker price opinions may not be used as the primary basis to determine the value of a piece of property for the purpose of loan origination of a residential mortgage loan secured by such piece of property." [36]

• *Be written and contain sufficient information and analysis to support the institution's decision to engage in the transaction.*

An institution should obtain an appraisal that is appropriate for the particular federally related transaction, considering the risk and complexity of the transaction. The level of detail should be sufficient for the institution to understand the appraiser's analysis and opinion of the property's market value. As provided by the USPAP Scope of Work Rule, appraisers are responsible for establishing the scope of work to be performed in rendering an opinion of the property's market value. An institution should ensure that the scope of work is appropriate for the assignment. The appraiser's scope of work should be consistent with the extent of the research and analyses employed for similar property types, market conditions, and transactions. Therefore, an institution should be cautious in limiting the scope of the appraiser's inspection, research, or other information used to determine the property's condition and relevant market factors, which could affect the credibility of the appraisal.

According to USPAP, appraisal reports must contain sufficient information to enable the intended user of the appraisal to understand the report properly. An institution should specify the use of an appraisal report option that is commensurate with the risk and complexity of the transaction. The appraisal report should contain sufficient disclosure of the nature and extent of inspection and research performed by the appraiser to verify the property's condition and support the appraiser's opinion of market value. (*See* Appendix D, *Glossary of Terms,* for the definition of appraisal report options.)

Institutions should be aware that provisions in the Dodd-Frank Act address appraisal requirements for a *higher-risk mortgage* to a consumer.[37] To implement these provisions, the Agencies recognize that future regulations will address the requirement that the appraiser conduct a physical property visit of the interior of the mortgaged property.[38]

• *Analyze and report appropriate deductions and discounts for proposed construction or renovation, partially leased buildings, non-market lease terms, and tract developments with unsold units.*

Appraisers must analyze, apply, and report appropriate deductions and discounts when providing an estimate of market value based on demand for real estate in the future. This standard is designed to avoid having appraisals prepared using unrealistic assumptions and inappropriate methods in arriving at the property's market value. (*See* Appendix C, *Deductions and Discounts,* for further explanation on deductions and discounts.)

• *Be based upon the definition of market value set forth in the appraisal regulation.*

Each appraisal must contain an estimate of market value, as defined by the Agencies' appraisal regulations. The definition of market value assumes that the price is not affected by undue stimulus, which would allow the value of the real property to be increased by favorable financing or seller concessions. Value opinions such as "going concern value," "value in use," or a special value to a specific property user may not be used as market value for federally related transactions. An appraisal may contain separate opinions of such values so long as they are clearly identified and disclosed.

The estimate of market value should consider the real property's actual physical condition, use, and zoning as of the effective date of the appraiser's opinion of value. For a transaction financing construction or renovation of a building, an institution would generally request an appraiser to provide the property's current market value in its "as is" condition, and, as applicable, its prospective market value upon completion and/or prospective market value upon stabilization.[39] Prospective market value opinions should be based upon current and reasonably expected market conditions. When an appraisal includes prospective market value opinions, there should be a point of reference to the market conditions and time frame on which the appraiser based the analysis.[40] An institution should understand the real property's "as is" market value and should consider the prospective market value that corresponds to the credit decision and the phase of the project being funded, if applicable.

• *Be performed by state certified or licensed appraisers in accordance with requirements set forth in the appraisal regulation.*

In determining competency for a given appraisal assignment, an institution must consider an appraiser's education and experience. While an institution must confirm that the appraiser holds a valid credential from the appropriate state appraiser regulatory authority, a state certification or license is a minimum credentialing

[35] Public Law 111–203, 124 Stat. 1376 (2010).

[36] Dodd-Frank Act, Section 1473(r).

[37] Under the law, the provisions are effective 12 months after final regulations to implement the provisions are published. *See* Dodd-Frank Act, Section 1400(c)(1).

[38] Section 1471 of the Dodd-Frank Act added a new section 129H to the Truth-in-Lending Act (15 U.S.C. 1631 *et seq.*).

[39] Under NCUA regulations, "market value" of a construction and development project is the value at the time a commercial real estate loan is made, which includes "the appraised value of land owned by the borrower on which the project is to be built, less any liens, plus the cost to build the project." 68 FR 56537, 56540 (October 1, 2003) (referring to Office of General Counsel Opinion 01–0422 (June 7, 2001)); 12 CFR 723.3(b).

[40] *See* USPAP, Statement 4 on Prospective Value Opinions, for further explanation.

requirement. Appraisers are expected to be selected for individual assignments based on their competency to perform the appraisal, including knowledge of the property type and specific property market. As stated in the Agencies' appraisal regulations, a state certified or licensed appraiser may not be considered competent solely by virtue of being certified or licensed. In communicating an appraisal assignment, an institution should convey to the appraiser that the Agencies' minimum appraisal standards must be followed.

IX. Appraisal Development

The Agencies' appraisal regulations require appraisals for federally related transactions to comply with the requirements in USPAP, some of which are addressed below. Consistent with the USPAP Scope of Work Rule,[41] the appraisal must reflect an appropriate scope of work that provides for "credible" assignment results. The appraiser's scope of work should reflect the extent to which the property is identified and inspected, the type and extent of data researched, and the analyses applied to arrive at opinions or conclusions. Further, USPAP requires the appraiser to disclose whether he or she previously appraised the property.

While an appraiser must comply with USPAP and establish the scope of work in an appraisal assignment, an institution is responsible for obtaining an appraisal that contains sufficient information and analysis to support its decision to engage in the transaction. Therefore, to ensure that an appraisal is appropriate for the intended use, an institution should discuss its needs and expectations for the appraisal with the appraiser. Such discussions should assist the appraiser in establishing the scope of work and form the basis of the institution's engagement letter, as appropriate. These communications should adhere to the institution's policies and procedures on independence of the appraiser and not unduly influence the appraiser. An institution should not allow lower cost or the speed of delivery time to inappropriately influence its appraisal ordering procedures or the appraiser's determination of the scope of work for an appraisal supporting a federally related transaction.

As required by USPAP, the appraisal must include any approach to value (that is, the cost, income, and sales comparison approaches) that is applicable and necessary to the assignment. Further, the appraiser should disclose the rationale for the omission of a valuation approach. The appraiser must analyze and reconcile the information from the approaches to arrive at the estimated market value. The appraisal also should include a discussion on market conditions, including relevant information on property value trends, demand and supply factors, and exposure time. Other information might include the prevalence and effect of sales and financing concessions, the list-to-sale price ratio, and availability of financing. In addition, an appraisal should reflect an analysis of the property's sales history and an opinion as to the highest and best use of the property. USPAP requires the appraiser to disclose whether or not the subject property was inspected and whether anyone provided significant assistance to the appraiser signing the appraisal report.

X. Appraisal Reports

An institution is responsible for identifying the appropriate appraisal report option to support its credit decisions. The institution should consider the risk, size, and complexity of the transaction and the real estate collateral when determining the appraisal report format to be specified in its appraisal engagement instructions to an appraiser.

USPAP provides various appraisal report options that an appraiser may use to present the results of appraisal assignments. The major difference among these report options is the level of detail presented in the report. A report option that merely states, rather than summarizes or describes the content and information required in an appraisal report, may lack sufficient supporting information and analysis to explain the appraiser's opinions and conclusions.

Generally, a report option that is restricted to a single client and intended user will not be appropriate to support most federally related transactions. These reports lack sufficient supporting information and analysis for underwriting purposes. These less detailed reports may be appropriate for real estate portfolio monitoring purposes. (*See* Appendix D, *Glossary of Terms,* for the definition of appraisal report options.)

Regardless of the report option, the appraisal report should contain sufficient detail to allow the institution to understand the scope of work performed. Sufficient information should include the disclosure of research and analysis performed, as well as disclosure of the research and analysis typically warranted for the type of appraisal, but omitted, along with the rationale for its omission.

XI. Transactions That Require Evaluations

The Agencies' appraisal regulations permit an institution to obtain an appropriate evaluation of real property collateral in lieu of an appraisal for transactions that qualify for certain exemptions. These exemptions include a transaction that:

- Has a transaction value equal to or less than the appraisal threshold of $250,000.
- Is a business loan with a transaction value equal to or less than the business loan threshold of $1 million, and is not dependent on the sale of, or rental income derived from, real estate as the primary source of repayment.[42]
- Involves an existing extension of credit at the lending institution, provided that:
  - There has been no obvious and material change in market conditions or physical aspects of the property that threaten the adequacy of the institution's real estate collateral protection after the transaction, even with the advancement of new monies; or
  - There is no advancement of new monies other than funds necessary to cover reasonable closing costs.[43]

For more information on real estate-related financial transactions that are exempt from the appraisal requirement, *see* Appendix A, *Appraisal Exemptions.* For a discussion on changes in market conditions, *see* the section on *Validity of Appraisals and Evaluations* in these Guidelines.

Although the Agencies' appraisal regulations allow an institution to use an evaluation for certain transactions, an institution should establish policies and procedures for determining when to obtain an appraisal for such transactions. For example, an institution should consider obtaining an appraisal as an institution's portfolio risk increases or for higher risk real estate-related financial transactions, such as those involving:

- Loans with combined loan-to-value ratios in excess of the supervisory loan-to-value limits.
- Atypical properties.
- Properties outside the institution's traditional lending market.

[41] *See* USPAP, Scope of Work Rule, Advisory Opinions 28 and 29.

[42] NCUA regulations do not contain an exemption from the appraisal requirements specific to member business loans.

[43] NCUA's appraisal regulation requires credit unions to meet both conditions to avoid the need for an appraisal as set forth in 12 CFR 722.3(d).

- Transactions involving existing extensions of credit with significant risk to the institution.
- Borrowers with high risk characteristics.

XII. Evaluation Development

An evaluation must be consistent with safe and sound banking practices and should support the institution's decision to engage in the transaction. An institution should be able to demonstrate that an evaluation, whether prepared by an individual or supported by an analytical method or a technological tool, provides a reliable estimate of the collateral's market value as of a stated effective date prior to the decision to enter into a transaction. (Refer to Appendix B, *Evaluations Based on Analytical Methods or Technological Tools.*)

A valuation method that does not provide a property's market value or sufficient information and analysis to support the value conclusion is not acceptable as an evaluation. For example, a valuation method that provides a sales or list price, such as a broker price opinion, cannot be used as an evaluation because, among other things, it does not provide a property's market value. Further, the Dodd-Frank Act provides "[i]n conjunction with the purchase of a consumer's principal dwelling, broker price opinions may not be used as the primary basis to determine the value of a piece of property for the purpose of loan origination of a residential mortgage loan secured by such piece of property." [44] Likewise, information on local housing conditions and trends, such as a competitive market analysis, does not contain sufficient information on a specific property that is needed, and therefore, would not be acceptable as an evaluation. The information obtained from such sources, while insufficient as an evaluation, may be useful to develop an evaluation or appraisal.

An institution should establish policies and procedures for determining an appropriate collateral valuation method for a given transaction considering associated risks. These policies and procedures should address the process for selecting the appropriate valuation method for a transaction rather than using the method that renders the highest value, lowest cost, or fastest turnaround time.

A valuation method should address the property's actual physical condition and characteristics as well as the economic and market conditions that affect the estimate of the collateral's market value. It would not be acceptable for an institution to base an evaluation on unsupported assumptions, such as a property is in "average" condition, the zoning will change, or the property is not affected by adverse market conditions. Therefore, an institution should establish criteria for determining the level and extent of research or inspection necessary to ascertain the property's actual physical condition, and the economic and market factors that should be considered in developing an evaluation. An institution should consider performing an inspection to ascertain the actual physical condition of the property and market factors that affect its market value. When an inspection is not performed, an institution should be able to demonstrate how these property and market factors were determined.

XIII. Evaluation Content

An evaluation should contain sufficient information detailing the analysis, assumptions, and conclusions to support the credit decision. An evaluation's content should be documented in the credit file or reproducible. The evaluation should, at a minimum:

- Identify the location of the property.
- Provide a description of the property and its current and projected use.
- Provide an estimate of the property's market value in its actual physical condition, use and zoning designation as of the effective date of the evaluation (that is, the date that the analysis was completed), with any limiting conditions.
- Describe the method(s) the institution used to confirm the property's actual physical condition and the extent to which an inspection was performed.
- Describe the analysis that was performed and the supporting information that was used in valuing the property.
- Describe the supplemental information that was considered when using an analytical method or technological tool.
- Indicate all source(s) of information used in the analysis, as applicable, to value the property, including:
  - External data sources (such as market sales databases and public tax and land records);
  - Property-specific data (such as previous sales data for the subject property, tax assessment data, and comparable sales information);
  - Evidence of a property inspection;
  - Photos of the property;
  - Description of the neighborhood; or
  - Local market conditions.
- Include information on the preparer when an evaluation is performed by a person, such as the name and contact information, and signature (electronic or other legally permissible signature) of the preparer.

(*See* Appendix B, *Evaluations Based on Analytical Methods or Technological Tools,* for guidance on the appropriate use of analytical methods and technological tools for developing an evaluation.)

XIV. Validity of Appraisals and Evaluations

The Agencies allow an institution to use an existing appraisal or evaluation to support a subsequent transaction in certain circumstances. Therefore, an institution should establish criteria for assessing whether an existing appraisal or evaluation continues to reflect the market value of the property (that is, remains valid). Such criteria will vary depending upon the condition of the property and the marketplace, and the nature of the transaction. The documentation in the credit file should provide the facts and analysis to support the institution's conclusion that the existing appraisal or evaluation may be used in the subsequent transaction. A new appraisal or evaluation is necessary if the originally reported market value has changed due to factors such as:

- Passage of time.
- Volatility of the local market.
- Changes in terms and availability of financing.
- Natural disasters.
- Limited or over supply of competing properties.
- Improvements to the subject property or competing properties.
- Lack of maintenance of the subject or competing properties.
- Changes in underlying economic and market assumptions, such as capitalization rates and lease terms.
- Changes in zoning, building materials, or technology.
- Environmental contamination.

XV. Reviewing Appraisals and Evaluations

The Agencies' appraisal regulations specify that appraisals for federally related transactions must contain sufficient information and analysis to support an institution's decision to engage in the credit transaction. For certain transactions that do not require an appraisal, the Agencies' regulations require an institution to obtain an appropriate evaluation of real property collateral that is consistent with safe

[44] Dodd-Frank Act, Section 1473(r).

and sound banking practices. As part of the credit approval process and prior to a final credit decision, an institution should review appraisals and evaluations to ensure that they comply with the Agencies' appraisal regulations and are consistent with supervisory guidance and its own internal policies. This review also should ensure that an appraisal or evaluation contains sufficient information and analysis to support the decision to engage in the transaction. Through the review process, the institution should be able to assess the reasonableness of the appraisal or evaluation, including whether the valuation methods, assumptions, and data sources are appropriate and well-supported. An institution may use the review findings to monitor and evaluate the competency and ongoing performance of appraisers and persons who perform evaluations. (*See* the discussion in these Guidelines on *Selection of Appraisers or Persons Who Perform Evaluations.*)

When an institution identifies an appraisal or evaluation that is inconsistent with the Agencies' appraisal regulations and the deficiencies cannot be resolved with the appraiser or person who performed the evaluation, the institution must obtain an appraisal or evaluation that meets the regulatory requirements prior to making a credit decision. Though a reviewer cannot change the value conclusion in the original appraisal, an appraisal review performed by an appropriately qualified and competent state certified or licensed appraiser in accordance with USPAP may result in a second opinion of market value. An institution may rely on the second opinion of market value obtained through an acceptable USPAP-compliant appraisal review to support its credit decision.

An institution's policies and procedures for reviewing appraisals and evaluations, at a minimum, should:

- Address the independence, educational and training qualifications, and role of the reviewer.
- Reflect a risk-focused approach for determining the depth of the review.
- Establish a process for resolving any deficiencies in appraisals or evaluations.
- Set forth documentation standards for the review and the resolution of noted deficiencies.

A. Reviewer Qualifications

An institution should establish qualification criteria for persons who are eligible to review appraisals and evaluations. Persons who review appraisals and evaluations should be independent of the transaction and have no direct or indirect interest, financial or otherwise, in the property or transaction, and be independent of and insulated from any influence by loan production staff. Reviewers also should possess the requisite education, expertise, and competence to perform the review commensurate with the complexity of the transaction, type of real property, and market. Further, reviewers should be capable of assessing whether the appraisal or evaluation contains sufficient information and analysis to support the institution's decision to engage in the transaction.

A small or rural institution or branch with limited staff should implement prudent safeguards for reviewing appraisals and evaluations when absolute lines of independence cannot be achieved. Under these circumstances, the review may be part of the originating loan officer's overall credit analysis, as long as the originating loan officer abstains from directly or indirectly approving or voting to approve the loan.

An institution should assess the level of in-house expertise available to review appraisals for complex projects, high-risk transactions, and out-of-market properties. An institution may find it appropriate to employ additional personnel or engage a third party to perform the reviews. When using a third party, an institution remains responsible for the quality and adequacy of the review process, including the qualification standards for reviewers. (*See* the discussion in these Guidelines on *Third Party Arrangements.*)

B. Depth of Review

An institution should implement a risk-focused approach for determining the depth of the review needed to ensure that appraisals and evaluations contain sufficient information and analysis to support the institution's decision to engage in the transaction. This process should differentiate between high- and low-risk transactions so that the review is commensurate with the risk. The depth of the review should be sufficient to ensure that the methods, assumptions, data sources, and conclusions are reasonable, well-supported, and appropriate for the transaction, property, and market. The review also should consider the process through which the appraisal or evaluation is obtained, either directly by the institution or from another financial services institution. The review process should be commensurate with the type of transaction as discussed below:

- *Commercial Real Estate.* An institution should ensure that appraisals or evaluations for commercial real estate transactions are subject to an appropriate level of review. Transactions involving complex properties or high-risk commercial loans should be reviewed more comprehensively to assess the technical quality of the appraiser's analysis. For example, an institution should perform a more comprehensive review of transactions involving large-dollar credits, loans secured by complex or specialized properties, and properties outside the institution's traditional lending market. Persons performing such reviews should have the appropriate expertise and knowledge relative to the type of property and its market.

The depth of the review of appraisals and evaluations completed for commercial properties securing lower risk transactions may be less technical in nature, but still should provide meaningful results that are commensurate with the size, type, and complexity of the underlying credit transaction. In addition, an institution should establish criteria for when to expand the depth of the review.

- *1-to-4 Family Residential Real Estate.* The reviews for residential real estate transactions should reflect a risk-focused approach that is commensurate with the size, type, and complexity of the underlying credit transaction, as well as loan and portfolio risk characteristics. These risk factors could include debt-to-income ratios, loan-to-value ratios, level of documentation, transaction dollar amount, or other relevant factors. With prior approval from its primary Federal regulator, an institution may employ various techniques, such as automated tools or sampling methods, for performing pre-funding reviews of appraisals or evaluations supporting lower risk residential mortgages. When using such techniques, an institution should maintain sufficient data and employ appropriate screening parameters to provide adequate quality assurance and should ensure that the work of all appraisers and persons performing evaluations is periodically reviewed. In addition, an institution should establish criteria for when to expand the depth of the review.

An institution may use sampling and audit procedures to verify the seller's representations and warranties that the appraisals for the underlying loans in a pool of residential loans satisfy the Agencies' appraisal regulations and are consistent with supervisory guidance and an institution's internal policies. If an institution is unable to confirm that the appraisal meets the Agencies' appraisal requirements, then the

institution must obtain an appraisal prior to engaging in the transaction.

• *Appraisals From Other Financial Services Institutions.*[45] The Agencies' appraisal regulations specify that an institution may use an appraisal that was prepared by an appraiser engaged directly by another financial services institution, provided the institution determines that the appraisal conforms to the Agencies' appraisal regulations and is otherwise acceptable. An institution should assess whether to use the appraisal prior to making a credit decision. An institution should subject such appraisals to at least the same level of review that the institution performs on appraisals it obtains directly for similar properties and document its review in the credit file. The documentation of the review should support the institution's reliance on the appraisal. Among other considerations, an institution should confirm that:

○ The appraiser was engaged directly by the other financial services institution.

○ The appraiser had no direct, indirect, or prospective interest, financial or otherwise, in the property or transaction.

○ The financial services institution (not the borrower) ordered the appraisal. For example, an engagement letter should show that the financial services institution, not the borrower, engaged the appraiser.

An institution must not accept an appraisal that has been readdressed or altered by the appraiser with the intent to conceal the original client. Altering an appraisal report in a manner that conceals the original client or intended users of the appraisal is misleading, does not conform to USPAP, and violates the Agencies' appraisal regulations.

C. Resolution of Deficiencies

An institution should establish policies and procedures for resolving any inaccuracies or weaknesses in an appraisal or evaluation identified through the review process, including procedures for:

• Communicating the noted deficiencies to and requesting correction of such deficiencies by the appraiser or person who prepared the evaluation. An institution should implement adequate internal controls to ensure that such communications do not result in any coercion or undue influence on the appraiser or person who performed the evaluation.

• Addressing significant deficiencies in the appraisal that could not be resolved with the original appraiser by obtaining a second appraisal or relying on a review that complies with Standards Rule 3 of USPAP and is performed by an appropriately qualified and competent state certified or licensed appraiser prior to the final credit decision.

• Replacing evaluations prior to the credit decision that do not provide credible results or lack sufficient information to support the final credit decision.

D. Documentation of the Review

An institution should establish policies for documenting the review of appraisals and evaluations in the credit file. Such policies should address the level of documentation needed for the review, given the type, risk and complexity of the transaction. The documentation should describe the resolution of any appraisal or evaluation deficiencies, including reasons for obtaining and relying on a second appraisal or evaluation. The documentation also should provide an audit trail that documents the resolution of noted deficiencies or details the reasons for relying on a second opinion of market value.

XVI. Third Party Arrangements

An institution that engages a third party to perform certain collateral valuation functions on its behalf is responsible for understanding and managing the risks associated with the arrangement. An institution should use caution if it engages a third party to administer any part of its appraisal and evaluation function, including the ordering or reviewing of appraisals and evaluations, selecting an appraiser or person to perform evaluations, or providing access to analytical methods or technological tools. An institution is accountable for ensuring that any services performed by a third party, both affiliated and unaffiliated entities, comply with applicable laws and regulations and are consistent with supervisory guidance.[46] Therefore, an institution should have the resources and expertise necessary for performing ongoing oversight of third party arrangements.

An institution should have internal controls for identifying, monitoring, and managing the risks associated with using a third party arrangement for valuation services, including compliance, legal, reputational, and operational risks. While the arrangement may allow an institution to achieve specific business objectives, such as gaining access to expertise that is not available internally, the reduced operational control over outsourced activities poses additional risk. Consistent with safe and sound practices, an institution should have a written contract that clearly defines the expectations and obligations of both the financial institution and the third party, including that the third party will perform its services in compliance with the Agencies' appraisal regulations and consistent with supervisory guidance.

Prior to entering into any arrangement with a third party for valuation services, an institution should compare the risks, costs, and benefits of the proposed relationship to those associated with using another vendor or conducting the activity in-house. The decision to outsource any part of the collateral valuation function should not be unduly influenced by any short-term cost savings. An institution should take into account all aspects of the long-term effect of the relationship, including the managerial expertise and associated costs for effectively monitoring the arrangement on an ongoing basis.

If an institution outsources any part of the collateral valuation function, it should exercise appropriate due diligence in the selection of a third party. This process should include sufficient analysis by the institution to assess whether the third party provider can perform the services consistent with the institution's performance standards and regulatory requirements. An institution should be able to demonstrate that its policies and procedures establish effective internal controls to monitor and periodically assess the collateral valuation functions performed by a third party.

An institution also is responsible for ensuring that a third party selects an appraiser or a person to perform an evaluation who is competent and

[45] An institution generally should not rely on an evaluation prepared by or for another financial services institution because it will not have sufficient information relative to the other institution's risk management practices for developing evaluations.

[46] *See,* for example, FFIEC *Statement on Risk Management of Outsourced Technology Service* (November 28, 2000) for guidance on the assessment, selection, contract review, and monitoring of a third party that provides services to a regulated institution. Refer to the institution's primary Federal regulator for additional guidance on third party arrangements: OCC Bulletin 2001–47, *Third-Party Relationships* (November 1, 2001); OTS Thrift Bulletin 82a, *Third Party Arrangements* (September 1, 2004); NCUA Letter to Credit Unions: 01–CU–20, *Due Diligence Over Third Party Service Arrangements* (November 2001), 07–CU–13, Supervisory Letter—*Evaluation Third Party Relationships* (December 2007), 08–CU–09, *Evaluating Third Party Relationships Questionnaire* (April 2008); and FDIC Financial Institution Letter 44–2008, *Guidance for Managing Third-Party Risk* (June 2008).

independent, has the requisite experience and training for the assignment, and thorough knowledge of the subject property's market. Appraisers must be appropriately certified or licensed, but this minimum credentialing requirement, although necessary, is not sufficient to determine that an appraiser is competent to perform an assignment for a particular property or geographic market.

An institution should ensure that when a third party engages an appraiser or a person who performs an evaluation, the third party conveys to that person the intended use of the appraisal or evaluation and that the regulated institution is the client. For example, an engagement letter facilitates the communication of this information.

An institution's risk management system should reflect the complexity of the outsourced activities and associated risk. An institution should document the results of ongoing monitoring efforts and periodic assessments of the arrangement(s) with a third party for compliance with applicable regulations and consistency with supervisory guidance and its performance standards. If deficiencies are discovered, an institution should take remedial action in a timely manner.

XVII. Program Compliance

Deficiencies in an institution's appraisal and evaluation program that result in violations of the Agencies' appraisal regulations or contraventions of the Agencies' supervisory guidance reflect negatively on management. An institution's appraisal and evaluation policies should establish internal controls to promote an effective appraisal and evaluation program. The compliance process should:

- Maintain a system of adequate controls, verification, and testing to ensure that appraisals and evaluations provide credible market values.
- Insulate the persons responsible for ascertaining the compliance of the institution's appraisal and evaluation function from any influence by loan production staff.
- Ensure the institution's practices result in the selection of appraisers and persons who perform evaluations with the appropriate qualifications and demonstrated competency for the assignment.
- Establish procedures to test the quality of the appraisal and evaluation review process.
- Use, as appropriate, the results of the institution's review process and other relevant information as a basis for considering a person for a future appraisal or evaluation assignment.
- Report appraisal and evaluation deficiencies to appropriate internal parties and, if applicable, to external authorities in a timely manner.

A. Monitoring Collateral Values

Consistent with the Agencies' real estate lending regulations and guidelines,[47] an institution should monitor collateral risk on a portfolio and on an individual credit basis. Therefore, an institution should have policies and procedures that address the need for obtaining current collateral valuation information to understand its collateral position over the life of a credit and effectively manage the risk in its real estate credit portfolios. The policies and procedures also should address the need to obtain current valuation information for collateral supporting an existing credit that may be modified or considered for a loan workout.

Under their appraisal regulations, the Agencies reserve the right to require an institution to obtain an appraisal or evaluation when there are safety and soundness concerns on an existing real estate secured credit. Therefore, an institution should be able to demonstrate that sufficient information is available to support the current market value of the collateral and the classification of a problem real estate credit. When such information is not available, an examiner may direct an institution to obtain a new appraisal or evaluation in order to have sufficient information to understand the current market value of the collateral. Examiners would be expected to provide an institution with a reasonable amount of time to obtain a new appraisal or evaluation.

B. Portfolio Collateral Risk

Prudent portfolio monitoring practices include criteria for determining when to obtain a new appraisal or evaluation. Among other considerations, the criteria should address deterioration in the credit since origination or changes in market conditions. Changes in market conditions could include material changes in current and projected vacancy, absorption rates, lease terms, rental rates, and sale prices, including concessions and overruns and delays in construction costs. Fluctuations in discount or direct capitalization rates also are indicators of changing market conditions.

In assessing whether changes in market conditions are material, an institution should consider the individual and aggregate effect of these changes on its collateral protection and the risk in its real estate lending programs or credit portfolios. Moreover, as an institution's reliance on collateral becomes more important, its policies and procedures should:

- Ensure that timely information is available to management for assessing collateral and associated risk.
- Specify when new or updated collateral valuations are appropriate or desirable to understand collateral risk in the transaction(s).
- Delineate the valuation method to be employed after considering the property type, current market conditions, current use of the property, and the relevance of the most recent appraisal or evaluation in the credit file.

Consistent with sound collateral valuation monitoring practices, an institution can use a variety of techniques for monitoring the effect of collateral valuation trends on portfolio risk. Sources of relevant information may include external market data, internal data, or reviews of recently obtained appraisals and evaluations. An institution should be able to demonstrate that it has sufficient, reliable, and timely information on market trends to understand the risk associated with its lending activity.

C. Modifications and Workouts of Existing Credits

An institution may find it appropriate to modify a loan or to engage in a workout with an existing borrower. The Agencies expect an institution to consider current collateral valuation information to assess its collateral risk and facilitate an informed decision on whether to engage in a modification or workout of an existing real estate credit. (*See* the discussion above on *Portfolio Collateral Risk.)*

- *Loan Modifications.* A loan modification to an existing credit that involves a limited change(s) [48] in the terms of the note or loan agreement and that does not adversely affect the institution's real estate collateral protection after the modification does not rise to the level of a new real estate-

[47] OCC: 12 CFR part 34, subpart D; FRB: 12 CFR part 208, subpart E; FDIC: 12 CFR part 365; OTS: 12 CFR 560.100 and 560.101; and NCUA: 12 CFR 701.21.

[48] A loan modification that entails a decrease in the interest rate or a single extension of a limited or short-term nature would not be viewed as a subsequent transaction. For example, an extension arising from a short-term delay in the full repayment of the loan when there is documented evidence that payment from the borrower is forthcoming, or a brief delay in the scheduled closing on the sale of a property when there is evidence that the closing will be completed in the near term.

related financial transaction for purposes of the Agencies' appraisal regulations. As a result, an institution would not be required to obtain either a new appraisal or evaluation to comply with the Agencies' appraisal regulations, but should have an understanding of its collateral risk. For example, institutions can use automated valuation models or other valuation techniques when considering a modification to a residential mortgage loan. An institution should have procedures for ensuring an alternative collateral valuation method provides reliable information. In addition, an institution should be able to demonstrate that a modification reflects prudent underwriting standards and is consistent with safe and sound lending practices. Examiners will assess the adequacy of valuation information an institution uses for loan modifications.

• *Loan Workouts.* As noted under "Monitoring Collateral Values," an institution's policies and procedures should address the need for current information on the value of real estate collateral supporting a loan workout. A loan workout can take many forms, including a modification that adversely affects the institution's real estate collateral protection after the modification, a renewal or extension of loan terms, the advancement of new monies, or a restructuring with or without concessions. These types of loan workouts are new real estate-related financial transactions.

If the loan workout does not include the advancement of new monies other than reasonable closing costs, the institution may obtain an evaluation in lieu of an appraisal. For loan workouts that involve the advancement of new monies, an institution may obtain an evaluation in lieu of an appraisal provided there has been no obvious and material change in market conditions and no change in the physical aspects of the property that threatens the adequacy of the institution's real estate collateral protection after the workout.[49] In these cases, an institution should support and document its rationale for using this exemption. An institution must obtain an appraisal when a loan workout involves the advancement of new monies and there is an obvious and material change in either market conditions or physical aspects of the property, or both, that threatens the adequacy of the institution's real estate collateral protection after the workout (unless another exemption applies).[50] (*See* also Appendix A, *Appraisal Exemptions,* for transactions where an evaluation would be allowed in lieu of an appraisal.)

• *Collateral Valuation Policies for Modifications and Workouts.* An institution's policies should address the need for obtaining current collateral valuation information for a loan modification or workout. The policies should specify the valuation method to be used and address the need to monitor collateral risk on an ongoing basis taking into consideration changing market conditions and the borrower's repayment performance. An institution also should be able to demonstrate that the collateral valuation method used is reliable for a given credit or loan type.

Further, for loan workouts, an institution's policies should specify conditions under which an appraisal or evaluation will be obtained. As loan repayment becomes more dependent on the sale of collateral, an institution's policies should address the need to obtain an appraisal or evaluation for safety and soundness reasons even though one is not otherwise required by the Agencies' appraisal regulations.

XVIII. Referrals

An institution should file a complaint with the appropriate state appraiser regulatory officials when it suspects that a state certified or licensed appraiser failed to comply with USPAP, applicable state laws, or engaged in other unethical or unprofessional conduct. In addition, effective April 1, 2011, an institution must file a complaint with the appropriate state appraiser certifying and licensing agency under certain circumstances.[51] An institution also must file a suspicious activity report (SAR) with the Financial Crimes Enforcement Network of the Department of the Treasury (FinCEN) when suspecting fraud or identifying other transactions meeting the SAR filing criteria.[52] Examiners finding evidence of unethical or unprofessional conduct by appraisers should instruct the institution to file a complaint with state appraiser regulatory officials and, when required, to file a SAR with FinCEN. If there is a concern regarding the institution's ability or willingness to file a complaint or make a referral, examiners should forward their findings and recommendations to their supervisory office for appropriate disposition and referral to state appraiser regulatory officials and FinCEN, as necessary.

Appendix A—Appraisal Exemptions

Under Title XI of FIRREA, the Agencies were granted the authority to identify categories of real estate-related financial transactions that do not require the services of an appraiser to protect Federal financial and public policy interests or to satisfy principles of safe and sound lending. Therefore, in their appraisal regulations, the Agencies identified certain real estate-related financial transactions that do not require the services of an appraiser and that are exempt from the appraisal requirement. This appendix provides further clarification on the application of these regulatory exemptions and should be read in the context of each Agency's appraisal regulation. If an institution has a question as to whether a particular transaction qualifies for an exemption, the institution should seek guidance from its primary Federal regulator. For those transactions qualifying for the appraisal threshold, existing extensions of credit, or the business loan exemptions, an institution is exempted from the appraisal requirement, but still must, at a minimum, obtain an evaluation consistent with these Guidelines.[53]

1. Appraisal Threshold

For transactions with a transaction value equal to or less than $250,000, the Agencies' appraisal regulations, at a minimum, require an evaluation consistent with safe and sound banking practices.[54] If an institution enters into a transaction that is secured by several individual properties that are not part of a tract development, the estimate of value of each individual property should determine whether an appraisal

[49] Under the NCUA's appraisal regulation, a credit union must meet both conditions to avoid the need for an appraisal. If a transaction does not involve an advancement of new monies and there have been no obvious and material changes in market or property conditions, a credit union must obtain a written estimate of market value that is consistent with the standards for evaluations as discussed in these Guidelines. 12 CFR 722.3(d).

[50] For example, if the transaction value is below the appraisal threshold of $250,000.

[51] *See* 12 CFR 226.42(g).

[52] Refer to Federal regulations at FRB: 12 CFR 208.62, 211.5(k), 211.24(f), and 225.4(f); FDIC: 12 CFR part 353; NCUA: 12 CFR part 748; OCC: 12 CFR 21.11; OTS: 12 CFR 563.180; and FinCEN: 31 CFR 103.18. Refer also to the *Federal Financial Institutions Examination Council Bank Secrecy Act/Anti-Money Laundering Examination Manual* (Revised April 29, 2010) to review the general criteria, but note that instructions on filing a SAR through the Financial Crime Enforcement Network (FinCEN) of the Department of the Treasury are attached to the SAR form. The SAR form is available on FinCEN's Web site.

[53] NCUA's regulations do not provide an exemption from the appraisal requirements specific to member business loans.

[54] NCUA's appraisal regulation requires a written estimate of market value, performed by a qualified and experienced person who has no interest in the property, for transactions equal to or less than the appraisal threshold and transactions involving an existing extension of credit. 12 CFR 722.3(d).

or evaluation would be required for that property. For example, an institution makes a loan secured by seven commercial properties in different markets with two properties valued in excess of the appraisal threshold and five properties valued less than the appraisal threshold. An institution would need to obtain an appraisal on the two properties valued in excess of the appraisal threshold and evaluations on the five properties below the appraisal threshold, even though the aggregate loan commitment exceeds the appraisal threshold.

2. Abundance of Caution

An institution may take a lien on real estate and be exempt from obtaining an appraisal if the lien on real estate is taken by the lender in an abundance of caution. This exemption is intended to have limited application, especially for real estate loans secured by residential properties in which the real estate is the only form of collateral. In order for a business loan to qualify for the abundance of caution exemption, the Agencies expect the extension of credit to be well supported by the borrower's cash flow or collateral other than real property. The institution's credit analysis should verify and document the adequacy and reliability of these repayment sources and conclude that knowledge of the market value of the real estate on which the lien will be taken as an abundance of caution is unnecessary in making the credit decision.

An institution should not invoke the abundance of caution exemption if its credit analysis reveals that the transaction would not be adequately secured by sources of repayment other than the real estate, even if the contributory value of the real estate collateral is low relative to the entire collateral pool and other repayment sources. Similarly, the exemption should not be applied to a loan or loan program unless the institution verifies and documents the primary and secondary repayment sources. In the absence of verification of the repayment sources, this exemption should not be used merely to reduce the cost associated with obtaining an appraisal, to minimize transaction processing time, or to offer slightly better terms to a borrower than would be otherwise offered.

In addition, prior to making a final commitment to the borrower, the institution should document and retain in the credit file the analysis performed to verify that the abundance of caution exemption has been appropriately applied. If the operating performance or financial condition of the company subsequently deteriorates and the lender determines that the real estate will be relied upon as a repayment source, an appraisal should then be obtained, unless another exemption applies.

3. Loans Not Secured by Real Estate

An institution is not required to obtain an appraisal on a loan that is not secured by real estate, even if the proceeds of the loan are used to acquire or improve real property.[55] For loans covered by this exemption, the real estate has no direct effect on the institution's decision to extend credit because the institution has no legal security interest in the real estate. This exemption is not intended to be applied to real estate-related financial transactions other than those involving loans. For example, this exemption should not be applied to a transaction such as an institution's investment in real estate for its own use.

4. Liens for Purposes Other Than the Real Estate's Value

This exemption allows an institution to take liens against real estate without obtaining an appraisal to protect legal rights to, or control over, other collateral. Institutions frequently take real estate liens to protect legal rights to other collateral rather than because of the contributory value of the real estate as an individual asset. For example, an institution making a loan to a logging operation may take a lien against the real estate upon which the timber stands to ensure its access to the timber in the event of default. To apply the exemption, the institution should determine that the market value of the real estate as an individual asset is not necessary to support its decision to extend credit.

5. Real Estate-Secured Business Loans

This exemption applies to business loans with a transaction value of $1 million or less when the sale of, or rental income derived from, real estate is not the primary source of repayment.[56] To apply this exemption, the Agencies expect the institution to determine that the primary source of repayment for the business loan is operating cash flow from the business rather than rental income or sale of real estate. For this type of exempted loan, under the Agencies' appraisal regulations, an institution may obtain an evaluation in lieu of an appraisal.

This exemption will not apply to transactions in which the lender has taken a security interest in real estate, but the primary source of repayment is provided by cash flow or sale of real estate in which the lender has no security interest. For example, a transaction in which a loan is secured by real estate for one project, in which the lender has taken a security interest, but will be repaid with the cash flow from real estate sales or rental income from other real estate projects, in which the lender does not have a security interest, would not qualify for the exemption. (*See* Appendix D, *Glossary of Terms,* for a definition of business loan.)

6. Leases

An institution is required to obtain appraisals of leases that are the economic equivalent of a purchase or sale of the leased real estate. For example, an institution must obtain an appraisal on a transaction involving a capital lease, as the real estate interest is of sufficient magnitude to be recognized as an asset of the lessee for accounting purposes. Operating leases that are not the economic equivalent of the purchase or sale of the leased property do not require appraisals.

7. Renewals, Refinancings, and Other Subsequent Transactions

Under certain circumstances, renewals, refinancings, and other subsequent transactions may be supported by evaluations rather than appraisals. The Agencies' appraisal regulations permit an evaluation for a renewal or refinancing of an existing extension of credit at the institution when either:

(i) There has been no obvious and material change in market conditions or physical aspects of the property that threatens the adequacy of the institution's real estate collateral protection after the transaction, even with the advancement of new monies; or

(ii) There is no advancement of new monies, other than funds necessary to cover reasonable closing costs.[57]

A subsequent transaction is exempt from the appraisal requirement if no new monies are advanced (other than

[55] NCUA's regulations do not provide an exemption from the appraisal requirements specific to loans not secured by real estate.

[56] NCUA's appraisal regulation, 12 CFR 722, does not define "business loan." A "member business loan" is regulated under 12 CFR 723.

[57] Under the NCUA's appraisal regulation, a credit union must meet both conditions to avoid the need for an appraisal. If a transaction does not involve an advancement of new monies and there have been no obvious and material changes in market or property conditions, a credit union must obtain a written estimate of market value that is consistent with the standards for evaluations as discussed in these Guidelines. 12 CFR 722.3(d).

funds necessary to cover reasonable closing costs) even when there has been an obvious and material change in market conditions or the physical aspects of the property that threatens the adequacy of the institution's real estate collateral protection. Conversely, when new monies are advanced (other than funds necessary to cover reasonable closing costs) and there has been an obvious and material change in market conditions or the physical aspects of the property that threaten the adequacy of the institution's real estate collateral protection, the institution must obtain an appraisal unless another exemption applies.

For the purposes of these Guidelines, an institution is considered to have advanced new monies (excluding reasonable closing costs) when there is an increase in the principal amount of the loan over the amount of principal outstanding before the renewal or refinancing. For example, an institution originated a 15-year term loan for $3 million and, in year 14, the outstanding principal is $2.5 million. In year 14, the borrower seeks to refinance the loan at a lower interest rate and requests a loan of $2.8 million. The $300,000 would be considered new monies. On the other hand, an institution has provided a $5 million revolving line of credit to a borrower for two years and, at the end of year two, renews the $5 million line for another two years. At the time of renewal, the borrower has drawn down $1 million. In this example, the amount of the line remains unchanged even though the amount available on the line is less than the line commitment. Renewing the line of credit at its original amount would not be considered an advancement of new monies. Further, when an institution advances funds to protect its interest in a property, such as to repair damaged property, a new appraisal or evaluation would not be required because these funds would be used to restore the damaged property to its original condition.

To satisfy the condition for no obvious and material change in market conditions or the physical aspects of the property, the current or planned future use of the property should be consistent with the use identified in the existing appraisal or evaluation. For example, if a property has reportedly increased in value because of a planned change in use of the property resulting from rezoning, an appraisal should be performed unless another exemption applies.

If an evaluation is permitted under this exemption, an institution may use an existing appraisal or evaluation as long as the institution verifies and documents that the appraisal or evaluation continues to be valid. (*See* the discussion in the *Validity of Appraisals and Evaluations* section of these Guidelines.) Even if a subsequent transaction qualifies for this exemption, an institution should consider the risk posed by the transaction and may wish to consider obtaining a new appraisal.

Loan Workouts or Restructurings. Loan workouts, debt restructurings, loan assumptions, and similar transactions involving the addition or substitution of borrowers may qualify for the exemption for renewals, refinancings and other subsequent transactions. Use of this exemption depends on meeting the conditions listed in (i) and (ii) at the beginning of the discussion on Renewals, Refinancings, and Other Subsequent Transactions. An institution also should consider such factors as the quality of the underlying collateral and the validity of the existing appraisal or evaluation. If a loan workout involves acceptance of new real estate collateral that facilitates the orderly collection of the credit, or reduces the institution's risk of loss, an appraisal or evaluation of the existing and new collateral may be prudent, even if it is obtained after the workout occurs and the institution perfects its security interest.

8. Transactions Involving Real Estate Notes

This exemption applies to appraisal requirements for transactions involving the purchase, sale, investment in, exchange of, or extension of credit secured by a loan or interest in a loan, pooled loans, or interests in real property, including mortgage-backed securities. If each note or real estate interest meets the Agencies' regulatory requirements for appraisals at the time the real estate note was originated, the institution need not obtain a new appraisal to support its interest in the transaction. The institution should employ audit procedures and review a representative sample of appraisals supporting pooled loans or real estate notes to determine that the conditions of the exemption have been satisfied.

Principles of safe and sound banking practices require an institution to determine the suitability of purchasing or investing in existing real estate-secured loans and real estate interests. These transactions should have been originated according to secondary market standards and have a history of performance. The information from these sources, together with original documentation, should be sufficient to allow an institution to make appropriate credit decisions regarding these transactions.

An institution may presume that the underlying loans in a marketable, mortgage-backed security satisfy the requirements of the Agencies' appraisal regulations whenever an issuer makes a public statement, such as in a prospectus, that the appraisals comply with the Agencies' appraisal regulations. A marketable security is one that may be sold with reasonable promptness at a price that corresponds to its fair value.

If the mortgages that secure the mortgage warehouse loan are sold to Fannie Mae or Freddie Mac, the sale itself may be used to demonstrate that the underlying loans complied with the Agencies' appraisal regulations. In such cases, the Agencies expect an institution to monitor its borrower's performance in selling loans to the secondary market and take appropriate steps, such as increasing sampling and auditing of the loans and the supporting documentation, if the borrower experiences more than a minimal rate of loans being put back by an investor.

9. Transactions Insured or Guaranteed by a U.S. Government Agency or U.S. Government-Sponsored Agency

This exemption applies to transactions that are wholly or partially insured or guaranteed by a U.S. government agency or U.S. government-sponsored agency. The Agencies expect these transactions to meet all the underwriting requirements of the Federal insurer or guarantor, including its appraisal requirements, in order to receive the insurance or guarantee.

10. Transactions That Qualify for Sale to, or Meet the Appraisal Standards of, a U.S. Government Agency or U.S. Government-Sponsored Agency

This exemption applies to transactions that either (i) qualify for sale to a U.S. government agency or U.S. government-sponsored agency,[58] or (ii) involve a residential real estate transaction in which the appraisal conforms to Fannie Mae or Freddie Mac appraisal standards applicable to that category of real estate. An institution may engage in these transactions without obtaining a separate appraisal conforming to the Agencies' appraisal regulations. Given the risk to the institution that it may have to repurchase a loan that does not comply with the appraisal standards of the U.S.

[58] These government-sponsored agencies include Banks for Cooperatives; Federal Agriculture Mortgage Corporation; Federal Farm Credit Banks; Federal Home Loan Banks; Freddie Mac; Fannie Mae; and Tennessee Valley Authority.

government agency or U.S. government-sponsored agency, the institution should have appropriate policies to confirm its compliance with the underwriting and appraisal standards of the U.S. government agency or U.S. government-sponsored agency.

10(i)—An institution that relies on exemption 10(i) should maintain adequate documentation that confirms that the transaction qualifies for sale to a U.S. government agency or U.S. government-sponsored agency. If the qualification for sale is not adequately documented, the transaction should be supported by an appraisal that conforms to the Agencies' appraisal regulations, unless another exemption applies.

10(ii)—To qualify for this exemption, transactions that do not conform to all of Fannie Mae or Freddie Mac underwriting standards, such as jumbo or other residential real estate loans, must be supported by an appraisal that meets these government-sponsored agencies' appraisal standards for the applicable property type and is documented in the credit file or reproducible.

11. Transactions by Regulated Institutions as Fiduciaries

An institution acting as a fiduciary is not required to obtain appraisals under the Agencies' appraisal regulations if an appraisal is not required under other laws governing fiduciary responsibilities in connection with a transaction.[59] For example, if no other law requires an appraisal in connection with the sale of a parcel of real estate to a beneficiary of a trust on terms specified in a trust instrument, an appraisal is not required under the Agencies' appraisal regulations. However, when a fiduciary transaction requires an appraisal under other laws, that appraisal should conform to the Agencies' appraisal requirements.

12. Appraisals Not Necessary To Protect Federal Financial and Public Policy Interests or the Safety and Soundness of Financial Institutions

The Agencies retain the authority to determine when the services of an appraiser are not required in order to protect Federal financial and public policy interests or the safety and soundness of financial institutions. This exemption is intended to apply to individual transactions on a case-by-case basis rather than broad categories of transactions that would otherwise be addressed by an appraisal exemption. An institution would need to seek a waiver from its supervisory Federal agency before entering into the transaction.

Appendix B—Evaluations Based on Analytical Methods or Technological Tools

The Agencies' appraisal regulations permit an institution to use an evaluation in lieu of an appraisal for certain transactions. An institution may use a variety of analytical methods and technological tools for developing an evaluation, provided the institution can demonstrate that the valuation method is consistent with safe and sound banking practices and these Guidelines (*see* sections on *Evaluation Development and Evaluation Content*).[60] An institution should not select a method or tool solely because it provides the highest value, the lowest cost, or the fastest response or turnaround time.

An institution should establish policies and procedures that provide a sound process for using various methods or tools. Such policies and procedures should:

- Ensure staff has the requisite expertise and training to manage the selection, use, and validation of an analytical method or technological tool. If an institution does not have the in-house expertise relative to a particular method or tool, then an institution should employ additional personnel or engage a third party. (*See* the *Third Party Arrangements* section in these Guidelines.)
- Address the selection, use, and validation of the valuation method or tool.
- Establish criteria for determining whether a particular valuation method or tool is appropriate for a given transaction or lending activity, considering associated risks. These risks include, but are not limited to, transaction size and purpose, credit quality, and leverage tolerance (loan-to-value).
- Specify criteria when a market event or risk factor would preclude the use of a particular method or tool.
- Address standards for the use of multiple methods or tools, if applicable, for valuing the same property or to support a particular lending activity.
- Provide criteria for ensuring that the institution uses a method or tool that produces a reliable estimate of market value that supports the institution's decision to engage in a transaction.
- Address the extent to which:
  - An inspection or research is necessary to ascertain the property's actual physical condition, and
  - Supplemental information is needed to assess the effect of market conditions or other factors on the estimate of market value.

An institution should establish an effective system of controls for verifying that a valuation method or tool is employed in a manner consistent with internal policies and procedures. Moreover, the institution's staff responsible for internal controls should have the skills commensurate with the complexity or sophistication of the method or tool. Examiners will review an institution's policies, procedures, and internal controls to ensure that an institution's use of a method or tool is appropriate and consistent with safe and sound banking practices.

Automated Valuation Models (AVMs)

AVMs are computer programs that estimate a property's market value based on market, economic, and demographic factors. Institutions may employ AVMs for a variety of uses such as loan underwriting and portfolio monitoring. An institution may not rely solely on the results of an AVM to develop an evaluation unless the resulting evaluation is consistent with safe and sound banking practices and these Guidelines. (*See* the *Evaluation Development* and *Evaluation Content* sections.) For example, to be consistent with the standards for an evaluation, the results of an AVM would need to address a property's actual physical condition, and therefore, could not be based on an unsupported assumption, such as a property is in "average" condition.

Institutions should establish policies and procedures that govern the use of AVMs and specify the supplemental information that is required to develop an evaluation. When the supplemental information indicates the AVM is not an acceptable valuation tool, the institution's policies and procedures should require the use of an alternative method or tool.

Selecting an AVM(s)

When selecting an AVM or multiple AVMs, an institution should:

- Perform the necessary level of due diligence on AVM vendors and their models, including how model developers conducted performance testing as well as the sample size used

[59] Generally, credit unions have limited fiduciary authority and NCUA's appraisal regulation does not specifically exempt transactions by fiduciaries.

[60] For example, the sole use of data from the Internet or other public sources would not be an evaluation under these Guidelines. Additionally, valuation methods that do not contain sufficient information and analysis or provide a market value conclusion would not be acceptable as evaluations.

and the geographic level tested (such as, county level or zip code).

- Establish acceptable minimum performance criteria for a model prior to and independent of the validation process.
- Perform a detailed validation of the model(s) considered during the selection process and document the validation process.
- Evaluate underlying data used in the model(s), including the data sources and types, frequency of updates, quality control performed on the data, and the sources of the data in states where public real estate sales data are not disclosed.
- Assess modeling techniques and the inherent strengths and weaknesses of different model types (such as hedonic, index, and blended) as well as how a model(s) performs for different property types (such as condominiums, planned unit developments, and single family detached residences).
- Evaluate the vendor's scoring system and methodology for the model(s). Determine whether the scoring system provides an appropriate indicator of model reliability by property types and geographic locations.

Following the selection of an AVM(s), an institution should develop policies and procedures to address the appropriate use of an AVM(s) and its monitoring and ongoing validation processes.

Determining AVM Use

An institution should establish policies and procedures for determining whether an AVM can be used for a particular transaction. The institution should:

- Maintain AVM performance criteria for accuracy and reliability in a given transaction, lending activity, and geographic location.[61]
- Establish internal confidence score[62] minimums, or similar criteria, for when each model can be used.
- Implement controls to preclude "value shopping" when more than one AVM is used for the same property.
- Establish procedures for obtaining an appraisal or using a different valuation method to develop an evaluation when an AVM's resulting value is not reliable to support the credit decision. For example, in areas that have experienced a high incidence of fraud, the institution should consider whether the AVM may be relied upon for the transaction or another valuation method should be used.
- Identify circumstances under which an AVM may not be used, including:
  - When market conditions warrant, such as during the aftermath of a natural disaster or a major economic event;
  - When a model's performance is outside of specified tolerances for a particular geographic market or property price-tier range; or
  - When a property is non-homogeneous, such as atypical lot sizes or property types.

Validating AVM Results

An institution should establish standards and procedures for independent and ongoing monitoring and model validation, including the testing of multiple AVMs, to ensure that results are credible.[63] An institution should be able to demonstrate that the depth and extent of its validation processes are consistent with the materiality of the risk and the complexity of the transaction. Validation can be performed internally or with the assistance of a third party, as long as the validation is conducted by qualified individuals that are independent of the model development or sales functions. An institution should not rely solely on validation representations provided by an AVM vendor. An institution should perform appropriate model validation regardless of whether it relies on AVMs that are supported by value insurance or guarantees. If there are insurance or guarantee components of any particular AVM, the institution is responsible for understanding the extent and limitations of the insurance policy or guarantee, and the claim process and financial strength of the insurer.

An institution should ensure that persons who validate an AVM on an ongoing basis are independent of the loan production and collection processes and have the requisite expertise and training. In the AVM validation procedures, an institution should specify, at a minimum:

- Expectations for an appropriate sample size.
- Level of geographic analysis.
- Testing frequency and criteria for re-testing.
- Standards of performance measures to be used.
- Range of acceptable performance results.

To ensure unbiased test results, an institution should compare the results of an AVM to actual sales data in a specified trade area or market prior to the information being available to the model. If an institution uses more than one AVM, each AVM should be validated. To assess the effectiveness of its AVM practices, an institution should verify whether loans in which an AVM was used to establish value met the institution's performance expectations relative to similar loans that used a different valuation process. An institution should document the results of its validation and audit findings. An institution should use these findings to analyze and periodically update its policies and procedures for an AVM(s) when warranted.

Tax Assessment Valuations (TAVs)

An institution may not rely solely on the data provided by local tax authorities to develop an evaluation unless the resulting evaluation is consistent with safe and sound banking practices and these Guidelines. (*See* the *Evaluation Development* and *Evaluation Content* sections.) Since analytical methods such as TAVs generally need additional support to meet these Guidelines, institutions should develop policies and procedures that specify the level and extent of supplemental information that should be obtained to develop an evaluation. Such policies and procedures also should require the use of an alternate valuation method when such information does not support the transaction.

An institution may use a TAV in developing an evaluation when it can demonstrate that a valid correlation exists between the tax assessment data and the market value. In using a TAV to develop an evaluation, an institution should:

- Determine and document how the tax jurisdiction calculates the TAV and how frequently property revaluations occur.
- Perform an analysis to determine the relationship between the TAV and the property market values for properties within a tax jurisdiction.
- Test and document how closely TAVs correlate to market value based on contemporaneous sales at the time of assessment and revalidate whether the correlation remains stable as of the effective date of the evaluation.

[61] For example, an institution should establish a level of acceptable core accuracy and limit exposure to a model's systemic tendency to over value properties (commonly referred to as "tail risk").

[62] A "confidence score" generally refers to a vendor's own method of quantifying how reliable a model value is by using a rank ordering process. The scale and components of a confidence score are not standardized. Therefore an institution needs to understand how a confidence score was derived and the extent to which a confidence score correlates to model accuracy. If multiple AVMs are used, an institution should understand how the combination of models affects overall accuracy.

[63] *See,* for example, OCC Bulletin 2000–16, *Risk Modeling—Model Validation* (May 30, 2000).

Appendix C—Deductions and Discounts

The Agencies' appraisal regulations require an appraiser to analyze and report appropriate deductions and discounts for proposed construction or renovation, partially leased buildings, non-market lease terms, and tract developments with unsold units. For such transactions, an appraisal must include the market value of the property, which should reflect the property's actual physical condition, use, and zoning designation (referred to as the "as is" value of the property), as of the effective date of the appraisal. Therefore, if the highest and best use of the property is for development to a different use, the cost of demolition and site preparation should be considered in the analysis.

Proposed Construction or Renovation

For properties where improvements are to be constructed or rehabilitated, an institution may request a prospective market value upon completion and a prospective market value upon stabilization. While an institution may request the appraiser to provide the sum of retail sales for a proposed development, the result of such calculation is not the market value of the property for purposes of the Agencies' appraisal regulations.

Partially Leased Buildings

For proposed and partially leased rental developments, the appraiser must make appropriate deductions and discounts to reflect that the property has not achieved stabilized occupancy. The appraisal analysis also should include consideration of the absorption of the unleased space. Appropriate deductions and discounts should include items such as leasing commission, rent losses, tenant improvements, and entrepreneurial profit, if such profit is not included in the discount rate.

Non-Market Lease Terms

For properties subject to leases with terms that do not reflect current market conditions, the appraisal must clearly state the ownership interest being appraised and provide a discussion of the leases that are in place. If the leased fee interest is being appraised and contract rent is less than market rent on one or more long term lease(s) to a highly rated tenant, the market value of the leased fee interest would be less than the market value of the unencumbered fee simple interest in the property.[64] In these situations, the market value of the leased fee interest should be used.

Tract Developments with Unsold Units

A tract development is defined in the Agencies' appraisal regulations as a project of five units or more that is constructed or is to be constructed as a single development. Appraisals for these properties must reflect deductions and discounts for holding costs, marketing costs, and entrepreneurial profit supported by market data. In some cases entrepreneurial profit may be included in the discount rate. The applicable discount rate is developed based on investor requirements and the risk associated with the physical and financial characteristics of the property. In some markets, entrepreneurial profit is treated as a line item deduction while in other markets it is reflected as a component of the discount rate. Regardless of how entrepreneurial profit is handled in the appraisal analysis, an appropriate explanation and discussion should be provided in the appraisal report. The projected sales prices and absorption rate of units should be supported by anticipated demand at the time the units are expected to be exposed for sale. Anticipated demand for the units should be supported and presented in the appraisal. A reader of the appraisal report should be able to understand the risk characteristics associated with the subject property and the market, including the anticipated supply of competing properties.

- *Raw Land*

The appraiser must provide an opinion of value for raw land based on its current condition and existing zoning. If an appraiser employs a developmental approach to value the land that is based on projected land sales or development and sale of lots, the appraisal must reflect appropriate deductions and discounts for costs associated with developing and selling lots in the future. These costs may be incurred during the permitting, construction or selling stages of development. Appropriate deductions and discounts should include items such as feasibility studies, permitting, engineering, holding costs, marketing costs, and entrepreneurial profit and other costs specific to the property. If sufficient market data exists to perform both the sales comparison and developmental approaches to value, the appraisal report should detail a reconciliation of these two approaches in arriving at a market value conclusion for the raw land.

- *Developed Lots*

For existing or proposed developments of five or more residential lots in a single development, the appraiser must analyze and report appropriate deductions and discounts. Appropriate deductions and discounts should reflect holding costs, marketing costs, and entrepreneurial profit during the sales absorption period for the sale of the developed lots. The estimated sales absorption period should reflect the appraiser's estimate of the time frame for the actual development and sale of the lots, starting on the effective date of value and ending as of the expected date of the last lot sale. The absorption period should be based on market demand for lots in light of current and expected competition for similar lots in the market area.

- *Attached or Detached Single-family Homes*

For proposed construction and sale of five or more attached or detached single-family homes in the same development, the appraiser must analyze and report appropriate deductions and discounts. Appropriate deductions and discounts should reflect holding costs, marketing costs, and entrepreneurial profit during the sales absorption period of the completed units. If an institution finances construction on an individual unit basis, an appraisal of the individual units may be used if the institution can demonstrate through an independently obtained feasibility study or market analysis that all units collateralizing the loan can be constructed and sold within 12 months. However, the transaction should be supported by an appraisal that analyzes and reports appropriate deductions and discounts if any of the individual units are not completed and sold within the 12-month time frame.

- *Condominiums*

For proposed construction and sale of a condominium building with five or more units, the appraisal must reflect appropriate deductions and discounts. Appropriate deductions and discounts should include holding costs, marketing costs, and entrepreneurial profit during the sales absorption period of the completed units. If an institution finances construction of a single condominium building with less than five units or a condominium project with multiple buildings with less than five units per building, the institution may rely on appraisals of the individual

[64] Fee simple interest refers to the most complete ownership unencumbered by any leases or other interests. It is subject only to the limitations imposed by the governmental powers of taxation, eminent domain, police power and escheat. Leased fee interest, on the other hand, refers to a landlord's ownership that is encumbered by one or more leases.

units if the institution can demonstrate through an independently obtained feasibility study or market analysis that all units collateralizing the loan can be constructed and sold within 12 months. However, the transaction should be supported by an appraisal that analyzes and reports appropriate deductions and discounts if any of the individual units are not completed and sold within the 12-month time frame.

Appendix D—Glossary of Terms

Agent—The Agencies' appraisal regulations do not specifically define the term "agent." However, the term is generally intended to refer to one who undertakes to transact business or to manage business affairs for another. According to the Agencies' appraisal regulations, fee appraisers must be engaged directly by the federally regulated institution or its agent,[65] and have no direct or indirect interest, financial or otherwise, in the property or the transactions. The Agencies do not limit the arrangements that federally regulated institutions have with their agents, provided those arrangements do not place the agent in a conflict of interest that prevents the agent from representing the interests of the federally regulated institution.

Appraisal—As defined in the Agencies' appraisal regulations, a written statement independently and impartially prepared by a qualified appraiser (state licensed or certified) setting forth an opinion as to the market value of an adequately described property as of a specific date(s), supported by the presentation and analysis of relevant market information.

Appraisal Management Company—The Agencies' appraisal regulations do not define the term appraisal management company. For purposes of these Guidelines, an "appraisal management company" includes, but is not limited to, a third-party entity that provides real property valuation-related services, such as selecting and engaging an appraiser to perform an appraisal based upon requests originating from a regulated institution. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) has a specific definition for this term in connection with transactions secured by a consumer's principal dwelling or mortgage secondary market transactions. *See* the *Third Party Arrangements* section in these Guidelines.

Appraisal Report Options—Refer to the definitions for Restricted Use Appraisal Report, Self-Contained Appraisal Report, and Summary Appraisal Report.

Appraisal Threshold—An appraisal is not required on transactions with a transaction value of $250,000 or less. As specified in the Agencies' appraisal regulations, an institution must obtain an evaluation of the real property collateral, if no other appraisal exemption applies.

Approved Appraiser List—A listing of appraisers who an institution has determined to be generally qualified and competent to perform appraisals and may address the appraiser's expertise in a particular market and property type.

"*As Completed*" *Market Value*—Refer to the definition for Prospective Market Value.

"*As Is*" *Market Value*—The estimate of the market value of real property in its current physical condition, use, and zoning as of the appraisal's effective date.

"*As Stabilized*" *Market Value*—Refer to the definition for Prospective Market Value.

Automated Valuation Model—A computer program that estimates a property's market value based on market, economic, and demographic factors. *Hedonic* models generally use property characteristics (such as square footage and room count) and methodologies to process information, often based on statistical regression. *Index* models generally use geographic repeat sales data over time rather than property characteristic data. *Blended or hybrid* models use elements of both hedonic and index models.

Broker Price Opinion (BPO)—An estimate of the probable sales or listing price of the subject property provided by a real estate broker, sales agent, or sales person. A BPO generally provides a varying level of detail about a property's condition, market, and neighborhood, as well as comparable sales or listings. A BPO is not by itself an appraisal or evaluation, but could be used for monitoring the collateral value of an existing loan, when deemed appropriate. Further, the Dodd-Frank Act provides "[i]n conjunction with the purchase of a consumer's principal dwelling, broker price opinions may not be used as the primary basis to determine the value of a piece of property for the purpose of loan origination of a residential mortgage loan secured by such piece of property."[66]

Business Loan—As defined in the Agencies' appraisal regulations, a loan or extension of credit to any corporation, general or limited partnership, business trust, joint venture, syndicate, sole proprietorship, or other business entity.[67] A business loan includes extensions to entities engaged in agricultural operations, which is consistent with the Agencies' real estate lending guidelines definition of an improved property loan that include loans secured by farmland, timberland, and ranchland committed to ongoing management and agricultural production.

Business Loan Threshold—A business loan with a transaction value of $1,000,000 or less does not require an appraisal if the primary source of repayment is not dependent on the sale of, or rental income derived from, real estate. As specified in the Agencies' appraisal regulations, an institution must obtain an evaluation of the real property collateral.[68]

Client—According to USPAP, the party or parties who engage(s) an appraiser by employment or contract for a specific appraisal assignment. For the purposes of these Guidelines, the appraiser should be aware that the client is the regulated institution. (Refer to the section on *Third Party Arrangements* in these Guidelines.)

Credible (Appraisal) Assignment Results—According to USPAP, credible means "worthy of belief" used in the context of the Scope of Work Rule. Under this rule, credible assignment results depend on meeting or exceeding both (1) the expectations of parties who are regularly intended users for similar assignments, and (2) what an appraiser's peers' actions would be in performing the same or a similar assignment.

Credit File—A hardcopy or electronic record that documents all information necessary to (1) analyze the credit before it is granted and (2) monitor the credit during its life. An institution may use a computerized or manual system to manage the information in its credit files.

Date of the Appraisal Report—According to USPAP, the date of the appraisal report indicates when the appraisal analysis was completed.

Effective Date of the Appraisal—USPAP requires that each appraisal report specifies the effective date of the appraisal and the date of the report. The

[65] Except that the regulated institution also may accept an appraisal that was prepared by an appraiser engaged directly by another financial services institution in certain circumstances as set forth in the Agencies' appraisal regulations.

[66] Dodd-Frank Act, Section 1473(r).

[67] NCUA's appraisal regulation, 12 CFR 722, does not define "business loan." A "member business loan" is regulated under 12 CFR 723.

[68] NCUA's appraisal regulation, 12 CFR 722, does not provide a higher appraisal threshold for loans defined as "member business loans" under 12 CFR 723.

date of the report indicates the perspective from which the appraiser is examining the market. The effective date of the appraisal establishes the context for the value opinion. Three categories of effective dates—retrospective, current, or prospective—may be used, according to the intended use of the appraisal assignment.

Effective Date of the Evaluation—For the purposes of the Agencies' appraisal regulations and these Guidelines, the effective date of an evaluation is the date that the analysis is completed.

Engagement Letter—An engagement letter between an institution and an appraiser documents the expectations of each party to the appraisal assignment. For example, an engagement letter may specify, among other items: (i) The property's location and legal description; (ii) intended use and users of the appraisal; (iii) the requirement to provide an opinion of the property's market value; (iv) the expectation that the appraiser will comply with applicable laws and regulations, and be consistent with supervisory guidance; (v) appraisal report format; (vi) expected delivery date; and (vii) appraisal fee.

Evaluation—A valuation permitted by the Agencies' appraisal regulations for transactions that qualify for the appraisal threshold exemption, business loan exemption, or subsequent transaction exemption.

Exposure Time—As defined in USPAP, the estimated length of time the property interest being appraised would have been offered on the market prior to the hypothetical consummation of a sale at market value on the effective date of the appraisal. Exposure time is always presumed to precede the effective date of the appraisal. Exposure time is a function of price, time, and use—not an isolated opinion of time alone. (*See* USPAP Standard 1–2(c) and Statement 6.)

Extraordinary Assumption—As defined in USPAP, an assumption, directly related to a specific assignment, which, if found to be false, could alter the appraiser's opinions or conclusions regarding the property's market value. An example of an extraordinary assumption is when an appraiser assumes that an application for a zoning change will be approved and there is no evidence to suggest otherwise.

Federally Regulated Institution—For purposes of the Agencies' appraisal regulations and these Guidelines, an institution that is supervised by a Federal financial institution's regulatory agency. This includes a national or a state-chartered bank and its subsidiaries, a bank holding company and its non-bank subsidiaries, a Federal savings association and its subsidiaries, a Federal savings and loan holding company and its subsidiaries, and a credit union.

Federally Related Transaction—As defined in the Agencies' appraisal regulations, any real estate-related financial transaction in which the Agencies or any regulated institution engages or contracts for, and that requires the services of an appraiser.

Financial Services Institution—The Agencies' appraisal regulations do not contain a specific definition of the term "financial services institution." The term is intended to describe entities that provide services in connection with real estate lending transactions on an ongoing basis, including loan brokers.

Going Concern Value—The value of a business entity rather than the value of the real property. The valuation is based on the existing operations of the business and its current operating record, with the assumption that the business will continue to operate.

Hypothetical Condition—As defined in USPAP, a condition that is contrary to what exists but is supposed for the purpose of analysis. An example of a hypothetical condition is when an appraiser assumes a particular property's zoning is different from what the zoning actually is.

Loan Production Staff—Generally, all personnel responsible for generating loan volume or approving loans, as well as their subordinates and supervisors. These individuals would include any employee whose compensation is based on loan volume (such as processing or approving of loans). An employee is not considered loan production staff just because part of their compensation includes a general bonus or profit sharing plan that benefits all employees. Employees responsible solely for credit administration or credit risk management are not considered loan production staff.

Marketing Time—According to USPAP Advisory Opinion 7, the time it might take to sell the property interest at the appraised market value during the period immediately after the effective date of the appraisal. An institution may request an appraiser to separately provide an estimate of marketing time in an appraisal. However, this is not a requirement of the Agencies' appraisal regulations.

Market Value—As defined in the Agencies' appraisal regulations, the most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition are the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby:

- Buyer and seller are typically motivated;
- Both parties are well informed or well advised, and acting in what they consider their own best interests;
- A reasonable time is allowed for exposure in the open market;
- Payment is made in terms of cash in U.S. dollars or in terms of financial arrangements comparable thereto; and
- The price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.

Presold Unit—A unit may be considered presold if a buyer has entered into a binding contract to purchase the unit and has made a substantial and non-refundable earnest money deposit. Further, the institution should obtain sufficient documentation that the buyer has entered into a legally binding sales contract and has obtained a written prequalification or commitment for permanent financing.

Prospective Market Value "as Completed" and "as Stabilized"—A prospective market value may be appropriate for the valuation of a property interest related to a credit decision for a proposed development or renovation project. According to USPAP, an appraisal with a prospective market value reflects an effective date that is subsequent to the date of the appraisal report. Prospective value opinions are intended to reflect the current expectations and perceptions of market participants, based on available data. Two prospective value opinions may be required to reflect the time frame during which development, construction, and occupancy will occur. The prospective market value "as completed" reflects the property's market value as of the time that development is expected to be completed. The prospective market value "as stabilized" reflects the property's market value as of the time the property is projected to achieve stabilized occupancy. For an income-producing property, stabilized occupancy is the occupancy level that a property is expected to achieve after the property is exposed to the market for lease over a reasonable period of time and at comparable terms and conditions to other similar properties. (*See* USPAP Statement 4 and Advisory Opinion 17.)

Put Back—Represents the ability of an investor to reject mortgage loans from a mortgage originator if the mortgage

loans do not comply with the warranties and representations in their mortgage purchasing agreement.

Raw Land—A parcel or tract of land with no improvements, for example, infrastructure or vertical construction. When an appraisal of raw land includes entitlements, the appraisal should disclose when such entitlements will expire if improvements are not completed within a specified time period and the potential effect on the value conclusion.

Real Estate-Related Financial Transaction—As defined in the Agencies' appraisal regulations, any transaction involving:

- The sale, lease, purchase, investment in or exchange of real property, including interests in property, or the financing thereof;
- The refinancing of real property or interests in real property; or
- The use of real property or interests in property as security for a loan or investment, including mortgage-backed securities.

Regulated Institution—Refer to the definition of Federally Regulated Institution.

Restricted Use Appraisal Report—According to USPAP Standards Rule 2–2(c), a restricted use appraisal report briefly states information significant to solve the appraisal problem as well as a reference to the existence of specific work-file information in support of the appraiser's opinions and conclusions. The Agencies believe that the restricted use appraisal report will not be appropriate to underwrite a significant number of federally related transactions due to the lack of supporting information and analysis in the appraisal report. However, it may be appropriate to use this type of appraisal report for ongoing collateral monitoring of an institution's real estate transactions and other purposes.

Sales Concessions—A cash or noncash contribution that is provided by the seller or other party to the transaction and reduces the purchaser's cost to acquire the real property. A sales concession may include, but is not limited to, the seller paying all or some portion of the purchaser's closing costs (such as prepaid expenses or discount points) or the seller conveying to the purchaser personal property which is typically not conveyed with the real property. Sales concessions do not include fees that a seller is customarily required to pay under state or local laws. In developing an opinion of market value, an appraiser must take into consideration the effect of any sales concessions on the market value of the real property. (*See* "market value" above and USPAP Standards Rule 1–2(c).)

Sales History and Pending Sales—According to USPAP Standards Rule 1–5, when the value opinion to be developed is market value, an appraiser must, if such information is available to the appraiser in the normal course of business, analyze: (1) All current agreements of sale, options, and listings of the subject property as of the effective date of the appraisal, and (2) all sales of the subject property that occurred within three years prior to the effective date of the appraisal.

Scope of Work—According to USPAP Scope of Work Rule, the type and extent of research and analyses in an appraisal assignment. (*See* the Scope of Work Rule in USPAP.)

Self-contained Appraisal Report—According to USPAP Standards Rule 2–2(a), a self-contained appraisal report is the most complete and detailed appraisal report option.

Sum of Retail Sales—A mathematical calculation of the sum of the expected sales prices of several individual properties in the same development to an individual purchaser. The sum of retail sales is not the market value for purposes of meeting the minimum appraisal standards in the Agencies' appraisal regulations.

Summary Appraisal Report—According to USPAP Standards Rule 2–2(b), the summary appraisal report summarizes all information significant to the solution of an appraisal problem while still providing sufficient information to enable the client and intended user(s) to understand the rationale for the opinions and conclusions in the report.

Tract Development—As defined in the Agencies' appraisal regulations, a project of five units or more that is constructed or is to be constructed as a single development. For purposes of these Guidelines, "unit" refers to: a residential or commercial building lot, a detached single-family home, an attached single-family home, and a residence in a condominium, cooperative, or timeshare building.

Transaction Value—As defined in the Agencies' appraisal regulations:

- For loans or other extensions of credit, the amount of the loan or extension of credit;
- For sales, leases, purchases, and investments in or exchanges of real property, the market value of the real property interest involved; and
- For the pooling of loans or interests in real property for resale or purchase, the amount of the loan or market value of the real property calculated with respect to each such loan or interest in real property.

For purposes of this definition, the transaction value for loans that permit negative amortization should be the institution's total committed amount, including any potential negative amortization.

Uniform Standards of Professional Appraisal Practice (USPAP)—USPAP identifies the minimum set of standards that apply in all appraisal, appraisal review, and appraisal consulting assignments. These standards are promulgated by the Appraisal Standards Board of the Appraisal Foundation and are incorporated as a minimum appraisal standard in the Agencies' appraisal regulations.

Unsold Units—An unsold unit is a unit that does not meet the conditions listed in the definition of Presold Units.

Value of Collateral (for Use in Determining Loan-to-Value Ratio)—According to the Agencies' real estate lending standards guidelines, the term "value" means an opinion or estimate set forth in an appraisal or evaluation, whichever may be appropriate, of the market value of real property, prepared in accordance with the Agencies' appraisal regulations and these Guidelines. For loans to purchase an existing property, "value" means the lesser of the actual acquisition cost or the estimate of value.

Dated: November 1, 2010.

John Walsh,

Acting Comptroller of the Currency.

By order of the Board of Governors of the Federal Reserve System, December 1, 2010.

Jennifer J. Johnson,

Secretary of the Board.

Dated at Washington, DC, the 1st day of December, 2010.

By order of the Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

Dated: December 1, 2010.

By the Office of Thrift Supervision.

John E. Bowman,

Acting Director.

Dated: November 9, 2010.

By the National Credit Union Administration Board.

Mary F. Rupp,

Secretary of the Board.

[FR Doc. 2010–30913 Filed 12–9–10; 8:45 am]

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Federal Register

Friday,

December 10, 2010

Part VII

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 223

Endangered and Threatened Species; Proposed Threatened Status for Subspecies of the Ringed Seal; Endangered and Threatened Species; Proposed Threatened and Not Warranted Status for Subspecies and Distinct Population Segments of the Bearded Seal; Proposed Rules

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 223

[Docket No. 101126590–0589–01]

RIN 0648–XZ59

Endangered and Threatened Species; Proposed Threatened Status for Subspecies of the Ringed Seal

AGENCY: National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

ACTION: Proposed rule; 12-month petition finding; status review; request for comments.

SUMMARY: We, NMFS, have completed a comprehensive status review of the ringed seal (*Phoca hispida*) under the Endangered Species Act (ESA) and announce a 12-month finding on a petition to list the ringed seal as a threatened or endangered species. Based on consideration of information presented in the status review report, an assessment of the factors in the ESA, and efforts being made to protect the species, we have determined the Arctic (*Phoca hispida hispida*), Okhotsk (*Phoca hispida ochotensis*), Baltic (*Phoca hispida botnica*), and Ladoga (*Phoca hispida ladogensis*) subspecies of the ringed seal are likely to become endangered throughout all or a significant portion of their range in the foreseeable future. Accordingly, we issue a proposed rule to list these subspecies of the ringed seal as threatened species, and we solicit comments on this proposed action. At this time, we do not propose to designate critical habitat for the Arctic ringed seal because it is not currently determinable. In order to complete the critical habitat designation process, we also solicit information on essential physical and biological features of Arctic ringed seal habitat.

DATES: Comments and information regarding this proposed rule must be received by close of business on February 8, 2011. Requests for public hearings must be made in writing and received by January 24, 2011.

ADDRESSES: Send comments to Kaja Brix, Assistant Regional Administrator, Protected Resources Division, Alaska Region, NMFS, Attn: Ellen Sebastian. You may submit comments, identified by RIN 0648–XZ59, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal *http://www.regulations.gov*.
- *Mail:* P.O. Box 21668, Juneau, AK 99802.
- *Fax:* (907) 586–7557.
- *Hand delivery to the Federal Building:* 709 West 9th Street, Room 420A, Juneau, AK.

All comments received are a part of the public record. No comments will be posted to *http://www.regulations.gov* for public viewing until after the comment period has closed. Comments will generally be posted without change. All Personal Identifying Information (for example, name, address, *etc.*) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

We will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

The proposed rule, maps, status review report, and other materials relating to this proposal can be found on the Alaska Region Web site at: *http://alaskafisheries.noaa.gov/.*

FOR FURTHER INFORMATION CONTACT: Tamara Olson, NMFS Alaska Region, (907) 271–5006; Kaja Brix, NMFS Alaska Region, (907) 586–7235; or Marta Nammack, Office of Protected Resources, Silver Spring, MD (301) 713–1401.

SUPPLEMENTARY INFORMATION: On March 28, 2008, we initiated status reviews of ringed, bearded (*Erignathus barbatus*), and spotted seals (*Phoca largha*) under the ESA (73 FR 16617). On May 28, 2008, we received a petition from the Center for Biological Diversity to list these three species of seals as threatened or endangered under the ESA, primarily due to concerns about threats to their habitat from climate warming and loss of sea ice. The Petitioner also requested that critical habitat be designated for these species concurrent with listing under the ESA. Section 4(b)(3)(B) of the ESA of 1973, as amended (16 U.S.C. 1531 *et seq.*), requires that when a petition to revise the List of Endangered and Threatened Wildlife and Plants is found to present substantial scientific and commercial information, we make a finding on whether the petitioned action is (a) Not warranted, (b) warranted, or (c) warranted but precluded from immediate proposal by other pending proposals of higher priority. This finding is to be made within 1 year of the date the petition was received, and the finding is to be published promptly in the **Federal Register**.

After reviewing the petition, the literature cited in the petition, and other literature and information available in our files, we found (73 FR 51615; September 4, 2008) that the petition met the requirements of the regulations under 50 CFR 424.14(b)(2), and we determined that the petition presented substantial information indicating that the petitioned action may be warranted. Accordingly, we proceeded with the status reviews of ringed, bearded, and spotted seals and solicited information pertaining to them.

On September 8, 2009, the Center for Biological Diversity filed a lawsuit in the U.S. District Court for the District of Columbia alleging that we failed to make the requisite 12-month finding on its petition to list the three seal species. Subsequently, the Court entered a consent decree under which we agreed to finalize the status review of the ringed seal (and the bearded seal) and submit this 12-month finding to the Office of the **Federal Register** by December 3, 2010. Our 12-month petition finding for bearded seals is published as a separate notice concurrently with this finding. Spotted seals were also addressed in a separate **Federal Register** notice (75 FR 65239; October 22, 2010; see also, 74 FR 53683, October 20, 2009).

The status review report of the ringed seal is a compilation of the best scientific and commercial data available concerning the status of the species, including the past, present, and future threats to this species. The Biological Review Team (BRT) that prepared this report was composed of eight marine mammal biologists, a fishery biologist, a marine chemist, and a climate scientist from NMFS's Alaska and Northeast Fisheries Science Centers, NOAA's Pacific Marine Environmental Lab, and the U.S. Fish and Wildlife Service (USFWS). The status review report underwent independent peer review by five scientists with expertise in ringed seal biology, Arctic sea ice, climate change, and ocean acidification.

ESA Statutory, Regulatory, and Policy Provisions

There are two key tasks associated with conducting an ESA status review. The first is to delineate the taxonomic group under consideration; and the second is to conduct an extinction risk assessment to determine whether the petitioned species is threatened or endangered. To be considered for listing under the ESA, a group of organisms must constitute a "species," which section 3(16) of the ESA defines as "any

subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." The term "distinct population segment" (DPS) is not commonly used in scientific discourse, so the USFWS and NMFS developed the "Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act" to provide a consistent interpretation of this term for the purposes of listing, delisting, and reclassifying vertebrates under the ESA (61 FR 4722; February 7, 1996). We describe and use this policy below to guide our determination of whether any population segments of this species meet the DPS criteria of the DPS policy.

The ESA defines the term "endangered species" as "any species which is in danger of extinction throughout all or a significant portion of its range." The term "threatened species" is defined as "any species which is likely to become endangered within the foreseeable future throughout all or a significant portion of its range." The foreseeability of a species' future status is case specific and depends upon both the foreseeability of threats to the species and foreseeability of the species' response to those threats. When a species is exposed to a variety of threats, each threat may be foreseeable in a different time frame. For example, threats stemming from well-established, observed trends in a global physical process may be foreseeable on a much longer time horizon than a threat stemming from a potential, though unpredictable, episodic process such as an outbreak of disease that may never have been observed to occur in the species.

In the 2008 status review of the ribbon seal (Boveng, *et al.,* 2008; see also 73 FR 79822, December 30, 2008), NMFS scientists used the same climate projections used in our risk assessment here, but terminated the analysis of threats to ribbon seals at 2050. One reason for that approach was the difficulty of incorporating the increased divergence and uncertainty in climate scenarios beyond that time. Other reasons included the lack of data for threats other than those related to climate change beyond 2050, and the fact that the uncertainty embedded in the assessment of the ribbon seal's response to threats increased as the analysis extended farther into the future.

Since that time, NMFS scientists have revised their analytical approach to the foreseeability of threats and responses to those threats, adopting a more threat-specific approach based on the best scientific and commercial data available for each respective threat. For example, because the climate projections in the Intergovernmental Panel on Climate Change's (IPCC's) *Fourth Assessment Report* extend through the end of the century (and we note the IPCC's *Fifth Assessment Report,* due in 2014, will extend even farther into the future), we used those models to assess impacts from climate change through the end of the century. We continue to recognize that the farther into the future the analysis extends, the greater the inherent uncertainty, and we incorporated that limitation into our assessment of the threats and the species' response. For other threats, where the best scientific and commercial data does not extend as far into the future, such as for occurrences and projections of disease or parasitic outbreaks, we limited our analysis to the extent of such data. We believe this approach creates a more robust analysis of the best scientific and commercial data available.

Species Information

A thorough review of the taxonomy, life history, and ecology of the ringed seal is presented in the status review report (Kelly *et al.,* 2010a; available at *http://alaskafisheries.noaa.gov/*).

The ringed seal is the smallest of the northern seals, with typical adult body sizes of 1.5 m in length and 70 kg in weight. The average life span of ringed seals is about 15–28 years. As the common name of this species suggests, its coat is characterized by ring-shaped markings. Ringed seals are adapted to remaining in heavily ice-covered areas throughout the fall, winter, and spring by using the stout claws on their fore flippers to maintain breathing holes in the ice.

Seasonal Distribution, Habitat Use, and Movements

Ringed seals are circumpolar and are found in all seasonally ice covered seas of the Northern Hemisphere as well as in certain freshwater lakes. They range throughout the Arctic Basin and southward into adjacent seas, including the southern Bering Sea and Newfoundland. Ringed seals are also found in the Sea of Okhotsk and Sea of Japan in the western North Pacific, the Baltic Sea in the North Atlantic, and landlocked populations inhabit lakes Ladoga and Saimaa east of the Baltic Sea (Figure 1).

Throughout most of its range, the Arctic subspecies does not come ashore and uses sea ice as a substrate for resting, pupping, and molting. During the ice-free season in more southerly regions including the White Sea, the Sea of Okhotsk, and the Baltic Sea, ringed seals occasionally rest on island shores or offshore reefs. In lakes Ladoga and Saimaa, ringed seals typically rest on rocks and island shores when ice is absent. In all subspecies except the Okhotsk, pups normally are born in subnivean lairs (snow caves) on the sea ice (Arctic and Baltic ringed seals) or in subnivean lairs along shorelines (Saimaa and Ladoga ringed seals) in late winter to early spring. Although use of subnivean lairs has been reported for Okhotsk ringed seals, this subspecies apparently depends primarily on sheltering in the lee of ice hummocks.

The seasonality of ice cover strongly influences ringed seal movements, foraging, reproductive behavior, and vulnerability to predation. Born *et al.* (2004) recognized three "ecological seasons" as important to ringed seals off northwestern Greenland: The "open-water season," the ice-covered "winter," and "spring," when the seals breed and after the breeding season haul out on the ice to molt. Tracking seals in Alaska and the western Canadian Arctic, Kelly *et al.* (2010b) used different terms to refer to these ecological seasons. Kelly *et al.* (2010b) referred to the open-water period when ringed seals forage most intensively as the "foraging period," early winter through spring when seals rest primarily in subnivean lairs on the ice as the "subnivean period," and the period between abandonment of the lairs and ice break-up as the "basking period."

Open-water (foraging) period: Short and long distance movements by ringed seals have been documented during the open-water period. Overall, the record from satellite tracking indicates that ringed seals breeding in shorefast ice practice one of two strategies during the open-water foraging period. Some seals forage within 100 km of their shorefast ice breeding habitat while others make extensive movements of hundreds or thousands of kilometers to forage in highly productive areas and along the pack ice edge. Movements during the open-water period by ringed seals that breed in the pack ice are unknown. Tracking and observational records indicate that adult Arctic ringed seals breeding in the shorefast ice show inter-annual fidelity to breeding sites. Saimaa and Ladoga ringed seals show similar site fidelity. High quality, abundant food is important to the annual energy budgets of ringed seals. Fall and early winter periods, prior to the occupation of breeding sites, are important in allowing ringed seals to accumulate enough fat stores to support estrus and lactation.

Winter (subnivean period): At freeze-up in fall, ringed seals surface to breathe in the remaining open water of cracks and leads. As these openings freeze over, the seals push through the ice to breathe until it is too thick. They then open breathing holes by abrading the ice with the claws on their fore flippers. As the ice thickens, the seals continue to maintain the breathing holes by scratching at the walls. The breathing holes can be maintained in ice 2 m or greater in thickness but often are concentrated in the thinner ice of refrozen cracks.

As snow accumulates and buries the breathing hole, the seals breathe through the snow layer. Ringed seals excavate lairs in the snow above breathing holes where snow depth is sufficient. These subnivean lairs are occupied for resting, pupping, and nursing young in annual shorefast and pack ice. Snow accumulation on sea ice is typically sufficient for lair formation only where pressure ridges or ice hummocks cause the snow to form drifts at least 45 cm deep (at least 50–65 cm for birth lairs). Such drifts typically occur only where average snow depths (on flat ice) are 20–30 cm or more. A general lack of such ridges or hummocks in lakes Ladoga and Saimaa limits suitable snow drifts to island shorelines, where most lairs in Lake Ladoga and virtually all lairs in Lake Saimaa are found.

Subnivean lairs provide refuge from air temperatures too low for survival of ringed seal pups. Lairs also conceal ringed seals from predators, an advantage especially important to the small pups that start life with minimal tolerance for immersion in cold water. When forced to flee into the water to avoid predators, the pups that survive depend on the subnivean lairs to subsequently warm themselves. Ringed seal movements during the subnivean period typically are quite limited, especially where ice cover is extensive.

Spring (basking period): Numbers of ringed seals hauled out on the surface of the ice typically begin to increase during spring as the temperatures warm and the snow covering the seals' lairs melts. Although the snow cover can melt rapidly, the ice remains largely intact and serves as a substrate for the molting seals that spend many hours basking in the sun. Adults generally molt from mid-May to mid-July, although there is regional variation. The relatively long periods of time that ringed seals spend out of the water during the molt has been ascribed to the need to maintain elevated skin temperatures. Feeding is reduced and the seal's metabolism declines during the molt. As seals complete this phase of the annual pelage cycle, they spend increasing amounts of time in the water.

Food Habits

Ringed seals eat a wide variety of prey in the marine environment. Most ringed seal prey is small, and preferred fishes tend to be schooling species that form dense aggregations. Ringed seals rarely prey upon more than 10–15 species in any one area, and not more than 2–4 of those species are considered important prey. Despite regional and seasonal variations in the diet of ringed seals, fishes of the cod family tend to dominate the diet of ringed seals from late autumn through early spring in many areas. Arctic cod (*Boreogadus saida*) is often reported to be among the most important prey species, especially during the ice-covered periods of the year. Other members of the cod family, including polar cod (*Arctogadus glacialis*), saffron cod (*Eleginus gracilis*), and navaga (*Eleginus navaga*), are also seasonally important to ringed seals in some areas. Arctic cod is not found in the Sea of Okhotsk, but capelin (*Mallotus villosus*) are abundant in the region. Other fishes reported to be locally important to ringed seals include smelt (*Osmerus* sp.) and herring (*Clupea* sp.). Invertebrates appear to become more important to ringed seals in many areas during the open-water season, and are often found to dominate the diets of young seals. In the brackish water of the Baltic Sea, the prey community includes a mixture of marine and freshwater fish species, as well as invertebrates. In the freshwater environment of Lake Saimaa, several schooling fishes were reported to be the most important prey species; and in Lake Ladoga, a variety of fish species were found in the diet of ringed seals.

Reproduction

Sexual maturity in ringed seals varies with population status and can be as late as 7 years for males and 9 years for females and as early as 3 years for both sexes. Ringed seals breed annually, with timing varying regionally. Mating takes place while mature females are still nursing their pups and is thought to occur under the ice in the vicinity of birth lairs. Little is known about the breeding system of ringed seals; however, males are often reported to be territorial during the breeding season.

A single pup is born in a subnivean lair on either the shorefast ice or pack ice. In much of the Arctic, pupping occurs in late March through April, but the timing varies with latitude. Pupping in the Sea of Okhotsk takes place in March and April. In the Baltic Sea, Lake Saimaa, and Lake Ladoga, pups are born in February through March. At birth, ringed seal pups are approximately 60–65 cm in length and weigh 4.5–5.0 kg with regional variation. The pups are born with a white natal coat (lanugo) that provides insulation, particularly when dry, until it is shed after 4–6 weeks. Pups nurse for as long as 2 months in stable shorefast ice and for as little as 3–6 weeks in moving ice. Pups normally are weaned before break-up of spring ice. At weaning, pups are four times their birth weights, and they lose weight for several months after weaning.

Species Delineation

The BRT reviewed the best scientific and commercial data available on the ringed seal's taxonomy and concluded that there are five currently recognized subspecies of the ringed seal: Arctic ringed seal; Baltic ringed seal; Okhotsk ringed seal; Ladoga ringed seal; and Saimaa ringed seal (*Phoca hispida saimensis*). The BRT noted, however, that further investigation would be required to discern whether there are additional distinct units, especially within the Arctic subspecies, whose genetic structuring has yet to be thoroughly investigated. We agree with the BRT's conclusions that these five subspecies of the ringed seal qualify as "species" under the ESA. Our DPS analysis follows, and the geographic distributions of the five subspecies are shown in Figure 1.

Under our DPS policy (61 FR 4722; February 7, 1996), two elements are considered in a decision regarding the potential identification of a DPS: (1) The discreteness of the population segment in relation to the remainder of the species or subspecies to which it belongs; and (2) the significance of the population segment to the species or subspecies to which it belongs. A population segment of a vertebrate species may be considered discrete if it satisfies either one of the following conditions: (1) It is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors. Quantitative measures of genetic or morphological discontinuity may provide evidence of this separation; or (2) it is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the ESA.

If a population segment is considered to be discrete under one or both of the above conditions, its biological and ecological significance to the taxon to which it belongs is evaluated in light of

the ESA's legislative history indicating that the authority to list DPSs be used "sparingly" while encouraging the conservation of genetic diversity (*see* Senate Report 151, 96th Congress, 1st Session). This consideration may include, but is not limited to, the following: (1) Persistence of the discrete population segment in an ecological setting unusual or unique for the taxon, (2) evidence that loss of the discrete population segment would result in a significant gap in the range of the taxon, (3) evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historic range, or (4) evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics.

If a population segment is discrete and significant (*i.e.,* it is a DPS) its evaluation for endangered or threatened status will be based on the ESA's definitions of those terms and a review of the factors enumerated in section 4(a)(1).

With respect to discreteness criterion 1 above, we concluded that resolution of ringed seal population segments beyond the subspecies level is not currently possible using the best available scientific and commercial data. We also did not find sufficient differences in the conservation status or management within any of the ringed seal subspecies among their respective range countries to justify the use of international boundaries to satisfy the discreteness criterion of our DPS Policy. We therefore conclude that there are no population segments within any of the subspecies that satisfy the discreteness criteria of our DPS Policy. Since there are no discrete population segments within any of the subspecies, we cannot take the next step of determining whether any discrete population segment is significant to the taxon to which it belongs.

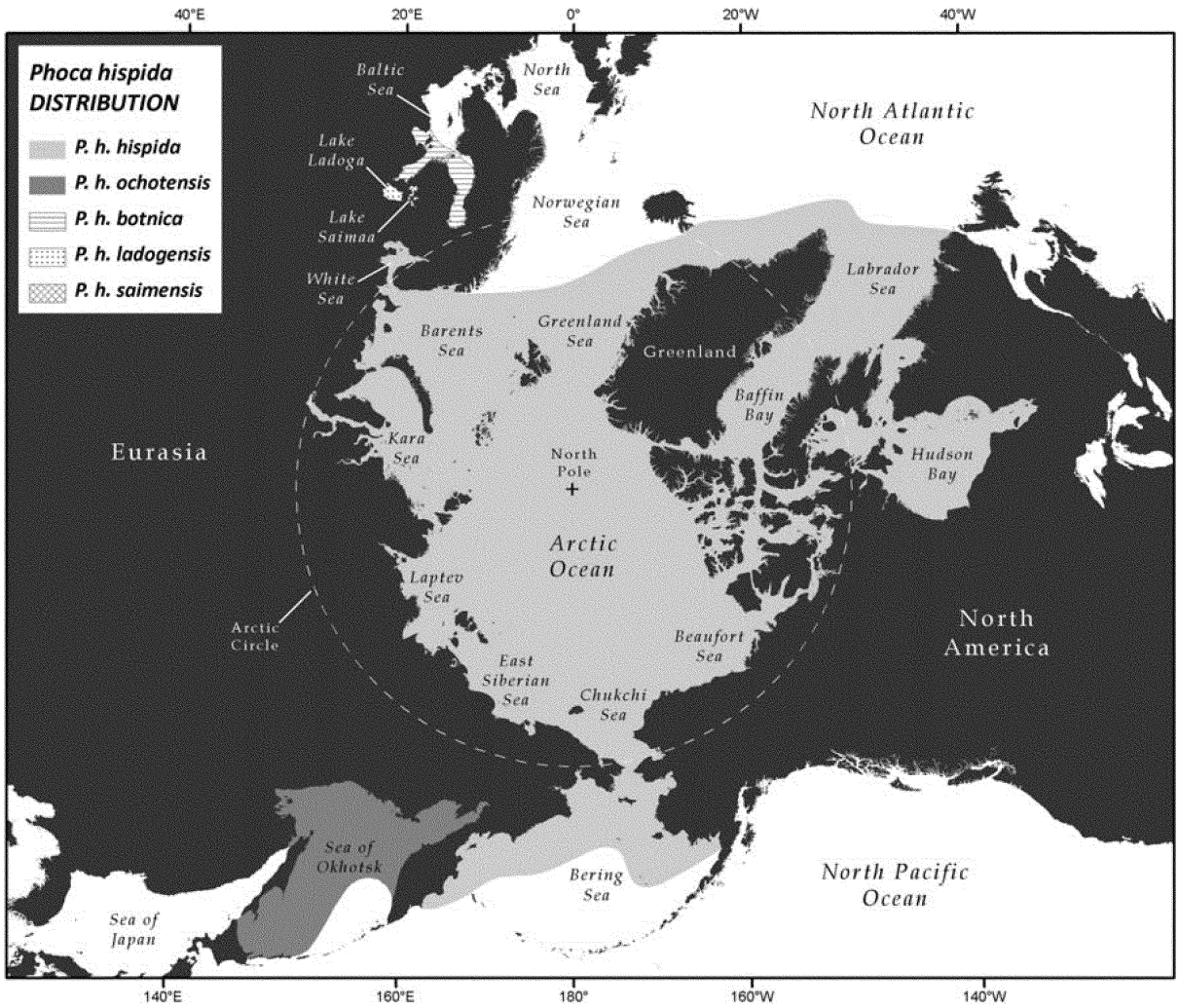

Figure 1. Distributions of the five subspecies of the ringed seal (Phoca hispida), from Kelly et al. (2010a).

Abundance and Trends

Several factors make it difficult to accurately assess ringed seals' abundance and trends. The remoteness and dynamic nature of their sea ice habitat, time spent below the surface, and their broad distribution and seasonal movements make surveying ringed seals expensive and logistically

challenging. Additionally, the species' range crosses political boundaries and there has been limited international cooperation to conduct range-wide surveys. Details of survey methods and data are often limited or have not been published, making it difficult to judge the reliability of the reported numbers. Some studies have relied on surveys of seal holes and then estimated the number of seals based on various assumptions of the ratio of seals to holes. Most surveys are conducted during the basking period and the numbers of seals on ice is multiplied by some factor to estimate population size or determine a population index. While a few, recent studies have used data recorders and haul-out models to develop correction factors for seals submerged and unseen, many studies present only estimates for seals visible on ice (i.e., "basking population"). The timing of annual snow and ice melts also varies widely from year to year and, unless surveys are conducted to coincide with similar ice and weather conditions, comparisons between years (even if conducted during the same time of year) can be erroneous. With these limitations in mind, the best scientific and commercial data on abundance and trends are summarized below for each of the ringed seal subspecies.

Arctic Ringed Seal

The Arctic ringed seal is the most abundant of the ringed seal subspecies and has a circumpolar distribution. The BRT divided the distribution of Arctic ringed seals into five regions: Greenland Sea and Baffin Bay, Hudson Bay, Beaufort Sea, Chukchi Sea, and the White, Barents and Kara Seas. These regions were largely chosen to reflect the geographical groupings of published studies and not to imply any actual population structure. These areas also do not represent the full distribution of Arctic ringed seals as estimates are not available in some areas (*e.g.,* areas of the Russian Arctic coast and the Canadian Arctic Archipelago).

The only available comprehensive estimate for the Greenland Sea and Baffin Bay region is 787,000, based on surveys conducted in 1979. Consistency in harvest records over time lends some confidence that the population has not changed significantly.

The Hudson Bay ringed seal population was estimated at 53,346 based on the mid-point of estimates from aerial surveys conducted in 2007 and 2008. Prior surveys conducted in western Hudson Bay in the 1970s produced an estimate of 455,000 seals, which was much larger than the 218,300 reported in the 1950s. The earlier studies did not account for seals using pack ice habitats which might account for the difference. A more recent survey in 1995 provided an estimate of approximately 280,000 seals when missed seals were accounted for.

Population assessments of ringed seals in the Beaufort and Chukchi Seas have been mostly confined to U.S. and Canadian waters. Based on the available abundance estimates for study areas within this region and extrapolations for pack ice areas without survey data, a reasonable estimate for the Chukchi and Beaufort Seas is 1 million seals. Estimates derived for all Alaskan shorefast ice habitats in both the Chukchi and Beaufort Seas based on aerial surveys conducted in the mid 1980s were 250,000 ringed seals in the shorefast ice and 1–1.5 million including seals in the pack-ice habitat.

The White, Barents, Kara, and East Siberian Seas encompass at least half of the worldwide distribution of Arctic ringed seals. The total population across these seas may be as many as 220,000 seals based on available survey data, primarily from 1975–1993.

Okhotsk Ringed Seal

Based on aerial surveys, ringed seal abundance in the Sea of Okhotsk from 1968–1990 was estimated at between 676,000 and 855,000 seals. These estimates include a general (not species-specific) 30 percent adjustment to account for seals in the water. Fluctuations in population estimates since catch limits were initiated in 1968 were suspected to be natural (Fedoseev, 2000). Based on these surveys, a conservative estimate of the current total population of ringed seals in the Sea of Okhotsk would be 676,000 seals. Aerial surveys conducted in the Sea of Okhotsk from 1968–1969 provided a population estimate of 800,000. This was the same as the estimate previously back-calculated from catch data in 1966 when a population decline due to hunting was identified. These calculations also suggested that ringed seal abundance in the Sea of Okhotsk had been in a state of steady decline since 1955 when estimates suggested the population exceeded 1 million seals.

Baltic Ringed Seal

The Baltic ringed seal population was estimated at 10,000 seals based on comprehensive surveys conducted in 1996. Historical estimates of population size for the Baltic ringed seal range from 50,000 to 450,000 seals in 1900 (Kokko *et al.,* 1999). These estimates were derived as back calculations from historical bounty records. The large range in the estimates reflects uncertainty in the hunting dynamics and whether the populations were historically subject to density dependence. By the 1940s, the population had been reduced to 25,000 seals in large part due to Swedish and Finnish removal efforts. Ringed seals in the Baltic are found in three general regions, the Bothnian Bay, Gulf of Finland, and Gulf of Riga plus the Estonian west coast. Low numbers of ringed seals are also present in the Bothnian Sea and the southwestern region of Finland. The greatest concentration of Baltic ringed seals is found in the Bothnian Bay.

Ladoga Ringed Seal

The population size of ringed seals in Lake Ladoga is currently suggested to range between 3,000 and 5,000 seals based on an aerial survey in 2001. This represents a decline from estimates of 20,000 and 5,000–10,000 seals reported for the 1930s and the 1960s, respectively (Chapskii, 1974). Results from a Russian aerial survey in the 1970s estimated the population of ringed seals in Lake Ladoga to be 3,500–4,700 seals.

Saimaa Ringed Seal

The current population estimate of ringed seals in Lake Saimaa is less than 300, and the mean population growth rate from 1990–2004 was 1.026. Lake Saimaa is a complex body of water, and the population trends and abundance for Saimaa ringed seals have differed across the various regions. It has been projected that the population of Saimaa ringed seals may reach 400 by 2015, but with the caveat that seals may no longer be present in some regions of the lake. Historical abundance of ringed seals in Lake Saimaa is estimated to have been between 4,000 and 6,000 animals approximately 5,000 years ago (Sipilä and Hyvärinen, 1998; Sipilä, 2006). However, using a back-casting process based on reported bounty statistics, the population was estimated in 1893 to be between 100 and 1,300 seals. In 1993, the Saimaa seal was listed as endangered under the ESA (58 FR 26920; May 6, 1993) and as depleted under the U.S. Marine Mammal Protection Act of 1972, as amended. At that time, the population was estimated at 160–180 seals (57 FR 60162; December 18, 1992).

Summary of Factors Affecting the Ringed Seal

Section 4(a)(1) of the ESA and the listing regulations (50 CFR part 424) set forth procedures for listing species. We must determine, through the regulatory process, if a species is endangered or

threatened because of any one or a combination of the following factors: (1) The present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) inadequacy of existing regulatory mechanisms; or (5) other natural or human-made factors affecting its continued existence. These factors are discussed below, with each subspecies of the ringed seal considered under each factor. The reader is also directed to section 4.2 of the status review report for a more detailed discussion of the factors affecting the five subspecies of the ringed seal (*see* **ADDRESSES**). As discussed above, the data on ringed seal abundance and trends of most populations are unavailable or imprecise, especially in the Arctic and Okhotsk subspecies, and there is little basis for quantitatively linking projected environmental conditions or other factors to ringed seal survival or reproduction. Our risk assessment therefore primarily evaluated important habitat features and was based upon the best available scientific and commercial data and the expert opinion of the BRT members.

A. Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range

The main concern about the conservation status of ringed seals stems from the likelihood that their sea ice habitat has been modified by the warming climate and, more so, that the scientific consensus projections are for continued and perhaps accelerated warming in the foreseeable future. A second concern, related by the common driver of carbon dioxide (CO_2) emissions, is the modification of habitat by ocean acidification, which may alter prey populations and other important aspects of the marine ecosystem. A reliable assessment of the future conservation status of each of the subspecies of the ringed seal therefore requires a focus on the observed and projected changes in sea ice, snow cover, ocean temperature, ocean pH (acidity), and associated changes in ringed seal prey species.

The threats (analyzed below) associated with impacts of the warming climate on the habitat of ringed seals, to the extent that they may pose risks to these seals, are expected to manifest throughout the current breeding and molting range (for snow and ice related threats) or throughout the entire range (for ocean warming and acidification) of each of the subspecies, since the spatial resolution of data pertaining to these threats is currently limited.

Overview of Global Climate Change and Effects on the Annual Formation of the Ringed Seal's Sea Ice Habitat

Sea ice in the Northern Hemisphere can be divided into first-year sea ice that formed in the most recent autumn-winter period, and multi-year sea ice that has survived at least one summer melt season. The Arctic Ocean is covered by a mix of multi-year sea ice. More southerly regions, such as the Bering Sea, Barents Sea, Baffin Bay, the Baltic Sea, Hudson Bay, and the Sea of Okhotsk are known as seasonal ice zones, where first year sea ice is renewed every winter. Similarly, freshwater ice in lakes Ladoga and Saimaa forms and melts annually. Both the observed and the projected effects of a warming global climate are most extreme in northern high-latitude regions, in large part due to the ice-albedo feedback mechanism in which melting of snow and sea ice lowers reflectivity and thereby further increases surface warming by absorption of solar radiation.

Sea ice extent at the end of summer (September) 2007 in the Arctic Ocean was a record low (4.3 million sq km), nearly 40 percent below the long-term average and 23 percent below the previous record set in 2005 (5.6 million sq km) (Stroeve *et al.,* 2008). Sea ice extent in September 2010 was the third lowest in the satellite record for the month, behind 2007 and 2008 (second lowest). Most of the loss of sea ice was on the Pacific side of the Arctic. Of even greater long-term significance was the loss of over 40 percent of Arctic multi-year sea ice over the last 5 years (Kwok *et al.,* 2009). While the annual minimum of sea ice extent is often taken as an index of the state of Arctic sea ice, the recent reductions of the area of multi-year sea ice and the reduction of sea ice thickness is of greater physical importance. It would take many years to restore the ice thickness through annual growth, and the loss of multi-year sea ice makes it unlikely that the Arctic will return to previous climatological conditions. Continued loss of sea ice will be a major driver of changes across the Arctic over the next decades, especially in late summer and autumn.

Sea ice and other climatic conditions that influence ringed seal habitats are quite different between the Arctic and seasonal ice zones. In the Arctic, sea ice loss is a summer feature with a delay in freeze up occurring into the following fall. Sea ice persists in the Arctic from late fall through mid-summer due to cold and dark winter conditions. Sea ice variability is primarily determined by radiation and melting processes during the summer season. In contrast, the seasonal ice zones are free of sea ice during summer. The variability in extent, thickness, and other sea ice characteristics important to marine mammals is determined primarily by changes in the number, intensity, and track of winter and spring storms in the sub-Arctic. Although there are connections between sea ice conditions in the Arctic and the seasonal ice zones, the early loss of summer sea ice in the Arctic cannot be extrapolated to the seasonal ice zones, which are behaving differently than the Arctic. For example, the Bering Sea has had 4 years of colder than normal winter and spring conditions from 2007 to 2010, with near record sea ice extents, rivaling the sea ice maximum in the mid-1970s, despite record retreats in summer.

IPCC Model Projections

The analysis and synthesis of information presented by the IPCC in its *Fourth Assessment Report* (AR4) represents the scientific consensus view on the causes and future of climate change. The IPCC AR4 used a range of future greenhouse gas (GHG) emissions produced under six "marker" scenarios from the *Special Report on Emissions Scenarios* (SRES) (IPCC, 2000) to project plausible outcomes under clearly-stated assumptions about socio-economic factors that will influence the emissions. Conditional on each scenario, the best estimate and likely range of emissions were projected through the end of the 21st century. It is important to note that the SRES scenarios do not contain explicit assumptions about the implementation of agreements or protocols on emission limits beyond current mitigation policies and related sustainable development practices.

Conditions such as surface air temperature and sea ice area are linked in the IPCC climate models to GHG emissions by the physics of radiation processes. When CO_2 is added to the atmosphere, it has a long residence time and is only slowly removed by ocean absorption and other processes. Based on IPCC AR4 climate models, expected increases in global warming—defined as the change in global mean surface air temperature (SAT)—by the year 2100 depends strongly on the assumed emissions of CO_2 and other GHGs. By contrast, global warming projected out to about 2040–2050 will be primarily due to emissions that have already occurred and those that will occur over the next decade. Thus, conditions projected to mid-century are less sensitive to assumed future emission

scenarios. Uncertainty in the amount of warming out to mid-century is primarily a function of model-to-model differences in the way that the physical processes are incorporated, and this uncertainty can be addressed in predicting ecological responses by incorporating the range in projections from different models.

Comprehensive Atmosphere-Ocean General Circulation Models (AOGCMs) are the major objective tools that scientists use to understand the complex interaction of processes that determine future climate change. The IPCC used the simulations from about 2 dozen AOGCMs developed by 17 international modeling centers as the basis for the AR4 (IPCC, 2007). The AOGCM results are archived as part of the Coupled Model Intercomparison Project-Phase 3 (CMIP3) at the Program for Climate Model Diagnosis and Intercomparison (PCMDI). The CMIP3 AOGCMs provide reliable projections, because they are built on well-known dynamical and physical principles, and they simulate quite well many large scale aspects of present-day conditions. However, the coarse resolution of most current climate models dictates careful application on small scales in heterogeneous regions.

There are three main contributors to divergence in AOGCM climate projections: Large natural variations, the range in emissions scenarios, and across-model differences. The first of these, variability from natural variation, can be incorporated by averaging the projections over decades, or, preferably, by forming ensemble averages from several runs of the same model. The second source of variation arises from the range in plausible emissions scenarios. As discussed above, the impacts of the scenarios are rather similar before mid-21st century. For the second half of the 21st century, however, and especially by 2100, the choice of the emission scenario becomes the major source of variation among climate projections and dominates over natural variability and model-to-model differences (IPCC, 2007). Because the current consensus is to treat all SRES emissions scenarios as equally likely, one option for representing the full range of variability in potential outcomes would be to project from any model under all of the six "marker" scenarios. This can be impractical in many situations, so the typical procedure for projecting impacts is to use an intermediate scenario, such as A1B or B2 to predict trends, or one intermediate and one extreme scenario (*e.g.,* A1B and A2) to represent a significant range of variability. The third primary source of variability results from differences among models in factors such as spatial resolution. This variation can be addressed and mitigated in part by using the ensemble means from multiple models.

There is no universal method for combining AOGCMs for climate projections, and there is no one best model. The approach taken by the BRT for selecting the models used to project future sea ice and snow conditions is summarized below.

Data and Analytical Methods

NMFS scientists have recognized that the physical basis for some of the primary threats faced by the species had been projected, under certain assumptions, through the end of the 21st century, and that these projections currently form the most widely accepted version of the best available data about future conditions. In our risk assessment for ringed seals, we therefore considered all the projections through the end of the 21st century to analyze the threats stemming from climate change.

The CMIP3 (IPCC) model simulations used in the BRT analyses were obtained from PCMDI on-line (PCMDI, 2010). The six IPCC models previously identified by Wang and Overland (2009) as performing satisfactorily at reproducing the magnitude of the observed seasonal cycle of sea ice extent in the Arctic under the A1B ("medium") and A2 ("high") emissions scenarios were used to project monthly sea ice concentrations in the Northern Hemisphere in March–July for each of the decadal periods 2025–2035, 2045–2055, and 2085–2095. Snow cover on sea ice in the Northern Hemisphere was forecasted using one of the six models, the Community Climate System Model, version 3 (CCSM3, National Center for Atmospheric Research) (under the A1B scenario), a model that is known for incorporating advanced sea ice physics, and for which snow data were available. To incorporate natural variability, this model was run seven times.

Climate models generally perform better on continental or larger scales, but because habitat changes are not uniform throughout the hemisphere, the six IPCC models used to project sea ice conditions in the Northern Hemisphere were further evaluated independently on their performance at reproducing the magnitude of the observed seasonal cycle of sea ice extent in 14 different regions throughout the ringed seal's range, including 12 regions for the Arctic ringed seal, one region for the Okhotsk ringed seal, and one region for the Baltic, Ladoga, and Saimaa ringed seals. For Arctic ringed seals, in three regions (Chukchi Sea, east Siberian Sea, and the central Arctic) six of the models simulated sea ice conditions in reasonable agreement with observations, in two regions (Beaufort and eastern Bering Seas) four models met the performance criteria, in two regions (western Bering and the Barents Seas) a single model (CCSM3) met the performance criteria, and in five regions (Baffin Bay, Hudson Bay, the Canadian Arctic Archipelago, east Greenland, and the Kara and Laptev Seas) none of the models performed satisfactorily. The models also did not meet the performance criteria for the Baltic region and the Sea of Okhotsk. Other less direct means of predicting regional ice cover, such as comparison of surface air temperature predictions with past climatology (Sea of Okhotsk), other existing analyses (Baltic Sea and Hudson Bay), and results from the hemispheric predictions (Baffin Bay, the Canadian Arctic Archipelago, and the East Greenland, Kara, and Laptev Seas), were used for regions where ice projections could not be obtained. For the Baltic Sea we reviewed the analysis of Jylha *et al.* (2008). They used seven regional climate models and found good agreement with observations for the 1902–2000 comparison period. For Hudson Bay we referred to the analysis of Joly *et al.* (2010). They used a regional sea ice-ocean model to investigate the response of sea ice and oceanic heat storage in the Hudson Bay system to a climate-warming scenario.

Regional predictions of snow cover were based on results from the hemispheric projections for Arctic and Okhotsk ringed seals, and on other existing analyses for Baltic, Ladoga, and Saimaa ringed seals. For the Baltic Sea we referred to the analysis of Jylha *et al.* (2008) noted above. For lakes Ladoga and Saimaa we considered the analysis of Saelthun *et al.* (1998; cited in Kuusisto, 2005). They used a modified hydrological model to analyze the effects of climate change on hydrological conditions and runoff in Finland and the Scandinavian Peninsula.

While our inferences about future regional ice and snow conditions are based upon the best available scientific and commercial data, we recognize that there are uncertainties associated with predictions based on hemispheric projections or indirect means. We also note that judging the timing of the onset of potential impacts to ringed seals is complicated by the coarse resolution of the IPCC models.

Northern Hemisphere Sea Ice and Snow Cover Predictions

Projections of Northern Hemisphere sea ice concentrations for November indicate a major delay in fall freeze-up by 2050 north of Alaska and in the Barents Sea. By 2090, the average sea ice concentration in November is below 50 percent in the Russian Arctic, and some models show a nearly ice free Arctic, except for the region of the Canadian Arctic Archipelago. In March and April, winter type conditions persist out to 2090. There is some reduction of sea ice by 2050 in the outer portions of the seasonal ice zones, but the sea ice south of Bering Strait, eastern Barents Sea, Baffin Bay, and the Kara and Laptev Seas remains substantial. The month of May shows diminishing sea ice cover at 2050 and 2090 in the Barents and Bering Seas and the Sea of Okhotsk. By the month of June, projections begin to show substantial changes as the century progresses. Current conditions occasionally exhibit a lack of sea ice near the Bering Strait during June. By 2050, however, this sea ice loss becomes a major feature, with open water continuing along the northern Alaskan coast in most models. Open water in June spreads to the East Siberian Shelf by 2090. The eastern Barents Sea experiences a reduction in sea ice between 2030 and 2050. The models indicate that sea ice in Baffin Bay will be affected very little until the end of the century.

In July, the Arctic Ocean shows a marked effect of global warming, with the sea ice retreating to a central core as the century progresses. The loss of multi-year sea ice over the last 5 years has provided independent evidence for this conclusion. By 2050, the continental shelves of the Beaufort, Chukchi, and East Siberian Seas are nearly ice free in July, with ice concentrations less than 20 percent in the ensemble mean projections. The Kara and Laptev Seas also show a reduction of sea ice in coastal regions by mid-century in most but not all models. The Canadian Arctic Archipelago and the adjacent Arctic Ocean north of Canada and Greenland, however, are predicted to become a refuge for sea ice through the end of the century. This conclusion is supported by typical Arctic wind patterns, which tend to blow onshore in this region. Indeed, this refuge region is why sea ice scientists use the phrase: A nearly sea ice free summer in the Arctic by mid-century.

As the Arctic Ocean warms and is covered by less ice, precipitation is expected to increase overall including during the winter months. Five climate models used by the *Arctic Climate Impact Assessment* forecasted an average increase in precipitation over the Arctic Ocean of 14 percent by the end of the century (Walsh *et al.*, 2005). The impact of increased winter precipitation on the depth of snow on sea ice, however, will be counteracted by delays in the formation of sea ice. Over most of the Arctic Ocean, snow cover reaches its maximal depth in May, but most of that accumulation takes place in the autumn (Sturm *et al.*, 2002). Snow depths reach 50 percent of the annual maximum by the end of October and 67 percent of their maximum by the end of November (Radionov et *al.*, 1997). Thus, delays of 1–2 months in the date of ice formation would result in substantial decreases in spring snow depths despite the potential for increased winter precipitation. Thinner ice will be more susceptible to deforming and producing pressure ridges and ice hummocks favoring snow drifts where depths exceed those on flat ice (Iacozaa and Barber, 1999; Strum *et al.*, 2006). However, as noted above, average snow depths of 20–30 cm or more are typically necessary to form drifts that are deep enough for ringed seal lair formation. As spring air temperatures continue to warm, snow melt will continue to come earlier in the year. The CCSM3 model forecasted that the accumulation of snow on sea ice will decrease by almost 50 percent by the end of this century, with more than half of that decline projected to occur by 2050. Although the forecasted snow accumulations in the seven integrations of the model varied, all predicted substantial declines over the century.

Regional Sea Ice and Snow Cover Predictions by Subspecies

Arctic ringed seal: In the East Siberian, Chukchi, Beaufort, Kara-Laptev, and Greenland Seas, as well as in Baffin Bay, and the Canadian Arctic Archipelago, little or no decline in ice extent is expected in April and May during the remainder of this century. In most of these areas, a moderate decline in sea ice is predicted during June within this century, while substantial declines in sea ice are projected in July and November after mid-century. The central Arctic (defined as regions north of 80° N. latitude) also shows declines in sea ice cover that are most apparent in July and November after 2050. For Hudson Bay, under a warmer climate scenario (for the years 2041–2070) Joly *et al.* (2010) projected a reduction in the sea ice season of 7–9 weeks, with substantial reductions in sea ice cover most apparent in July and during the first months of winter.

In the Bering Sea, April and May ice cover is projected to decline throughout this century, with substantial inter-annual variability forecasted in the eastern Bering Sea. The projection for May indicates that there will commonly be years with little or no ice in the western Bering Sea beyond mid-century. Very little ice has remained in the eastern Bering Sea in June since the mid-1970s. Sea ice cover in the Barents Sea in April and May is also projected to decline throughout this century, and in the months of June and July, ice is expected to disappear rapidly in the coming decades.

Based on model projections, April snow depths over much of the range of the Arctic ringed seal averaged 25–35 cm in the first decade of this century, consistent with on-ice measurements by Russian scientists (Weeks, 2010). By mid-century, a substantial decrease in areas with April snow depths of 25–35 cm is projected (much of it reduced to 20–15 cm). The deepest snow (25–30 cm) is forecasted to be found just north of Greenland, in the Canadian Arctic Archipelago, and in an area tapering north from there into the central Arctic Basin. Southerly regions, such as the Bering Sea and Barents Sea, are forecasted to have snow depths of 10 cm or less my mid-century. By the end of the century, April snow depths of 20–25 cm are forecasted only for a portion of the central Arctic, most of the Canadian Arctic Archipelago, and a few small, isolated areas in a few other regions. Areas with 25–30 cm of snow are projected to be limited to a few small isolated pockets in the Canadian Arctic by 2090–2099.

Okhotsk ringed seal: As noted above, none of the IPCC models performed satisfactorily at projecting sea ice for the Sea of Okhotsk, and so projected surface air temperatures were examined relative to current climate conditions as a proxy to predict sea ice extent and duration. Based on that analysis, ice is expected to persist in the Sea of Okhotsk in March during the remainder of this century, although ice may be limited to the northern region in most years after mid-century. Conditions for sea ice in April are likely to be limited to the far northern reaches of the Sea of Okhotsk or non-existent by 2100. Little to no sea ice is expected in May by mid-century. Average snow depth projections for April show depths of 15–20 cm only in the northern portions of the Sea of Okhotsk in the past 10 years and nowhere in that sea by mid-century. By the end of the century average snow depths are projected to be 10 cm or less even in the northern Sea of Okhotsk.

Baltic, Ladoga, and Saimaa ringed seals: For the Baltic Sea, the analysis of regional climate models by Jylhä *et al.* (2008) was considered. They used seven regional climate models and found good agreement with observations for the 1902–2000 comparison period. For the forecast period 2071–2100, one model predicted a change to mostly mild conditions, while the remaining models predicted unprecedentedly mild conditions. They noted that their estimates for a warming climate were in agreement with other studies that found unprecedentedly mild ice extent conditions in the majority of years after about 2030. The model we used to project snow depths (CCSM3) did not provide adequate resolution for the Baltic Sea. The climate models analyzed by Jylhä *et al.* (2008), however, forecasted decreases of 45–60 days in duration of snow cover by the end of the century in the northern Baltic Sea region. The shortened seasonal snow cover would result primarily from earlier spring melts, but also from delayed onset of snow cover. Depth of snow is forecasted to decrease 50–70 percent in the region over the same period. The depth of snow also will be decreased by mid-winter thaws and rain events. Simulations of the snow cover indicated that an increasing proportion of the snow pack will consist of icy or wet snow.

Ice cover has diminished about 12 percent over the past 50 years in Lake Ladoga. Although we are not aware of any ice forecasts specific to lakes Ladoga and Saimaa, the simulations of future climate reported by Jylhä *et al.* (2008) suggest warming winters with reduced ice and snow cover. Snow cover in Finland and the Scandinavian Peninsula is projected to decrease 10–30 percent before mid-century and 50–90 percent by 2100 (Saelthun *et al.,* 1998, *cited in* Kuusisto, 2005).

Effects of Changes in Ice and Snow Cover on Ringed Seals

Ringed seals are vulnerable to habitat loss from changes in the extent or concentration of sea ice because they depend on this habitat for pupping, nursing, molting, and resting. The ringed seal's broad distribution, ability to undertake long movements, diverse diet, and association with widely varying ice conditions suggest resilience in the face of environmental variability. However, the ringed seal's long generation time and ability to produce only a single pup each year may limit its ability to respond to environmental challenges such as the diminishing ice and snow cover projected in a matter of decades. Ringed seals apparently thrived during glacial maxima and survived warm interglacial periods. How they survived the latter periods or in what numbers is not known. Declines in sea ice cover in recent decades are more extensive and rapid than any known for at least the last few thousand years (Polyak *et al.,* 2010).

Ringed seals create birth lairs in areas of accumulated snow on stable ice including the shore-fast ice over continental shelves along Arctic coasts, bays, and inter-island channels. While some authors suggest that shorefast ice is the preferred pupping habitat of ringed seals due to its stability throughout the pupping and nursing period, others have documented ringed seal pupping on drifting pack ice both nearshore and offshore. Both of these habitats can be affected by earlier warming and break-up in the spring, which shortens the length of time pups have to grow and mature in a protected setting. Harwood *et al.* (2000) reported that an early spring break-up negatively impacted the growth, condition, and apparent survival of unweaned ringed seal pups. Early break-up was believed to have interrupted lactation in adult females, which in turn, negatively affected the condition and growth of pups.

Unusually heavy ice has also been implicated in shifting distribution, high winter mortality, and reduced productivity of ringed seals. It has been suggested that reduced ice thickness associated with warming in some areas could lead to increased biological productivity that might benefit ringed seals, at least in the short-term. However, any transitory and localized benefits of reduced ice thickness are expected to be outweighed by the negative effects of increased thermoregulatory costs and vulnerability of seal pups to predation associated with earlier ice break-up and reduced snow cover.

Ringed seals, especially the newborn, depend on snow cover for protection from cold temperatures and predators. Occupation of subnivean lairs is especially critical when pups are nursed in late March–June. Ferguson *et al.* (2005) attributed low ringed seal recruitment in western Hudson Bay to decreased snow depth in April and May. Reduced snowfall results in less snow drift accumulation next to pressure ridges, and pups in lairs with thin snow cover are more vulnerable to predation than pups in lairs with thick snow cover (Hammill and Smith, 1989; Ferguson *et al.,* 2005). When snow cover is insufficient, pups can also freeze in their lairs as documented in 1974 when roofs of lairs in the White Sea were only 5–10 cm thick (Lukin and Potelov, 1978). Similarly, pup mortality from freezing and polar bear (*Ursus maritimus*) predation increased when unusually warm spring temperatures caused early melting near Baffin Island in the late 1970s (Smith and Hammill, 1980; Stirling and Smith, 2004). Prematurely exposed pups also are vulnerable to predation by wolves (*Canis lupus*) and foxes (*Alopex lagopus* and *Vulpes vulpes)*—as documented during an early snow melt in the White Sea in 1977 (Lukin, 1980)—and by gulls (Laridae) and ravens (*Corvus corax*) as documented in the Barents Sea (Gjertz and Lydersen, 1983; Lydersen and Gjertz, 1987; Lydersen *et al.,* 1987; Lydersen and Smith, 1989; Lydersen and Rig, 1990; Lydersen, 1998). When lack of snow cover has forced birthing to occur in the open, some studies have reported that nearly 100 percent of pups died from predation (Kumlien, 1879; Lydersen *et al.,* 1987; Lydersen and Smith, 1989; Smith *et al.,* 1991; Smith and Lydersen, 1991). The high fidelity to birthing sites exhibited by ringed seals also makes them more susceptible to localized degradation of snow cover (Kelly *et al.,* 2010).

Increased rain-on-snow events during the late winter also negatively impact ringed seal recruitment by damaging or eliminating snow-covered birth lairs, increasing exposure and the risk of hypothermia, and facilitating predation by polar bears and other predators. Stirling and Smith (2004) documented the collapse of subnivean lairs during unseasonal rains near southeastern Baffin Island and the subsequent exposure of ringed seals to hypothermia. They surmised that most of the pups that survived exposure to cold were eventually killed by polar bears, Arctic foxes, or possibly gulls. Stirling and Smith (2004) postulated that, should early season rain become regular and widespread in the future, mortality of ringed seal pups will increase, especially in more southerly parts of their range.

Potential Impacts of Projected Ice and Snow Cover Changes on Ringed Seals

As discussed above, ringed seals divide their time between foraging in the water, and reproducing and molting out of the water, where they are especially vulnerable to predation. Females must nurse their pups for 1–2 months, and the small pups are vulnerable to cold temperatures and avian and mammalian predators on the ice, especially during the nursing period. Thus, a specific habitat requirement for ringed seals is adequate snow for the occupation of subnivean

lairs, especially in spring when pups are born and nursed.

Northern Hemisphere snow cover has declined in recent decades and spring melt times have become earlier (ACIA, 2005). In most areas of the Arctic Ocean, snow melt advanced 1–6 weeks from 1979–2007. Throughout most of the ringed seal's range, snow melt occurred within a couple of weeks of weaning. Thus, in the past 3 decades, snow melts in many areas have been pre-dating weaning. Shifts in the timing of reproduction by other pinnipeds in response to changes in food availability have been documented. However, the ability of ringed seals to adapt to earlier snow melts by advancing the timing of reproduction will be limited by snow depths. As discussed above, over most of the Arctic Ocean, snow cover reaches its maximal depth in May, but most of that accumulation takes place in autumn. It is therefore unlikely that snow depths for birth lair formation would be improved earlier in the spring. In addition, the pace at which snow melts are advancing is rapid relative to the generation time of ringed seals, further challenging the potential for an adaptive response.

Snow drifted to 45 cm or more is needed for excavation and maintenance of simple lairs, and birth lairs require depths of 50 to 65 cm or more (Smith and Stirling, 1975; Lydersen and Gjertz, 1986; Kelly, 1988; Furgal *et al.,* 1996; Lydersen, 1998; Lukin *et al.,* 2006). Such drifts typically only occur where average snow depths are at least 20–30 cm (on flat ice) and where drifting has taken place along pressure ridges or ice hummocks (Hammill and Smith, 1991; Lydersen and Ryg, 1991; Smith and Lydersen, 1991; Ferguson *et al.,* 2005). We therefore considered areas forecasted to have less than 20 cm average snow depth in April to be inadequate for the formation of ringed seal birth lairs.

Arctic ringed seal: The depth and duration of snow cover is projected to decrease throughout the range of Arctic ringed seals within this century. Whether ringed seals will continue to move north with retreating ice over the deeper, less productive Arctic Basin waters and whether forage species that they prey on will also move north is uncertain (see additional discussion below). Initially, impacts may be somewhat ameliorated if the subspecies' range retracts northward with its sea ice habitats. By 2100, however, April snow cover is forecasted to become inadequate for the formation and occupation of ringed seal birth lairs over much of the subspecies' range. The projected decreases in ice and, especially, snow cover are expected to lead to increased pup mortality from premature weaning, hypothermia, and predation.

Okhotsk ringed seal: Based on temperature proxies, ice is expected to persist in the Sea of Okhotsk through the onset of pupping in March through the end of this century. Ice suitable for pupping and nursing likely will be limited to the northernmost portions of the sea, as ice is likely to be limited to that region in April by the end of the century. The snow cover projections suggest that snow depths may already be inadequate for lairs in the Sea of Okhotsk, and most Okhotsk ringed seals apparently now give birth on pack ice in the lee of ice hummocks. However, it appears unlikely that this behavior could mitigate the threats posed by the expected decreases in sea ice. The Sea of Okhotsk is bounded to the north by land, which will limit the ability of Okhotsk ringed seals to respond to deteriorating sea ice and snow conditions by shifting their range northward. Some Okhotsk ringed seals have been reported on terrestrial resting sites during the ice-free season, but these sites provide inferior pupping and nursing habitat. Within the foreseeable future, the projected decreases in sea ice habitat suitable for pupping, nursing, and molting in the Sea of Okhotsk are expected to lead to reduced abundance and productivity.

Baltic, Ladoga, and Saimaa ringed seals: The considerable reductions in ice extent forecasted by mid-century, coupled with deteriorating snow conditions, are expected to substantially alter the habitats of Baltic ringed seals. Climate forecasts for northern Europe also suggest reduced ice and snow cover for lakes Ladoga and Saimaa within this century. These habitat changes are expected to lead to decreased survival of pups (due to hypothermia, predation, and premature weaning) and considerable declines in the abundance of these subspecies in the foreseeable future. Recent (2005–2007) high rates of pup mortality in Saimaa ringed seals (more than double those in 1980–2000) have been attributed to insufficient snow for lair formation and occupation. Given the small population size of the Saimaa ringed seal, this subspecies is at particular risk from the projected habitat changes. Although Baltic, Ladoga, and Saimaa ringed seals have been reported using terrestrial resting sites when ice is absent, these sites provide inferior pupping and nursing habitat. As sea ice and snow conditions deteriorate, Baltic ringed seals will be limited in their ability to respond by shifting their range northward because the Baltic Sea is bounded to the north by land; and the landlocked seal populations in lakes Ladoga and Saimaa will be unable to shift their ranges.

Impacts on Ringed Seals Related to Changes in Ocean Conditions

Ocean acidification is an ongoing process whereby chemical reactions occur that reduce both seawater pH and the concentration of carbonate ions when CO_2 is absorbed by seawater. Results from global ocean CO_2 surveys over the past two decades have shown that ocean acidification is a predictable consequence of rising atmospheric CO_2 levels. The process of ocean acidification has long been recognized, but the ecological implications of such chemical changes have only recently begun to be appreciated. The waters of the Arctic and adjacent seas are among the most vulnerable to ocean acidification. Seawater chemistry measurements in the Baltic Sea suggest that this sea is equally vulnerable to acidification as the Arctic. We are not aware of specific acidification studies in lakes Ladoga and Saimaa. Fresh water systems, however, are much less buffered than ocean waters and are likely to experience even larger changes in acidification levels than marine systems. The most likely impact of ocean acidification on ringed seals will be at lower tropic levels on which the species' prey depends. Cascading effects are likely both in the marine and freshwater environments. Our limited understanding of planktonic and benthic calcifiers in the Arctic (*e.g.,* even their baseline geographical distributions) means that future changes will be difficult to detect and evaluate.

Warming water temperatures and decreasing ice likely will result in a contraction in the range of Arctic cod, a primary prey of ringed seals. The same changes will lead to colonization of the Arctic Ocean by more southerly species, including potential prey, predators, and competitors. The outcome of new competitive interactions cannot be specified, but as sea ice specialists, ringed seals may be at a disadvantage in competition with generalists in an ice-diminished Arctic. Prey biomass may be reduced as a consequence of increased freshwater input and loss of sea ice habitat for amphipods and copepods. On the other hand, overall pelagic productivity may increase.

Summary of Factor A

Climate models consistently project overall diminishing sea ice and snow cover at least through the current century, with regional variation in the timing and severity of those losses.

Increasing atmospheric concentrations of greenhouse gases, including CO_2, will drive climate warming and increase acidification of the ringed seal's ocean and lake habitats. The impact of ocean warming and acidification on ringed seals is expected to be primarily through changes in community composition. However, the nature and timing of these changes is uncertain.

Diminishing ice and snow cover are the greatest challenges to persistence of all of the ringed seal subspecies. While winter precipitation is forecasted to increase in a warming Arctic, the duration of ice cover is projected to be substantially reduced, and the net effect will be lower snow accumulation on the ice. Within the century, snow cover adequate for the formation and occupation of birth lairs is forecasted only for parts of the Canadian Arctic Archipelago, a portion of the central Arctic, and a few small isolated areas in a few other regions. Without the protection of lairs, ringed seals, especially newborn, are vulnerable to freezing and predation. We conclude that the ongoing and projected changes in sea ice habitat pose significant threats to the persistence of each of the five subspecies of the ringed seal.

B. Overutilization for Commercial, Subsistence, Recreational, Scientific, or Educational Purposes

Ringed seals have been hunted by humans for millennia and remain a fundamental subsistence resource for many northern coastal communities today. Ringed seals were also harvested commercially in large numbers during the 20th century, which led to the depletion of their stocks in many parts of their range. Commercial harvests in the Sea of Okhotsk and predator-control harvests in the Baltic Sea, Lake Ladoga, and Lake Saimaa caused population declines in the past, but have since been restricted. Although subsistence harvest of the Arctic subspecies is currently substantial in some regions, harvest levels appear to be sustainable. Climate change is likely to alter patterns of subsistence harvest of marine mammals by changing their local densities or distributions in relation to hunting communities. Predictions of the impacts of climate change on subsistence hunting pressure are constrained by the complexity of interacting variables and imprecision of climate and sea ice models at small scales. Accurate information on both harvest levels and species' abundance and trends will be needed in order to assess the impacts of hunting as well as to respond appropriately to potential climate-induced changes in populations. Recreational, scientific, and educational uses of ringed seals are minimal and are not expected to increase significantly in the foreseeable future. We conclude that overutilization does not currently threaten any of the five subspecies of the ringed seal.

C. Diseases, Parasites, and Predation

Ringed seals have co-evolved with numerous parasites and diseases, and those relationships are presumed to be stable. Evidence of distemper virus, for example, has been reported in Arctic ringed seals, but there is no evidence of impacts to ringed seal abundance or productivity. Abiotic and biotic changes to ringed seal habitat potentially could lead to exposure to new pathogens or new levels of virulence, but we consider the potential threats to ringed seals as low.

Ringed seals are most commonly preyed upon by Arctic foxes and polar bears, and less commonly by other terrestrial carnivores, sharks, and killer whales (*Orcinus orca*). When ringed seal pups are forced out of subnivean lairs prematurely because of low snow accumulation and/or early melts, gulls and ravens also successfully prey on them. Avian predation is facilitated not only by lack of sufficient snow cover but also by conditions favoring influxes of birds. Lydersen and Smith (1989) pointed out that the small size of newborn ringed seals, coupled with their prolonged nursing period, make them vulnerable to predation by birds and likely sets a southern limit to their distribution.

Ringed seals and bearded seals are the primary prey of polar bears. Polar bear predation on ringed seals is most successful in moving offshore ice, often along floe edges and rarely in ice-free waters. Polar bears also successfully hunt ringed seals on stable shorefast ice by catching animals when they surface to breathe and when they occupy lairs. Hammill and Smith (1991) further noted that polar bear predation on ringed seal pups increased 4-fold in a year when average snow depths in their study area decreased from 23 to 10 cm. They concluded that while a high proportion of pups born each year are lost to predation, "without the protection provided by the subnivean lair, pup mortality would be much higher."

The distribution of Arctic foxes broadly overlaps with that of Arctic ringed seals. Arctic foxes prey on newborn seals by tunneling into the birth lairs. The range of the red fox overlaps with that of the Okhotsk, Baltic, Saimaa, and Ladoga subspecies, and on rare occasion red foxes also prey on newborn ringed seals in lairs.

High rates of predation on ringed seal pups have been associated with anomalous weather events that caused subnivean lairs to collapse or melt before pups were weaned. Thus, declining snow depths and duration of snow cover during the period when ringed seal pups are born and nursed can be expected to lead to increased predation on ringed seal pups. We conclude that the threat posed to ringed seals by predation is currently moderate, but predation risk is expected to increase as snow and sea ice conditions change with a warming climate.

D. Inadequacy of Existing Regulatory Mechanisms

A primary concern about the conservation status of the ringed seal stems from the likelihood that its sea ice habitat has been modified by the warming climate and, more so, that the scientific consensus projections are for continued and perhaps accelerated warming in the foreseeable future. A second major concern, related by the common driver of CO_2 emissions, is the modification of habitat by ocean acidification, which may alter prey populations and other important aspects of the marine ecosystem. There are currently no effective mechanisms to regulate GHG emissions, which are contributing to global climate change and associated modifications to ringed seal habitat. The risk posed to ringed seals due to the lack of mechanisms to regulate GHG emissions is directly correlated to the risk posed by the effects of these emissions. The projections we used to assess risks from GHG emissions were based on the assumption that no regulation will take place (the underlying IPPC emissions scenarios were all "non-mitigated" scenarios). Therefore, the lack of mechanisms to regulate GHG emissions is already included in our risk assessment. We thus recognize that the lack of effective mechanisms to regulate global GHG emissions is contributing to the risks posed to ringed seals by these emissions.

Drowning in fishing gear has been reported as the most common cause of death reported for Saimaa ringed seals. Although there have been seasonal fishing restrictions instituted in some parts of Lake Saimaa, these are apparently insufficient, as annual loss of seals has continued. We therefore conclude that the inadequacy of existing mechanisms to regulate bycatch of Saimma ringed seals is contributing to its endangered status.

E. Other Natural or Manmade Factors Affecting the Species' Continued Existence Pollution and Contaminants

Contaminants research on ringed seals is very extensive and has been conducted in most parts of the species' range (with the exception of the Sea of Okhotsk), particularly throughout the Arctic environment where ringed seals are an important diet item in coastal human communities. Pollutants such as organochlorine (OC) compounds and heavy metals have been found in all of the subspecies of ringed seal (with the exception of the Okhotsk ringed seal). The variety, sources, and transport mechanisms of contaminants vary across ringed seal ecosystems. Statistical analysis of OC compounds in marine mammals has shown that, for most OCs, the European Arctic is more contaminated than the Canadian and U.S. Arctic.

Reduced productivity in the Baltic ringed seal in recent decades resulted from impaired fertility that was associated with pollutants. High levels of DDT (dichloro-diphenyl-trichloroethane) and PCBs (polychlorinated biphenyls) were found in Baltic (Bothnian Bay) ringed seals in the 1960s and 1970s, and PCB levels were correlated with reproductive failure. More recently, PFOSs (perfluorooctane sulfonate; a perfluorinated contaminant or PFC) were reported as 15 times greater in Baltic ringed seals than in Arctic ringed seals.

Mercury levels detected in Saimaa ringed seals were higher than those reported for the Baltic Sea and Arctic Ocean. It has been suggested that high mercury levels may have contributed to the Saimaa ringed seal's population decline in the 1960s and 1970s. The high level of mercury in the seal's prey and shortage of selenium would reduce the seal's capacity for metabolic detoxification. The major source of mercury in Lake Saimaa has been noted as the pulp industry.

Present and future impacts of contaminants on ringed seal populations should remain a high priority issue. Climate change has the potential to increase the transport of pollutants from lower latitudes to the Arctic, highlighting the importance of continued monitoring of ringed seal contaminant levels.

Oil and Gas Activities

Extensive oil and gas reserves coupled with rising global demand make it very likely that oil and gas activity will increase throughout the U.S. Arctic and internationally in the future. Climate change is expected to enhance marine access to offshore oil and gas reserves by reducing sea ice extent, thickness, and seasonal duration, thereby improving ship access to these resources around the margins of the Arctic Basin. Oil and gas exploration, development, and production activities include, but are not limited to: Seismic surveys; exploratory, delineation, and production drilling operations; construction of artificial islands, causeways, ice roads, shore-based facilities, and pipelines; and vessel and aircraft operations. These activities have the potential to impact ringed seals primarily through noise, physical disturbance, and pollution, particularly in the event of a large oil spill or blowout.

Within the range of the Arctic ringed seal, offshore oil and gas exploration and production activities are currently underway in the United States, Canada, Greenland, Norway, and Russia. In the United States, oil and gas activities have been conducted off the coast of Alaska since the 1970s, with most of the activity occurring in the Beaufort Sea. Although five exploratory wells have been drilled in the past, no oil fields have been developed or brought into production in the Chukchi Sea to date. In December 2009, an exploration plan was approved by the Bureau of Ocean Energy Management, Regulation, and Enforcement (formerly the Minerals Management Service) for drilling at five potential sites within three prospects in the Chukchi Sea in 2010. These plans have been put on hold until at least 2011 pending further review following the Deepwater Horizon blowout in the Gulf of Mexico. There are no offshore oil or gas fields currently in development or production in the Bering Sea.

Of all the oil and gas produced in the Arctic today, about 80 percent of the oil and 99 percent of the gas comes from the Russian Arctic (AMAP, 2007). With over 75 percent of known Arctic oil, over 90 percent of known Arctic gas, and vast estimates of undiscovered oil and gas reserves, Russia will continue to be the dominant producer of Arctic oil and gas in the future (AMAP, 2007). Oil and gas developments in the Kara and Barents Seas began in 1992, and large-scale production activities were initiated during 1998–2000. Oil and gas production activities are expected to grow in the western Siberian provinces and Kara and Barents Seas in the future. Recently there has also been renewed interest in the Russian Chukchi Sea, as new evidence emerges to support the notion that the region may contain world-class oil and gas reserves. In the Sea of Okhotsk, oil and natural gas operations are active off the northeastern coast of Sakhalin Island, and future developments are planned in the western Kamchatka and Magadan regions.

A major project underway in the Baltic Sea is the Nord Stream 1,200-km gas line, which will be the longest subsea natural gas pipeline in the world. Concerns have been expressed about the potential disturbance of World War II landmines and chemical toxins in the sediment during construction. There are also concerns about potential leaks and spills from the pipeline and impacts on the Baltic Sea marine environment once the pipeline is operational. Circulation of waters in the Baltic Sea is limited and any contaminants may not be flushed efficiently.

Large oil spills or blowouts are considered to be the greatest threat of oil and gas exploration activities in the marine environment. In contrast to spills on land, large spills at sea are difficult to contain and may spread over hundreds or thousands of kilometers. Responding to a spill in the Arctic environment would be particularly challenging. Reaching a spill site and responding effectively would be especially difficult, if not impossible, in winter when weather can be severe and daylight extremely limited. Oil spills under ice or in ice-covered waters are the most challenging to deal with, simply because they cannot be contained or recovered effectively with current technology. The difficulties experienced in stopping and containing the oil blowout at the Deepwater Horizon well in the Gulf of Mexico, where environmental conditions and response preparedness are comparatively good, point toward even greater challenges of attempting a similar feat in a much more environmentally severe and geographically remote location.

Although planning, management, and use of best practices can help reduce risks and impacts, the history of oil and gas activities, including recent events, indicates that accidents cannot be eliminated. Tanker spills, pipeline leaks, and oil blowouts are likely to occur in the future, even under the most stringent regulatory and safety systems. In the Sea of Okhotsk, an accident at an oil production complex resulted in a large (3.5-ton) spill in 1999, and in winter 2009, an unknown quantity of oil associated with a tanker fouled 3 km of coastline and hundreds of birds in Aniva Bay. To date, there have been no large spills in the Arctic marine environment from oil and gas activities.

Researchers have suggested that pups of ice-associated seals may be

particularly vulnerable to fouling of their dense lanugo coats. Adults, juveniles, and weaned young of the year rely on blubber for insulation, so effects on their thermoregulation are expected to be minimal. A variety of other acute effects of oil exposure have been shown to reduce seals' health and possibly survival. Direct ingestion of oil, ingestion of contaminated prey, or inhalation of hydrocarbon vapors can cause serious health effects including death.

It is important to evaluate the effects of anthropogenic perturbations, such as oil spills, in the context of historical data. Without historical data on distribution and abundance, it is difficult to predict the impacts of an oil spill on ringed seals. Population monitoring studies implemented in areas where significant industrial activities are likely to occur would allow for comparison of future impacts with historical patterns, and thus to determine the magnitude of potential effects.

Commercial Fisheries Interactions and Bycatch

Commercial fisheries may impact ringed seals through direct interactions (i.e., incidental take or bycatch) and indirectly through competition for prey resources and other impacts on prey populations. Estimates of Arctic ringed seal bycatch could only be found for commercial fisheries that operate in Alaskan waters. Based on data from 2002–2006, there has been an annual average of 0.46 mortalities of Arctic ringed seals incidental to commercial fishing operations. NAMMCO (2002) stated that in the North Atlantic region Arctic ringed seals are seldom caught in fishing gear because their distribution does not coincide with intensive fisheries in most areas. No information could be found regarding ringed seal bycatch levels in the Sea of Okhotsk; however, given the intensive levels of commercial fishing that occur in this sea, bycatch of ringed seals likely occurs on some level there.

Drowning in fishing gear has been reported as one of the most significant mortality factors for seals in the Baltic Sea, especially for young seals, which are prone to getting trapped in fishing nets. There are no reliable estimates of seal bycatch in this sea, and existing estimates are known to be low in many areas, making risk assessment difficult. Based on monitoring of 5 percent of the commercial fishing effort in the Swedish coastal fisheries, bycatch of Baltic ringed seals was estimated at 50 seals in 2004. In Finland, it was estimated that about 70 Baltic ringed seals were caught by fishing gear annually during the period 1997–1999. There are no estimates of seal bycatch from Lithuanian, Estonian, or Russian waters of the Baltic. It has been suggested that decreases in the use of the most harmful types of nets (*i.e.*, gillnets and unprotected trap nets), along with the development of seal-proof fishing gear, may have resulted in a decline in Baltic ringed seal bycatch (Ministry of Agriculture and Forestry, 2007).

It has been estimated that 200–400 Ladoga ringed seals died annually in fishing gear during the late 1980s and early 1990s. Fishing patterns have reportedly changed since then due to changes in the economic market. As of the late 1990s, fishing was not regarded to be a threat to Ladoga ringed seal populations, but it was suggested that it could become so should market conditions improve (Sipilä and Hyvärinen, 1998). Based on interviews with fishermen in Lake Ladoga, Verevkin *et al.* (2006) reported that at least 483 Ladoga ringed seals were killed in fishing gear in 2003, even though official records only recorded 60 cases of bycatch. These figures from 2003 suggest that bycatch mortality is likely to be a continuing conservation concern for Ladoga ringed seals.

Small-scale fishing was thought to be the most serious threat to ringed seals in Lake Saimaa (Sipilä and Hyvärinen, 1998). More than half of the Saimaa seal carcasses that were examined for the period 1977–2000 were determined to have died from drowning in fishing gear, making this the most common cause of death for Saimaa ringed seals. Season and gear restrictions have been implemented in some parts of the lake to reduce bycatch. However, during the late 1990s, 1–3 adult ringed seals were lost annually from drowning in fishing gear (Sipilä and Hyvärinen, 1998), and bycatch mortalities have been reported since then, indicating that bycatch mortality remains a significant conservation concern.

For indirect interactions, we note that commercial fisheries target a number of known ringed seal prey species such as walleye pollock (*Theragra chalcogramma*), Pacific cod, herring (*Clupea* sp.), and capelin. These fisheries may affect ringed seals indirectly through reductions in prey biomass and through other fishing mediated changes in ringed seal prey species.

Shipping

The extraordinary reduction in Arctic sea ice that has occurred in recent years has renewed interest in using the Arctic Ocean as a potential waterway for coastal, regional, and trans-Arctic marine operations. Climate models predict that the warming trend in the Arctic will accelerate, causing the ice to begin melting earlier in the spring and resume freezing later in the fall, resulting in an expansion of potential shipping routes and lengthening the potential navigation season.

The most significant risk posed by shipping activities in the Arctic is the accidental or illegal discharge of oil or other toxic substances carried by ships, due to their immediate and potentially long-term effects on individual animals, populations, food webs, and the environment. Shipping activities can also affect ringed seals directly through noise and physical disturbance (*e.g.,* icebreaking vessels), as well as indirectly through ship emissions and possible effects of introduction of exotic species on the lower trophic levels of ringed seal food webs.

Current and future shipping activities in the Arctic pose varying levels of threats to ringed seals depending on the type and intensity of the shipping activity and its degree of spatial and temporal overlap with ringed seal habitats. These factors are inherently difficult to know or predict, making threat assessment highly uncertain. However, given what is currently known about ringed seal populations and shipping activity in the Arctic, some general assessments can be made. Arctic ringed seal densities are variable and depend on many factors; however, they are often reported to be widely distributed in relatively low densities and rarely congregate in large numbers. This may help mitigate the risks of more localized shipping threats (*e.g.,* oil spills or physical disturbance), since the impacts from such events would be less likely to affect large numbers of seals. The fact that nearly all shipping activity in the Arctic (with the exception of icebreaking) purposefully avoids areas of ice and primarily occurs during the ice-free or low-ice seasons also helps to mitigate the risks associated with shipping to ringed seals, since they are closely associated with ice at nearly all times of the year. Icebreakers pose special risks to ringed seals because they are capable of operating year-round in all but the heaviest ice conditions and are often used to escort other types of vessels (*e.g.,* tankers and bulk carriers) through ice-covered areas. If icebreaking activities increase in the Arctic in the future as expected, the likelihood of negative impacts (e.g., oil spills, pollution, noise, disturbance, and habitat alteration) occurring in ice-

covered areas where ringed seals occur will likely also increase.

Though few details are available regarding actual shipping levels in the Sea of Okhotsk, resource development over the last decade stands out as a likely significant contributor. It is clear that relatively high levels of shipping are needed to support present oil and gas operations. In addition, large-scale commercial fishing occurs in many parts of the sea. Winter shipping activities in the southern Sea of Okhotsk are expected to increase considerably as oil and gas production pushes the development and use of new classes of icebreaking ships, thereby increasing the potential for shipping accidents and oil spills in the ice-covered regions of this sea.

The Baltic Sea is one of the most heavily trafficked shipping areas in the world, with more than 2,000 large ships (including about 200 oil tankers) sailing on its waters on an average day. Additionally, ferry lines, fishing boats, and cruise ships frequent the Baltic Sea. Both the number and size of ships (especially oil tankers) have grown in recent years, and the amount of oil transported in the Baltic (especially from the Gulf of Finland) has increased significantly since 2000. The risk of oil exposure for seals living in the Baltic Sea is considered to be greatest in the Gulf of Finland, where oil shipping routes pass through ringed seal pupping areas as well as close to rocks and islets where seals sometimes haul out. Icebreaking during the winter is considered to be the most significant marine traffic factor for seals in the Baltic Sea, especially in the Bothnian Bay.

Lakes Ladoga and Saimaa are connected to the Baltic Sea and other bodies of water via a network of rivers and canals and are used as waterways to transport people, resources, and cargo throughout the Baltic region. However, reviews of the biology and conservation of Ladoga and Samiaa ringed seals have not identified shipping-related activities (other than accidental bycatch in fishing gear) as being important risks to the conservation status of these subspecies.

The threats posed from shipping activity in the Sea of Okhotsk, Baltic Sea, and lakes Ladoga and Saimaa are largely the same as they are for the Arctic. Two obvious but important distinctions between these regions and the Arctic are that these bodies of water are geographically smaller and more confined than many areas where the Arctic subspecies lives, and they contain much smaller populations of ringed seals. Therefore, shipping impacts and ringed seals are more likely to overlap spatially in these regions, and a single accident (e.g., a large oil spill) could potentially impact these smaller populations severely. However, the lack of specific information on actual threats and impacts (now and in the future) makes threat assessment in these regions similarly uncertain. More information is needed in order to adequately assess the risks of shipping to ringed seals.

Summary of Factor E

We find that the threats posed by pollutants, oil and gas activities, fisheries, and shipping, do not individually or cumulatively raise concern about them placing the Arctic or Okhotsk subspecies of ringed seals at risk of becoming endangered. We recognize, however, that the significance of these threats would increase for populations diminished by the effects of climate change or other threats.

Reduced productivity in the Baltic Sea ringed seal in recent decades resulted from impaired fertility that was associated with pollutants. We do not have any information to conclude that there are currently population-level effects on Baltic ringed seals from contaminant exposure. We find that the threats posed by pollutants, petroleum development, commercial fisheries, and increased ship traffic do not individually or cumulatively pose a significant risk to the persistence of the Baltic ringed seal throughout all or a significant portion of this subspecies' range. We recognize, however, that the significance of these threats would increase for populations diminished by the effects of climate change or other threats. We also note that, particularly given the elevated contaminant load in the Baltic Sea, continued efforts are necessary to ensure that population-level effects from contaminant exposure do not recur in Baltic ringed seals in the future.

Drowning of seals in fishing gear and disturbance by human activities are conservation concerns for ringed seals in lakes Ladoga and Saimaa and could exacerbate the effects of climate change on these seal populations. Drowning in fishing gear is also one of the most significant sources of mortality for ringed seals in the Baltic Sea. We currently do not have any data to conclude that these threats are having population-level effects on Ladoga or Baltic ringed seals. However, bycatch mortality in Lake Ladoga particularly warrants additional investigation, as does consideration of ways to minimize seal entanglement in fishing gear. Given the very low numbers of the Saimaa ringed seal, we consider the risk posed to this subspecies from mortality incidental to fishing activities to be a significant factor in our classification of the Saimaa ringed seal as endangered.

Analysis of Demographic Risks

Threats to a species' long-term persistence are manifested demographically as risks to its abundance; productivity; spatial structure and connectivity; and genetic and ecological diversity. These demographic risks provide the most direct indices or proxies of extinction risk. A species at very low levels of abundance and with few populations will be less tolerant to environmental variation, catastrophic events, genetic processes, demographic stochasticity, ecological interactions, and other processes. A rate of productivity that is unstable or declining over a long period of time can indicate poor resiliency to future environmental change. A species that is not widely distributed across a variety of well-connected habitats is at increased risk of extinction due to environmental perturbations, including catastrophic events. A species that has lost locally adapted genetic and ecological diversity may lack the raw resources necessary to exploit a wide array of environments and endure short- and long-term environmental changes.

The key factors limiting the viability of all five ringed seal subspecies are the forecasted reductions in ice extent and, in particular, depths and duration of snow cover on ice. Early snow melts already are evident in much of the species' range. Increasingly late ice formation in autumn is forecasted, contributing to expectations of substantial decreases in snow accumulation. The ringed seal's specific requirement for habitats with adequate spring snow cover is manifested in the pups' low tolerance for exposure to wet, cold conditions and their vulnerability to predation. Premature failure of the snow cover has caused high mortality due to freezing and predation. Climate warming will result in increasingly early snow melts, exposing vulnerable ringed seal pups to predators and hypothermia.

The BRT considered the current risks to the persistence of Arctic, Okhotsk, Baltic, and Ladoga ringed seals as low to moderate. Given the low population size (less than 300 seals) of the Saimaa ringed seal, the present risk to population persistence was judged by the BRT to be high for all of the demographic attributes.

Within the foreseeable future, the BRT judged the risks to Arctic ringed seal persistence to be moderate (diversity

and abundance) to high (productivity and spatial structure). As noted above, the impacts to Arctic ringed seals may be somewhat ameliorated initially if the subspecies's range retracts northward with sea ice habitats, but by the end of the century snow depths are projected to be insufficient for lair formation and maintenance throughout much of the subspecies' range. The BRT also judged the risks to persistence of the Okhotsk ringed seal in the foreseeable future to be moderate (diversity) to high (abundance, productivity, and spatial structure). Okhotsk ringed seals will have limited opportunity to shift their range northward because the sea ice will retract toward land.

Risks to ringed seal persistence within the foreseeable future were judged by the BRT to be highest for the Baltic, Ladoga, and, in particular, Saimaa ringed seal. Risks were judged as moderate (diversity) to high (abundance productivity, and spatial structure) for Baltic ringed seals; moderate (diversity), or high to very high (abundance, productivity, and spatial structure) for Ladoga ringed seals; and high to very high (abundance, productivity, spatial structure, and diversity) for Saimaa ringed seals. As noted above, Ladoga and Saimaa ringed seals are landlocked populations that will be unable to respond to the pronounced degradation of ice and snow habitats forecasted to occur by shifting their range. In addition, the range of the Baltic ringed seal is bounded to the north by land, and so there is limited opportunity for this subspecies to shift its range. The low density of the Saimaa ringed seal population coupled with limited dispersal opportunities and depensatory effects continue to put this subspecies at risk of extinction. An estimate of the demographic effective population size of Saimaa ringed seals indicated that low population size is exacerbated by habitat fragmentation and that the subspecies is "vulnerable to extinction due to demographic stochasticity alone" (Kokko *et al.,* 1998).

Conservation Efforts

When considering the listing of a species, section 4(b)(1)(A) of the ESA requires us to consider efforts by any State, foreign nation, or political subdivision of a State or foreign nation to protect the species. Such efforts would include measures by Native American tribes and organizations, local governments, and private organizations. Also, Federal, tribal, state, and foreign recovery actions (16 U.S.C. 1533(f)), and Federal consultation requirements (16 U.S.C. 1536) constitute conservation measures. In addition to identifying these efforts, under the ESA and our Policy on the Evaluation of Conservation Efforts (PECE) (68 FR 15100; March 28, 2003), we must evaluate the certainty of implementing the conservation efforts and the certainty that the conservation efforts will be effective on the basis of whether the effort or plan establishes specific conservation objectives, identifies the necessary steps to reduce threats or factors for decline, includes quantifiable performance measures for the monitoring of compliance and effectiveness, incorporates the principles of adaptive management, and is likely to improve the species' viability at the time of the listing determination.

International Conservation Efforts Specifically To Protect Ringed Seals

Baltic ringed seals: (1) Some protected areas in Sweden, Finland, the Russian Federation, and Estonia include Baltic ringed seal habitat; (2) The Baltic ringed seal is included in the Red Book of the Russian Federation as "Category 2" (decreasing abundance), is classified as "Endangered" in the Red Data Book of Estonia, and is listed as "Near Threatened" on the Finnish and Swedish Red Lists; (3) Hunting of Baltic ringed seals has been suspended in Baltic Sea region countries, although Finland is permitting the harvest of small numbers of ringed seals in Bothnia Bay beginning in 2010; and (4) Helsinki Commission (HELCOM) recommendation 27–28/2 (2006) on conservation of seals in the Baltic Sea established a seal expert group to address and coordinate seal conservation and management across the Baltic Sea region. This expert group has made progress toward completing a set of related tasks identified in the HELCOM recommendation, including coordinating development of national management plans and developing monitoring programs. The national red lists and red data books noted above highlight the conservation status of listed species and can inform conservation planning and prioritization.

Ladoga ringed seals: (1) Hunting of ringed seals in Lake Ladoga has been prohibited since 1980; (2) In May 2009, Ladoga Skerries National Park, which will encompass northern and northwest Lake Ladoga, was added to the Russian Federation's list of protected areas to be established; and (3) The Ladoga ringed seal is included in the Red Data Books of the Russian Federation, the Leningrad Region, and Karelia.

Saimaa ringed seals: (1) The Saimaa ringed seal is classified as a non-game species, and has been protected from hunting under Finnish law since 1955; (2) The Saimaa ringed seal is designated as an "Endangered" species on the Finnish Red List; (3) To conserve seal breeding areas, new construction on Lake Saimaa is not permitted within designated shoreline conservation areas (water bodies excluded), some of which are located within two national parks; (4) New construction on Lake Saimaa outside of designated shoreline conservation areas has been regulated since 1999 to limit the density of new buildings; however, it has been reported that lakeshore development has still increased substantially; (5) To reduce mortalities due to fishery interactions, restrictions have been placed on certain types of fishing gear within the breeding areas of the Saimaa ringed seal, and seasonal closure agreements have been signed with numerous fishing associations. However, continuing loss of seals, in particular juveniles, due to drowning in fishing gear has been reported. A working group for reconciliation of fishing and conservation of Saimaa ringed seals has recommended establishing a single contiguous protected area by December 2010 within which a mandatory seasonal net fishing closure and other fishing restrictions would be implemented. The Finnish Ministry of Agriculture and Forestry recently reported that the Finnish government has signed agreements with most of the Saimaa Lake fishing associations and that it is continuing to negotiate agreements with a few associations. However, in May 2010 the European Commission sent formal notice to Finland that it had not implemented adequate measures to protect the Saimaa ringed seal and that better targeted measures are still needed.

International Agreements

The International Union for the Conservation of Nature and Natural Resources (IUCN) Red List identifies and documents those species believed by its reviewers to be most in need of conservation attention if global extinction rates are to be reduced, and is widely recognized as the most comprehensive, apolitical global approach for evaluating the conservation status of plant and animal species. In order to produce Red Lists of threatened species worldwide, the IUCN Species Survival Commission draws on a network of scientists and partner organizations, which uses a standardized assessment process to determine species' risks of extinction. However, it should be noted that the IUCN Red List assessment criteria differ from the listing criteria provided by the

ESA. The ringed seal is currently classified as a species of "Least Concern" on the IUCN Red List. The Red List assessment notes that, given the risks posed to the ringed seal by climate change, the conservation status of all ringed seal subspecies should be reassessed within a decade. The European Red List compiles assessments of the conservation status of European species according to IUCN red listing guidelines. The assessment for the ringed seal currently classifies the Saimaa ringed seal as "Endangered" and the Ladoga ringed seal as "Vulnerable." The Baltic ringed seal is classified as a species of "Least Concern" on the European Red List, with the caveats that population numbers remain low and that there are significant conservation concerns in some part of the Baltic Sea. Similar to inclusion in national red lists and red data books, these listings highlight the conservation status of listed species and can inform conservation planning and prioritization.

The Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention) is a regional treaty on conservation. Current parties to the Bern Convention within the range of the ringed seal include Norway, Sweden, Finland, Estonia, and Latvia. The agreement calls for signatories to provide special protection for fauna species listed in Appendix II (species to be strictly protected) and Appendix III to the convention (species for which any exploitation is to be regulated). The Saimaa and Ladoga ringed seals are listed under Appendix II, and other ringed seals fall under Appendix III. As discussed above, the Saimaa ringed seal has been protected from hunting since 1955, hunting of Ladoga ringed seals has been prohibited since 1980, and hunting of Baltic ringed seals has also been suspended (but with the recent exception noted above).

The provisions of the Council of the European Union's Directive 92/43/EEC on the Conservation of Natural Habitats of Wild Fauna and Flora (Habitats Directive) are intended to promote the conservation of biodiversity in European Union (EU) member countries. EU members meet the habitat conservation requirements of the directive by designating qualified sites for inclusion in a special conservation areas network known as Natura 2000. Current members of the EU within the range of the ringed seal include Sweden, Finland, and Estonia. Annex II to the Habitats Directive lists species whose conservation is to be specifically considered in designating special conservation areas, Annex IV identifies species determined to be in need of strict protection, and Annex V identifies species whose exploitation may require specific management measures to maintain favorable conservation status. The Saimaa ringed seal is listed in Annex II (as a priority species) and IV, the Baltic ringed seal is listed in Annex II and V, and the Arctic ringed seal is listed in Annex V. Some designated Natura 2000 sites include Baltic or Saimaa ringed seal habitat. Although Finland has implemented specific management measures and designated conservation areas for Saimaa ringed seals, as discussed above, the European Commission has sent its first formal notice to Finland that better targeted measures are urgently needed.

In 2005 the International Maritime Organization (IMO) designated the Baltic Sea Area outside of Russian territorial waters as a Particularly Sensitive Sea Area (PSSA), which provides a framework under IMOS's International Convention for the Prevention of Pollution from Ships (MARPOL 73/78) for developing internationally agreed upon measures to reduce risks posed from maritime shipping activities. To date, a maritime traffic separation scheme is the sole protective measure associated with the Baltic PSSA. Expansion of Russian oil terminals is contributing to a marked increase in oil transport in the Baltic Sea; however, the Russian Federation has declined to support the Baltic Sea PSSA designation.

HELCOM's main goal since the Helsinki convention first entered force in 1980 has been to address Baltic Sea pollution caused by hazardous substances and to restore and safeguard the ecology of the Baltic. HELCOM acts as a coordinating body among the nine countries with coasts along the Baltic Sea. Activities of HELCOM have led to significant reductions in a number of monitored hazardous substances in the Baltic Sea. However, pollution caused by hazardous substances continues to pose risks.

The Agreement on Cooperation in Research, Conservation, and Management of Marine Mammals in the North Atlantic (North Atlantic Marine Mammal Commission [NAMMCO]) was established in 1992 by a regional agreement among the governments of Greenland, Iceland, Norway, and the Faroe Islands to cooperatively conserve and manage marine mammals in the North Atlantic. NAMMCO has provided a forum for the exchange of information and coordination among member countries on ringed seal research and management.

There are no known regulatory mechanisms that effectively address the factors believed to be contributing to reductions in ringed seal sea ice habitat at this time. The primary international regulatory mechanisms addressing GHG emissions and global warming are the United Nations Framework Convention on Climate Change and the Kyoto Protocol. However, the Kyoto Protocol's first commitment period sets targets for action only through 2012. There is no regulatory mechanism governing GHG emissions in the years beyond 2012. The United States, although a signatory to the Kyoto Protocol, has not ratified it; therefore, the Kyoto Protocol is non-binding on the United States.

Domestic U.S. Regulatory Mechanisms

Several laws exist that directly or indirectly promote the conservation and protection of ringed seals. These include the Marine Mammal Protection Act of 1972, as Amended, the National Environmental Policy Act, the Outer Continental Shelf Lands Act, the Coastal Zone Management Act, and the Marine Protection, Research and Sanctuaries Act. Although there are some existing domestic regulatory mechanisms directed at reducing GHG emissions, these mechanisms are not expected to be effective in counteracting the increase in global GHG emissions within the foreseeable future.

At this time, we are not aware of any formalized conservation efforts for ringed seals that have yet to be implemented, or which have recently been implemented, but have yet to show their effectiveness in removing threats to the species. Therefore, we do not need to evaluate any conservation efforts under the PECE.

NMFS has established a co-management agreement with the Ice Seal Committee (ISC) to conserve and provide co-management of subsistence use of ice seals by Alaska Natives. The ISC is an Alaska Native Organization dedicated to conserving seal populations, habitat, and hunting in order to help preserve native cultures and traditions. The ISC co-manages ice seals with NMFS by monitoring subsistence harvest and cooperating on needed research and education programs pertaining to ice seals. NMFS's National Marine Mammal Laboratory is engaged in an active research program for ringed seals. The new information from research will be used to enhance our understanding of the risk factors affecting ringed seals, thereby improving our ability to develop effective management measures for the species.

Proposed Determinations

We have reviewed the status of the ringed seal, fully considering the best scientific and commercial data available, including the status review report. We have reviewed threats to the five subspecies of the ringed seal, as well as other relevant factors, and given consideration to conservation efforts and special designations for ringed seals by states and foreign nations. In consideration of all of the threats and potential threats to ringed seals identified above, the assessment of the risks posed by those threats, the possible cumulative impacts, and the uncertainty associated with all of these, we draw the following conclusions:

Arctic subspecies: (1) There are no specific estimates of population size available for the Arctic subspecies, but most experts would postulate that the population numbers in the millions. (2) The depth and duration of snow cover are forecasted to decrease substantially throughout the range of the Arctic ringed seal. Within this century, snow cover is forecasted to be inadequate for the formation and occupation of birth lairs over most of the subspecies' range. (3) Because ringed seals stay with the ice as it annually advances and retreats, the southern edge of the ringed seal's range may initially shift northward. Whether ringed seals will continue to move north with retreating ice over the deeper, less productive Arctic Basin waters and whether the species that they prey on will also move north is uncertain. (4) The Arctic ringed seal's pupping and nursing seasons are adapted to the phenology of ice and snow. The projected decreases in sea ice, and especially snow cover, will likely lead to decreased pup survival and a substantial decline in the abundance of the Arctic subspecies. We conclude that the Arctic subspecies of the ringed seal is not in danger of extinction throughout all or a significant portion of its range, but is likely to become so within the foreseeable future. Therefore, we propose to list the Arctic subspecies of the ringed seal as threatened under the ESA.

Okhotsk subspecies: (1) The best available scientific data suggest a conservative estimate of 676,000 ringed seals in the Sea of Okhotsk, apparently reduced from historical numbers. (2) Before the end of the current century, ice suitable for pupping and nursing is forecasted to be limited to the northernmost regions of the Sea of Okhotsk, and projections suggest that snow cover may already be inadequate for birth lairs. The Sea of Okhotsk is bounded to the north by land, which will limit the ability of Okhotsk ringed seals to respond to deteriorating sea ice and snow conditions by shifting their range northward. (3) Although some Okhotsk ringed seals have been reported resting on island shores during the ice-free season, these sites provide inferior pupping and nursing habitat. (4) The Okhotsk ringed seal's pupping and nursing seasons are adapted to the phenology of ice and snow. Decreases in sea ice habitat suitable for pupping, nursing, and molting will likely lead to declines in abundance and productivity of the Okhotsk subspecies. We conclude that the Okhotsk subspecies of the ringed seal is not in danger of extinction throughout all or a significant portion of its range, but is likely to become so within the foreseeable future. Therefore, we propose to list the Okhotsk subspecies of the ringed seal as threatened under the ESA.

Baltic subspecies: (1) Current estimates of 10,000 Baltic ringed seals suggest that the population has been significantly reduced from historical numbers. (2) Reduced productivity in the Baltic subspecies in recent decades resulted from impaired fertility associated with pollutants. (3) Dramatic reductions in sea ice extent are projected by mid-century and beyond in the Baltic Sea, coupled with declining depth and insulating properties of snow cover on Baltic Sea ice. The Baltic Sea is bounded to the north by land, which will limit the ability of Baltic ringed seals to respond to deteriorating sea ice and snow conditions by shifting their range northward. (4) Although Baltic ringed seals have been reported resting on island shores or offshore reefs during the ice-free season, these sites provide inferior pupping and nursing habitat. (5) The Baltic ringed seal's pupping and nursing seasons are adapted to the phenology of ice and snow. The projected substantial reductions in sea ice extent and deteriorating snow conditions are expected to lead to decreased survival of pups and a substantial decline in the abundance of the Baltic subspecies. We conclude that the Baltic subspecies of the ringed seal is not in danger of extinction throughout all or a significant portion of its range, but is likely to become so within the foreseeable future. Therefore, we propose to list the Baltic subspecies of the ringed seal as threatened under the ESA.

Ladoga subspecies: (1) The population size of the ringed seal in Lake Ladoga is currently estimated at 3,000 to 5,000 seals. (2) Reduced ice and snow cover are expected in Lake Ladoga within this century based on regional projections. As ice and snow conditions deteriorate, the landlocked population of Ladoga ringed seals will be unable to respond by shifting its range. (3) Although Ladoga ringed seals have been reported resting on rocks and island shores during the ice-free season, these sites provide inferior pupping and nursing habitat. (4) The Ladoga ringed seal's pupping and nursing seasons are adapted to the phenology of ice and snow. Reductions in ice and snow are expected to lead to decreased survival of pups and a substantial decline in the abundance of this subspecies. We conclude that the Ladoga subspecies of the ringed seal is not in danger of extinction throughout all or a significant portion of its range, but is likely to become so within the foreseeable future. Therefore, we propose to list the Ladoga subspecies of the ringed seal as threatened under the ESA.

Saimaa subspecies: (1) The Saimaa ringed seal population currently numbers less than 300 animals, and has been significantly reduced from historical numbers. (2) Although the population has slowly grown under active management, it currently exists at levels where it is at risk of extinction from demographic stochasticity and small population effects. (3) Reduced ice and snow cover are expected in Lake Saimaa within this century. As ice and snow conditions deteriorate, the landlocked population of Saimaa ringed seal will be unable to respond by shifting its range. (4) Although Saimaa ringed seals have been reported resting on rocks and island shores during the ice-free season, these sites provide inferior pupping and nursing habitat. (5) The Saimaa ringed seal's pupping and nursing seasons are adapted to the phenology of ice and snow. Reductions in ice and snow cover are expected to lead to decreased survival of pups and a substantial decline in the abundance of this subspecies. (6) Ongoing mortality incidental to fishing activities is also a significant conservation concern. We conclude that the Saimaa subspecies of the ringed seal is in danger of extinction throughout its range, consistent with its current listing as endangered under the ESA.

Prohibitions and Protective Measures

Section 9 of the ESA prohibits certain activities that directly or indirectly affect endangered species. These prohibitions apply to all individuals, organizations and agencies subject to U.S. jurisdiction. Section 4(d) of the ESA directs the Secretary of Commerce (Secretary) to implement regulations "to provide for the conservation of [threatened] species" that may include extending any or all of the prohibitions

of section 9 to threatened species. Section 9(a)(1)(g) also prohibits violations of protective regulations for threatened species implemented under section 4(d). Based on the status of each of the ringed seal subspecies and their conservation needs, we conclude that the ESA section 9 prohibitions are necessary and advisable to provide for their conservation. We are therefore proposing protective regulations pursuant to section 4(d) for the Arctic, Okhotsk, Baltic, and Ladoga subspecies of ringed seal to include all of the prohibitions in section 9(a)(1).

Sections 7(a)(2) and (4) of the ESA require Federal agencies to consult with us to ensure that activities they authorize, fund, or conduct are not likely to jeopardize the continued existence of a listed species or a species proposed for listing, or to adversely modify critical habitat or proposed critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with us. Examples of Federal actions that may affect Arctic ringed seals include permits and authorizations relating to coastal development and habitat alteration, oil and gas development (including seismic exploration), toxic waste and other pollutant discharges, and cooperative agreements for subsistence harvest.

Sections 10(a)(1)(A) and (B) of the ESA provide us with authority to grant exceptions to the ESA's section 9 "take" prohibitions. Section 10(a)(1)(A) scientific research and enhancement permits may be issued to entities (Federal and non-Federal) for scientific purposes or to enhance the propagation or survival of a listed species. The type of activities potentially requiring a section 10(a)(1)(A) research/enhancement permit include scientific research that targets ringed seals. Section 10(a)(1)(B) incidental take permits are required for non-Federal activities that may incidentally take a listed species in the course of otherwise lawful activity.

Our Policies on Endangered and Threatened Wildlife

On July 1, 1994, we and FWS published a series of policies regarding listings under the ESA, including a policy for peer review of scientific data (59 FR 34270) and a policy to identify, to the maximum extent possible, those activities that would or would not constitute a violation of section 9 of the ESA (59 FR 34272). We must also follow the Office of Management and Budget policy for peer review as described below.

Role of Peer Review

The intent of the peer review policy is to ensure that listings are based on the best scientific and commercial data available. Prior to a final listing, we will solicit the expert opinions of three qualified specialists, concurrent with the public comment period. Independent specialists will be selected from the academic and scientific community, Federal and State agencies, and the private sector.

In December 2004, the Office of Management and Budget (OMB) issued a Final Information Quality Bulletin for Peer Review establishing minimum peer review standards, a transparent process for public disclosure of peer review planning, and opportunities for public participation. The OMB Bulletin, implemented under the Information Quality Act (Pub. L. 106–554), is intended to enhance the quality and credibility of the Federal Government's scientific information, and applies to influential or highly influential scientific information disseminated on or after June 16, 2005. The scientific information contained in the ringed seal status review report (Kelly *et al.,* 2010) that supports this proposal to list the Arctic, Okhotsk, Baltic, and Ladoga subspecies of the ringed seal as threatened species under the ESA received independent peer review.

The intent of the peer review policy is to ensure that listings are based on the best scientific and commercial data available. Prior to a final listing, we will solicit the expert opinions of three qualified specialists, concurrent with the public comment period. Independent specialists will be selected from the academic and scientific community, Federal and state agencies, and the private sector.

Identification of Those Activities That Would Constitute a Violation of Section 9 of the ESA

The intent of this policy is to increase public awareness of the effect of our ESA listing on proposed and ongoing activities within the species' range. We will identify, to the extent known at the time of the final rule, specific activities that will be considered likely to result in violation of section 9, as well as activities that will not be considered likely to result in violation. Because the Okhotsk, Baltic, and Ladoga ringed seal occur outside the jurisdiction of the United States, we are presently unaware of any activities that could result in violation of section 9 of the ESA for these subspecies; however, because the possibility for violations exists (for example, import into the United States), we have proposed maintaining the section 9 protection. Activities that we believe could result in violation of section 9 prohibitions against "take" of the Arctic ringed seal include: (1) Unauthorized harvest or lethal takes of Arctic ringed seals; (2) in-water activities that produce high levels of underwater noise, which may harass or injure Arctic ringed seals; and (3) discharging or dumping toxic chemicals or other pollutants into areas used by Arctic ringed seals.

We believe, based on the best available information, the following actions will not result in a violation of section 9: (1) Federally funded or approved projects for which ESA section 7 consultation has been completed and mitigated as necessary, and that are conducted in accordance with any terms and conditions we provide in an incidental take statement accompanying a biological opinion; and (2) takes of Arctic ringed seals that have been authorized by NMFS pursuant to section 10 of the ESA. These lists are not exhaustive. They are intended to provide some examples of the types of activities that we might or might not consider as constituting a take of Arctic ringed seals.

Critical Habitat

Section 3 of the ESA (16 U.S.C. 1532(3)) defines critical habitat as "(i) the specific areas within the geographical area occupied by the species, at the time it is listed * * * on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed * * * upon a determination by the Secretary that such areas are essential for the conservation of the species." Section 3 of the ESA also defines the terms "conserve," "conserving," and "conservation" to mean "to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary."

Section 4(a)(3) of the ESA requires that, to the extent practicable and determinable, critical habitat be designated concurrently with the listing of a species. Designation of critical habitat must be based on the best scientific data available, and must take into consideration the economic, national security, and other relevant impacts of specifying any particular area as critical habitat. Once critical habitat

is designated, section 7 of the ESA requires Federal agencies to ensure that they do not fund, authorize, or carry out any actions that are likely to destroy or adversely modify that habitat. This requirement is in addition to the section 7 requirement that Federal agencies ensure their actions do not jeopardize the continued existence of the species.

In determining what areas qualify as critical habitat, 50 CFR 424.12(b) requires that NMFS "consider those physical or biological features that are essential to the conservation of a given species including space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, and rearing of offspring; and habitats that are protected from disturbance or are representative of the historical geographical and ecological distribution of a species." The regulations further direct NMFS to "focus on the principal biological or physical constituent elements * * * that are essential to the conservation of the species," and specify that the "known primary constituent elements shall be listed with the critical habitat description." The regulations identify primary constituent elements (PCEs) as including, but not limited to: "Roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types."

The ESA directs the Secretary of Commerce to consider the economic impact, the national security impacts, and any other relevant impacts from designating critical habitat, and under section 4(b)(2), the Secretary may exclude any area from such designation if the benefits of exclusion outweigh those of inclusion, provided that the exclusion will not result in the extinction of the species. At this time, the Arctic ringed seal's critical habitat is not determinable. We will propose critical habitat for the Arctic ringed seal in a separate rulemaking. To assist us with that rulemaking, we specifically request information to help us identify the PCEs or "essential features" of the Arctic ringed seal's habitat, and to what extent those features may require special management considerations or protection, as well as the economic attributes within the range of the Arctic ringed seal that could be impacted by critical habitat designation. Although the range of the Arctic ringed seal is circumpolar, 50 CFR 424.12(h) specifies that critical habitat shall not be designated within foreign countries or in other areas outside U.S. jurisdiction. Therefore, we request information only on potential areas of critical habitat within the United States or waters within U.S. jurisdiction.

Public Comments Solicited

Relying on the best scientific and commercial information available, we exercised our best professional judgment in developing this proposal to list the Arctic, Okhotsk, Baltic, and Ladoga ringed seals. To ensure that the final action resulting from this proposal will be as accurate and effective as possible, we are soliciting comments and suggestions concerning this proposed rule from the public, other concerned governments and agencies, Alaska Natives, the scientific community, industry, and any other interested parties. Comments are encouraged on this proposal as well as on the status review report (*See* **DATES** and **ADDRESSES**). Comments are particularly sought concerning:

(1) The current population status of ringed seals;

(2) Biological or other information regarding the threats to ringed seals;

(3) Information on the effectiveness of ongoing and planned ringed seal conservation efforts by states or local entities;

(4) Activities that could result in a violation of section 9(a)(1) of the ESA if such prohibitions applied to the Arctic ringed seal;

(5) Information related to the designation of critical habitat, including identification of those physical or biological features which are essential to the conservation of the Arctic ringed seal and which may require special management considerations or protection; and

(6) Economic, national security, and other relevant impacts from the designation of critical habitat for the Arctic ringed seal.

You may submit your comments and materials concerning this proposal by any one of several methods (*see* **ADDRESSES**). We will review all public comments and any additional information regarding the status of these subspecies and will complete a final determination within 1 year of publication of this proposed rule, as required under the ESA. Final promulgation of the regulation(s) will consider the comments and any additional information we receive, and such communications may lead to a final regulation that differs from this proposal.

Public Hearings

50 CFR 424.16(c)(3) requires the Secretary to promptly hold at least one public hearing if any person requests one within 45 days of publication of a proposed rule to list a species. Such hearings provide the opportunity for interested individuals and parties to give opinions, exchange information, and engage in a constructive dialogue concerning this proposed rule. We encourage the public's involvement in this matter. If hearings are requested, details regarding location(s), date(s), and time(s) will be published in a forthcoming **Federal Register** notice.

Classification

National Environmental Policy Act (NEPA)

The 1982 amendments to the ESA, in section 4(b)(1)(A), restrict the information that may be considered when assessing species for listing. Based on this limitation of criteria for a listing decision and the opinion in *Pacific Legal Foundation* v. *Andrus,* 657 F. 2d 829 (6th Cir. 1981), we have concluded that NEPA does not apply to ESA listing actions. (See NOAA Administrative Order 216–6.)

Executive Order (E.O.) 12866, Regulatory Flexibility Act, and Paperwork Reduction Act

As noted in the Conference Report on the 1982 amendments to the ESA, economic impacts cannot be considered when assessing the status of a species. Therefore, the economic analyses required by the Regulatory Flexibility Act are not applicable to the listing process. In addition, this rule is exempt from review under E.O. 12866. This rule does not contain a collection of information requirement for the purposes of the Paperwork Reduction Act.

E.O. 13132, Federalism

E.O. 13132 requires agencies to take into account any federalism impacts of regulations under development. It includes specific directives for consultation in situations where a regulation will preempt state law or impose substantial direct compliance costs on state and local governments (unless required by statute). Neither of those circumstances is applicable to this rule.

E.O. 13175, Consultation and Coordination With Indian Tribal Governments

The longstanding and distinctive relationship between the Federal and tribal governments is defined by

treaties, statutes, executive orders, judicial decisions, and co-management agreements, which differentiate tribal governments from the other entities that deal with, or are affected by, the Federal Government. This relationship has given rise to a special Federal trust responsibility involving the legal responsibilities and obligations of the United States toward Indian Tribes and the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights. E.O. 13175—Consultation and Coordination with Indian Tribal Governments—outlines the responsibilities of the Federal Government in matters affecting tribal interests. Section 161 of Public Law 108–199 (188 Stat. 452), as amended by section 518 of Public Law 108–447 (118 Stat. 3267), directs all Federal agencies to consult with Alaska Native corporations on the same basis as Indian tribes under E.O. 13175.

We intend to coordinate with tribal governments and native corporations which may be affected by the proposed action. We will provide them with a copy of this proposed rule for review and comment and offer the opportunity to consult on the proposed action.

References Cited

A complete list of all references cited in this rulemaking can be found on our Web site at *http://alaskafisheries.noaa.gov/* and is available upon request from the NMFS office in Juneau, Alaska (*see* **ADDRESSES**).

List of Subjects in 50 CFR Part 223

Endangered and threatened species, Exports, Imports, Transportation.

Dated: December 3, 2010.

Eric C. Schwaab,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 223 is proposed to be amended as follows:

PART 223—THREATENED MARINE AND ANADROMOUS SPECIES

1. The authority citation for part 223 continues to read as follows:

Authority: 16 U.S.C. 1531 1543; subpart B, § 223.201–202 also issued under 16 U.S.C. 1361 *et seq.;* 16 U.S.C. 5503(d) for § 223.206(d)(9).

2. In § 223.102, in the table, amend paragraph (a) by adding paragraphs (a)(4), (a)(5), (a)(6), and (a)(7) to read as follows:

§ 223.102 Enumeration of threatened marine and anadromous species.

* * * * *

Species [1]		Where listed	Citation(s) for listing determination(s)	Citation(s) for critical habitat designation(s)
Common name	Scientific name			
(a) * * *				
(4) Ringed seal, Arctic subspecies.	*Phoca hispida hispida*.	The Arctic subspecies of ringed seal includes all breeding populations of ringed seals east of 157 degrees east longitude, and east of the Kamchatka Peninsula, in the Pacific Ocean.	[INSERT FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA.
(5) Ringed seal, Baltic subspecies.	*Phoca hispida botnica*.	The Baltic subspecies of ringed seal includes all breeding populations of ringed seals within the Baltic Sea.	[INSERT FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA.
(6) Ringed seal, Ladoga subspecies.	*Phoca hispida ladogensis*.	The Ladoga subspecies of ringed seal includes all breeding populations of ringed seals within Lake Ladoga.	[INSERT FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA.
(7) Ringed seal, Okhotsk subspecies.	*Phoca hispida ochotensis*.	The Okhotsk subspecies of ringed seal includes all breeding populations of ringed seals west of 157 degrees east longitude, or west of the Kamchatka Peninsula, in the Pacific Ocean.	[INSERT FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA.
*	*	* *	*	* *

[1] Species includes taxonomic species, subspecies, distinct population segments (DPSs) (for a policy statement, see 61 FR4722, February 7, 1996), and evolutionarily significant units (ESUs) (for a policy statement, see 56 FR 58612, November 20, 1991).

* * * * *

3. In Subpart B of part 223, add § 223.212 to read as follows:

§ 223.212 Arctic subspecies of ringed seal.

The prohibitions of section 9(a)(1)(A) through 9(a)(1)(G) of the ESA (16 U.S.C. 1538) relating to endangered species shall apply to the Arctic subspecies of ringed seal listed in § 223.102(a)(4).

4. In Subpart B of part 223, add § 223.213 to read as follows:

§ 223.213 Baltic subspecies of ringed seal.

The prohibitions of section 9(a)(1)(A) through 9(a)(1)(G) of the ESA (16 U.S.C. 1538) relating to endangered species shall apply to the Baltic subspecies of ringed seal listed in § 223.102(a)(5).

5. In Subpart B of part 223, add § 223.214 to read as follows:

§ 223.214 Ladoga subspecies of ringed seal.

The prohibitions of section 9(a)(1)(A) through 9(a)(1)(G) of the ESA (16 U.S.C. 1538) relating to endangered species shall apply to the Ladoga subspecies of ringed seal listed in § 223.102(a)(6).

6. In Subpart B of part 223, add § 223.215 to read as follows:

§ 223.215 Okhotsk subspecies of ringed seal.

The prohibitions of section 9(a)(1)(A) through 9(a)(1)(G) of the ESA (16 U.S.C. 1538) relating to endangered species shall apply to the Okhotsk subspecies of ringed seal listed in § 223.102(a)(7).

[FR Doc. 2010–30934 Filed 12–9–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 223

[Docket No. 101126591–0588–01]

RIN 0648–XZ58

Endangered and Threatened Species; Proposed Threatened and Not Warranted Status for Subspecies and Distinct Population Segments of the Bearded Seal

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

ACTION: Proposed rule; 12-month petition finding; status review; request for comments.

SUMMARY: We, NMFS, have completed a comprehensive status review of the bearded seal (*Erignathus barbatus*) under the Endangered Species Act (ESA) and announce a 12-month finding on a petition to list the bearded seal as a threatened or endangered species. The bearded seal exists as two subspecies: *Erignathus barbatus nauticus* and *Erignathus barbatus barbatus.* Based on the findings from the status review report and consideration of the factors affecting these subspecies, we conclude that *E. b. nauticus* consists of two distinct population segments (DPSs), the Beringia DPS and the Okhotsk DPS. Moreover, based on consideration of information presented in the status review report, an assessment of the factors in section 4(a)(1) of the ESA, and efforts being made to protect the species, we have determined the Beringia DPS and the Okhotsk DPS are likely to become endangered throughout all or a significant portion of their ranges in the foreseeable future. We have also determined that *E. b. barbatus* is not in danger of extinction or likely to become endangered throughout all or a significant portion of its range in the foreseeable future. Accordingly, we are now issuing a proposed rule to list the Beringia DPS and the Okhotsk DPS of the bearded seal as threatened species. No listing action is proposed for *E. b. barbatus.* We solicit comments on this proposed action. At this time, we do not propose to designate critical habitat for the Beringia DPS because it is not currently determinable. In order to complete the critical habitat designation process, we solicit information on the essential physical and biological features of bearded seal habitat for the Beringia DPS.

DATES: Comments and information regarding this proposed rule must be received by close of business on February 8, 2011. Requests for public hearings must be made in writing and received by January 24, 2011.

ADDRESSES: Send comments to Kaja Brix, Assistant Regional Administrator, Protected Resources Division, Alaska Region, NMFS, Attn: Ellen Sebastian. You may submit comments, identified by RIN 0648–XZ58, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal *http://www.regulations.gov*.
- *Mail:* P.O. Box 21668, Juneau, AK 99802.
- *Fax:* (907) 586–7557.
- *Hand delivery to the Federal Building:* 709 West 9th Street, Room 420A, Juneau, AK.

All comments received are a part of the public record. No comments will be posted to *http://www.regulations.gov* for public viewing until after the comment period has closed. Comments will generally be posted without change. All Personal Identifying Information (for example, name, address, *etc.*) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

We will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

The proposed rule, maps, status review report and other materials relating to this proposal can be found on the Alaska Region Web site at: *http://alaskafisheries.noaa.gov/*.

FOR FURTHER INFORMATION CONTACT: Tamara Olson, NMFS Alaska Region, (907) 271–5006; Kaja Brix, NMFS Alaska Region, (907) 586–7235; or Marta Nammack, Office of Protected Resources, Silver Spring, MD, (301) 713–1401.

SUPPLEMENTARY INFORMATION: On March 28, 2008, we initiated status reviews of bearded, ringed (*Phoca hispida*), and spotted seals (*Phoca largha*) under the ESA (73 FR 16617). On May 28, 2008, we received a petition from the Center for Biological Diversity to list these three species of seals as threatened or endangered under the ESA, primarily due to concerns about threats to their habitat from climate warming and loss of sea ice. The Petitioner also requested that critical habitat be designated for these species concurrent with listing under the ESA. Section 4(b)(3)(B) of the ESA of 1973, as amended (16 U.S.C. 1531 *et seq.*) requires that when a petition to revise the List of Endangered and Threatened Wildlife and Plants is found to present substantial scientific and commercial information, we make a finding on whether the petitioned action is (a) Not warranted, (b) warranted, or (c) warranted but precluded from immediate proposal by other pending proposals of higher priority. This finding is to be made within 1 year of the date the petition was received, and the finding is to be published promptly in the **Federal Register**.

After reviewing the petition, the literature cited in the petition, and other literature and information available in our files, we found (73 FR 51615; September 4, 2008) that the petition met the requirements of the regulations under 50 CFR 424.14(b)(2), and we determined that the petition presented substantial information indicating that the petitioned action may be warranted. Accordingly, we proceeded with the status reviews of bearded, ringed, and spotted seals and solicited information pertaining to them.

On September 8, 2009, the Center for Biological Diversity filed a lawsuit in the U.S. District Court for the District of Columbia alleging that we failed to make the requisite 12-month finding on its petition to list the three seal species. Subsequently, the Court entered a consent decree under which we agreed to finalize the status review of the bearded seal (and the ringed seal) and submit this 12-month finding to the Office of the Federal Register by December 3, 2010. Our 12-month petition finding for ringed seals is published as a separate notice concurrently with this finding. Spotted seals were also addressed in a separate **Federal Register** notice (75 FR 65239; October 22, 2010; see also, 74 FR 53683, October 20, 2009).

The status review report of the bearded seal is a compilation of the best scientific and commercial data available concerning the status of the species, including the past, present, and future threats to this species. The Biological Review Team (BRT) that prepared this report was composed of eight marine mammal biologists, a fishery biologist, a marine chemist, and a climate scientist from NMFS' Alaska and Northeast Fisheries Science Centers, NOAA's Pacific Marine Environmental Lab, and the U.S. Fish and Wildlife Service (USFWS). The status review report underwent independent peer review by five scientists with expertise in bearded

seal biology, Arctic sea ice, climate change, and ocean acidification.

ESA Statutory, Regulatory, and Policy Provisions

There are two key tasks associated with conducting an ESA status review. The first is to delineate the taxonomic group under consideration; and the second is to conduct an extinction risk assessment to determine whether the petitioned species is threatened or endangered.

To be considered for listing under the ESA, a group of organisms must constitute a "species," which section 3(16) of the ESA defines as "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." The term "distinct population segment" (DPS) is not commonly used in scientific discourse, so the USFWS and NMFS developed the "Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act" to provide a consistent interpretation of this term for the purposes of listing, delisting, and reclassifying vertebrates under the ESA (61 FR 4722; February 7, 1996). We describe and use this policy below to guide our determination of whether any population segments of this species meet the DPS criteria of the DPS policy.

The ESA defines the term "endangered species" as "any species which is in danger of extinction throughout all or a significant portion of its range." The term "threatened species" is defined as "any species which is likely to become endangered within the foreseeable future throughout all or a significant portion of its range." The foreseeability of a species' future status is case specific and depends upon both the foreseeability of threats to the species and foreseeability of the species' response to those threats. When a species is exposed to a variety of threats, each threat may be foreseeable in a different timeframe. For example, threats stemming from well-established, observed trends in a global physical process may be foreseeable on a much longer time horizon than a threat stemming from a potential, though unpredictable, episodic process such as an outbreak of disease that may never have been observed to occur in the species.

In the 2008 status review of the ribbon seal (Boveng *et al.,* 2008; see also 73 FR 79822, December 30, 2008), NMFS scientists used the same climate projections used in our risk assessment here, but terminated the analysis of threats to ribbon seals at 2050. One reason for that approach was the difficulty of incorporating the increased divergence and uncertainty in climate scenarios beyond that time. Other reasons included the lack of data for threats other than those related to climate change beyond 2050, and the fact that the uncertainty embedded in the assessment of the ribbon seal's response to threats increased as the analysis extended farther into the future.

Since that time, NMFS scientists have revised their analytical approach to the foreseeability of threats and responses to those threats, adopting a more threat-specific approach based on the best scientific and commercial data available for each respective threat. For example, because the climate projections in the Intergovernmental Panel on Climate Change's (IPCC's) *Fourth Assessment Report* extend through the end of the century (and we note the IPCC's *Fifth Assessment Report,* due in 2014, will extend even farther into the future), we used those models to assess impacts from climate change through the end of the century. We continue to recognize that the farther into the future the analysis extends, the greater the inherent uncertainty, and we incorporated that limitation into our assessment of the threats and the species' response. For other threats, where the best scientific and commercial data does not extend as far into the future, such as for occurrences and projections of disease or parasitic outbreaks, we limited our analysis to the extent of such data. We believe this approach creates a more robust analysis of the best scientific and commercial data available.

Species Information

A thorough review of the taxonomy, life history, and ecology of the bearded seal is presented in the status review report (Cameron *et al.,* 2010; available at *http://alaskafisheries.noaa.gov/*). The bearded seal is the largest of the northern ice-associated seals, with typical adult body sizes of 2.1–2.4 m in length and weight up to 360 kg. Bearded seals have several distinctive physical features including a wide girth; a small head in proportion to body size; long whiskers; and square-shaped fore flippers. The life span of bearded seals is about 20–25 years.

Bearded seals have a circumpolar distribution south of 85° N. latitude, extending south into the southern Bering Sea in the Pacific and into Hudson Bay and southern Labrador in the Atlantic. Bearded seals also occur in the Sea of Okhotsk south to the northern Sea of Japan (Figure 1). Two subspecies of bearded seals are widely recognized: *Erignathus barbatus nauticus* inhabiting the Pacific sector, and *Erignathus barbatus barbatus* often described as inhabiting the Atlantic sector (Rice, 1998). The geographic distributions of these subspecies are not separated by conspicuous gaps. There are regions of intergrading generally described as somewhere along the northern Russian and central Canadian coasts (Burns, 1981; Rice, 1998).

Although the validity of the division into subspecies has been questioned (Kosygin and Potelov, 1971), the BRT concluded, and we concur, that the evidence discussed in the status review report for retaining the two subspecies is stronger than any evidence for combining them. The BRT defined geographic boundaries for the divisions between the two subspecies, subject to the strong caveat that distinct boundaries do not appear to exist in the actual populations; and therefore, there is considerable uncertainty about the best locations for the boundaries. The BRT defined 112° W. longitude (*i.e.,* the midpoint between the Beaufort Sea and Pelly Bay) as the North American delineation between the two subspecies (Figure 1). Following Heptner *et al.* (1976), who suggested an east-west dividing line at Novosibirskiye, the BRT defined 145° E. longitude as the Eurasian delineation between the two subspecies in the Arctic (Figure 1).

Seasonal Distribution, Habitat Use, and Movements

Bearded seals primarily feed on benthic organisms that are more numerous in shallow water where light can reach the sea floor. As such, the bearded seal's effective range is generally restricted to areas where seasonal sea ice occurs over relatively shallow waters, typically less than 200 m in depth (see additional discussion below).

Bearded seals are closely associated with sea ice, particularly during the critical life history periods related to reproduction and molting, and they can be found in a broad range of different ice types. Sea ice provides the bearded seal and its young some protection from predators during the critical life history periods of whelping and nursing. It also allows molting bearded seals a dry platform to raise skin temperature and facilitate epidermal growth, and is important throughout the year as a platform for resting and perhaps thermoregulation. Of the ice-associated seals in the Arctic, bearded seals seem to be the least particular about the type and quality of ice on which they are observed. Bearded seals generally prefer

ice habitat that is in constant motion and produces natural openings and areas of open water, such as leads, fractures, and polynyas for breathing, hauling out on the ice, and access to water for foraging. They usually avoid areas of continuous, thick, shorefast ice and are rarely seen in the vicinity of unbroken, heavy, drifting ice or large areas of multi-year ice. Although bearded seals prefer sea ice with natural access to the water, observations indicate that bearded seals are able to make breathing holes in thinner ice.

Being so closely associated with sea ice, particularly pack ice, the seasonal movements and distribution of bearded seals are linked to seasonal changes in ice conditions. To remain associated with their preferred ice habitat, bearded seals generally move north in late-spring and summer as the ice melts and retreats, and then move south in the fall as sea ice forms.

The region that includes the Bering and Chukchi Seas is the largest area of continuous habitat for bearded seals. The Bering-Chukchi Platform is a shallow intercontinental shelf that encompasses about half of the Bering Sea, spans the Bering Strait, and covers nearly all of the Chukchi Sea. Bearded seals can reach the bottom everywhere along the shallow shelf, and so it provides them favorable foraging habitat. The Bering and Chukchi Seas are generally covered by sea ice in late winter and spring, and are mostly ice free in late summer and fall. As the ice retreats in the spring most adult bearded seals in the Bering Sea are thought to move north through the Bering Strait, where they spend the summer and early fall at the southern edge of the Chukchi and Beaufort Sea pack ice and at the wide, fragmented margin of multi-year ice. A smaller number of bearded seals, mostly juveniles, remain near the coasts of the Bering and Chukchi Seas for the summer and early fall. As the ice forms again in the fall and winter, most seals move south with the advancing ice edge through Bering Strait and into the Bering Sea where they spend the winter.

There are fewer accounts of the seasonal movements of bearded seals in other areas. Compared to the dramatic long range seasonal movements of bearded seals in the Chukchi and Bering Seas, bearded seals are considered to be relatively sedentary over much of the rest of their range, undertaking more local movements in response to ice conditions. These differences may simply be the result of the general persistence of ice over shallow waters in the High Arctic. In the Sea of Okhotsk, bearded seals remain in broken ice as the sea ice expands and retreats, inhabiting the southern pack ice edge beyond the fast ice in winter and moving north toward shore in spring and summer. In the White, Barents, and Kara Seas, bearded seals also conduct seasonal migrations following the ice edge, as may bearded seals in Baffin Bay. Excluded by shorefast ice from much of the Canadian Arctic Archipelago during winter, bearded seals are scattered throughout many of the inlets and fjords of this region from July to October, though at least in some years, a portion of the population is known to overwinter in a few isolated open water areas north of Baffin Bay.

Throughout most of their range, adult bearded seals are seldom found on land. However, some adults in the Sea of Okhotsk, and more rarely in a few other regions, use haul-out sites ashore in late summer and early autumn until ice floes begin to appear at the coast. This is most common in the western Sea of Okhotsk and along the coasts of western Kamchatka where bearded seals form numerous shore rookeries that can have tens to hundreds of individuals each.

Reproduction

In general, female and male bearded seals attain sexual maturity around ages 5–6 and 6–7, respectively. Adult female bearded seals ovulate after lactation, and are presumably then receptive to males. Mating is believed to usually take place at the surface of the water, but it is unknown if it also occurs underwater or on land or ice, as observed in some other phocids. The social dynamics of mating in bearded seals are not well known; however, theories regarding their mating system have centered around serial monogamy and promiscuity, and on the nature of competition among breeding males to attract and gain access to females. Bearded seals vocalize during the breeding season, with a peak in calling during and after pup rearing. Male vocalizations are believed to advertise mate quality to females, signal competing males of a claim on a female, or proclaim a territory.

During the winter and spring, as sea ice begins to break up, perinatal females find broken pack ice over shallow areas on which to whelp, nurse young, and molt. A suitable ice platform is likely a prerequisite to whelping, nursing, and rearing young (Heptner *et al.,* 1976; Burns, 1981; Reeves *et al.,* 1992; Lydersen and Kovacs, 1999; Kovacs, 2002). Because bearded seals whelp on ice, populations have likely adapted their phenology to the ice regimes of the regions that they inhabit. Wide-ranging observations of pups generally indicate whelping occurs from March to May with a peak in April, but there are considerable geographical differences in reported timing, which may reflect real variation, but that may also result from inconsistent sighting efforts across years and locations. Details on the spatial distribution of whelping can be found in section 2.5.1 of the status review report.

Females bear a single pup that averages 33.6 kg in mass and 131.3 cm in length. Pups begin shedding their natal (lanugo) coats in utero, and they are born with a layer of subcutaneous fat. These characteristics are thought to be adaptations to entering the water soon after birth as a means of avoiding predation.

Females with pups are generally solitary, tending not to aggregate. Pups enter the water immediately after or within hours of birth. Pups nurse on the ice, and by the time they are a few days old they spend half their time in the water. Recent studies using recorders and telemetry on pups have reported a lactation period of about 24 days, a transition to diving and more efficient swimming, mother-guided movements of greater than 10 km, and foraging while still under maternal care.

Detailed studies on bearded seal mothers show they forage extensively, diving shallowly (less than 10 m), and spending only about 10 percent of their time hauled out with pups and the remainder nearby at the surface or diving. Despite the relative independence of mothers and pups, their bond is described as strong, with females being unusually tolerant of threats in order to remain or reunite with pups. A mixture of crustaceans and milk in the stomachs of pups indicates that independent foraging occurs prior to weaning, at least in some areas.

Molting

Adult and juvenile bearded seals molt annually, a process that in mature phocid seals typically begins shortly after mating. Bearded seals haul out of the water more frequently during molting, a behavior that facilitates higher skin temperatures and may accelerate shedding and regrowth of hair and epidermis. Though not studied in bearded seals, molting has been described as diffuse, with individuals potentially shedding hair throughout the year but with a pulse in the spring and summer. This is reflected in the wide range of estimates for the timing of molting, though these estimates are also based on irregular observations.

The need for a platform on which to haul out and molt from late spring to mid-summer, when sea ice is rapidly melting and retreating, may necessitate movement for bearded seals between

habitats for breeding and molting. In the Sea of Okhotsk, the spatial distribution of bearded seals is similar between whelping and molting seasons so only short movements occur. In contrast, bearded seals that whelp and mate in the Bering Sea migrate long distances to summering grounds at the ice edge in the Chukchi Sea, a period of movement that coincides with the observed timing of molting. Similar migrations prior to and during the molting period have been presumed for bearded seals in the White and southeastern Barents Seas to more easterly and northern areas of the Barents Sea, where ice persists through the summer. Also during the interval between breeding and molting, passive movements on ice over large distances have been postulated between the White and Barents Seas, and from there further east to the Kara Sea. A post-breeding migration of bearded seals to molting grounds has also been postulated to occur from the southern Laptev Sea westward into the eastern Kara Sea. In some locations where bearded seals use terrestrial haul-out sites seasonally, the molting period overlaps with this use. However, the molting phenology of bearded seals on shore is unknown.

Food Habits

Bearded seals are considered to be foraging generalists because they have a diverse diet with a large variety of prey items throughout their circumpolar range. Bearded seals feed primarily on a variety of invertebrates and some fishes found on or near the sea bottom. They are also able to switch their diet to include schooling pelagic fishes when advantageous. The bulk of the diet appears to consist of relatively few prey types, primarily bivalve mollusks and crustaceans like crabs and shrimps. However, fishes like sculpins, Arctic cod (*Boreogadus saida*), polar cod (*Arctogadus glacialis*), or saffron cod (*Eleginus gracilis*) can also be a significant component. There is conflicting evidence regarding the importance of fish in the bearded seal diet throughout its range. Several studies have found high frequencies of fishes in the diet, but it is not known whether major consumption of fish is related to the availability of prey resources or the preferential selection of prey. Seasonal changes in diet composition have been observed throughout the year. For example, clams and fishes have been reported as more important in spring and summer months than in fall and winter.

Species Delineation

The BRT reviewed the best scientific and commercial data available on the bearded seal's taxonomy and concluded that there are two widely recognized subspecies of bearded seals: *Erignathus barbatus barbatus,* often described as inhabiting the Atlantic sector of the seal's range; and *Erignathus barbatus nauticus,* inhabiting the Pacific sector of the range. Distribution maps published by Burns (1981) and Kovacs (2002) provide the known northern and southern extents of the distribution. As discussed above, the BRT defined geographic boundaries for the divisions between the two subspecies (Figure 1), subject to the strong caveat that distinct boundaries do not appear to exist in the actual populations. Our DPS analysis follows.

Under our DPS policy (61 FR 4722; February 7, 1996) two elements are considered when evaluating whether a population segment qualifies as a DPS under the ESA: (1) The discreteness of the population segment in relation to the remainder of the species or subspecies to which it belongs; and (2) the significance of the population segment to the species or subspecies to which it belongs.

A population segment of a vertebrate species may be considered discrete if it satisfies either one of the following conditions: (1) It is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors. Quantitative measures of genetic or morphological discontinuity may provide evidence of this separation; or (2) it is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the ESA.

If a population segment is considered to be discrete under one or both of the above conditions, its biological and ecological significance to the taxon to which it belongs is evaluated in light of the ESA's legislative history indicating that the authority to list DPSs be used "sparingly," while encouraging the conservation of genetic diversity (see Senate Report 151, 96th Congress, 1st Session). This consideration may include, but is not limited to, the following: (1) Persistence of the discrete population segment in an ecological setting unusual or unique for the taxon; (2) evidence that loss of the discrete population segment would result in a significant gap in the range of the taxon; (3) evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historic range; or (4) evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics.

If a population segment is discrete and significant (*i.e.,* it is a DPS) its evaluation for endangered or threatened status will be based on the ESA's definitions of those terms and a review of the factors enumerated in section 4(a)(1).

Evaluation of Discreteness

The range of the bearded seal occurs in cold, seasonally or annually ice-covered Arctic and subarctic waters, without persistent intrusions of warm water or other conditions that would pose potential physiological barriers. Furthermore, the seasonal timings of reproduction and molting vary little throughout the bearded seal's distribution, suggesting that there are no obvious ecological separation factors.

The underwater vocalizations of males during the breeding season recorded in Alaskan, Canadian, and Norwegian waters are often more similar between adjacent geographical regions than between more distant sites, suggesting that bearded seals may have strong fidelity to specific breeding sites. However, these observed differences in vocalizations may be due to other factors such as ecological influences or sexual selection, and not to distance or geographic barriers. Bearded seals are known to make seasonal movements of greater than 1,000 km, and so only very large geographical barriers would have the potential by themselves to maintain discreteness between breeding concentrations. As primarily benthic feeders, bearded seals may be constrained to relatively shallow waters and so expanses of deep water may also pose barriers to movement.

Erignathus barbatus nauticus: Given the bearded seal's circumpolar distribution and their ability to travel long distances, it is difficult to imagine that land masses pose a significant barrier to the movement of this subspecies, with one exception: The great southerly extent of the Kamchatka Peninsula. The seasonal ice does not extend south to the tip of that peninsula, and the continental shelf is very narrow along its eastern Bering Sea coast. The seals' affinity for ice and shallow waters may help to confine bearded seals to their respective sea basins in the Bering and Okhotsk Seas. Heptner *et al.* (1976) and Krylov *et al.* (1964) described a typical annual pattern of bearded seals in the Sea of Okhotsk to be one of staying near the ice edge when ice is present, and then moving north and closer to shore as the

ice recedes in summer. Unlike other researchers describing tendencies of the species as a whole, Krylov *et al.* (1964) described the bearded seal as more or less sedentary, based primarily on observations of seals in the Sea of Okhotsk. Indeed, published maps indicate that the southeastern coast of the Kamchatka Peninsula is the only location where the distribution of the bearded seal is not contiguous (Burns, 1981; Kovacs, 2002; Blix, 2005), and there are no known records of bearded seals moving between the Sea of Okhotsk and Bering Sea.

Kosygin and Potelov (1971) conducted a study of craniometric and morphological differences between bearded seals in the White, Barents, and Kara Seas, and bearded seals in the Bering Sea and Sea of Okhotsk. They reported differences in measurements between the three regions, although they suggested that the differences were not significant enough to justify dividing the population into subspecies. Fedoseev (1973, 2000) also suggested that differences in the numbers of lip vibrissae as well as length and weight indicate population structure between the Bering and Okhotsk Seas. Thus, under the first factor for determining discreteness, the BRT concluded, and we concur, that the available evidence indicates the discreteness of two population segments: (1) The Sea of Okhotsk, and (2) the remainder of the range of *E. b. nauticus,* hereafter referred to as the Beringia population segment. Considerations of cross-boundary management do not outweigh or contradict the division proposed above based on biological grounds. In all countries in the range of the Beringia segment (Russia, United States, and Canada) annual harvest rates are considered small relative to the local populations and harvest is assumed to have little impact on abundance. In addition, if the Kamchatka Peninsula serves as a geographic barrier, the entire population of bearded seals in the Sea of Okhotsk may lie entirely within Russian jurisdiction.

Erignathus barbatus barbatus: The Greenland and Norwegian Seas, which separate northern Europe and Russia from Greenland, form a very deep basin that could potentially act as a type of physical barrier to a primarily benthic feeder. Risch *et al.* (2007) described distinct differences in male vocalizations at breeding sites in Svalbard and Canada; however, they also suggested that ecological influences or sexual selection, and not a geographical feature restricting gene flow, could be the cause of these differences. Gjertz *et al.* (2000) described at least one pup known to travel from Svalbard nearly to the Greenland coast across Fram Strait, and Davis *et al.* (2008) failed to find a significant difference between populations on either side of the Greenland Sea. Both of these studies suggest that the expanse of deep water is apparently not a geographic barrier to bearded seals. However, it should be noted that not all of the DNA samples used in the study by Davis *et al.* (2008) were collected during the time of breeding, and so might not reflect the potential for additional genetic discreteness if discrete breeding groups disperse and mix during the non-breeding period. When considered altogether, the BRT concluded, and we concur, that subdividing *E. b. barbatus* into two or more DPSs is not warranted because the best scientific and commercial data available does not indicate that the populations are discrete.

The core range of the bearded seal includes the waters of five countries (Russia, United States, Canada, Greenland, and Norway) with management regimes sufficiently similar that considerations of cross-boundary management and regulatory mechanisms do not support a positive discreteness determination. In addition, in all countries in the range of *E. b. barbatus,* annual harvest rates are considered small relative to the local populations and harvest is assumed to have little impact on abundance. Since we conclude that the *E. b. barbatus* populations are not discrete, we do not address whether they would be considered significant.

Evaluation of Significance

Having concluded that *E. b. nauticus* is composed of two discrete segments, here we review information that the BRT found informative for evaluating the biological and ecological significance of these segments.

Throughout most of their range, adult bearded seals are rarely found on land (Kovacs, 2002). However, some adults in the Sea of Okhotsk, and more rarely in Hudson Bay (COSEWIC, 2007), the White, Laptev, Bering, Chukchi, and Beaufort Seas (Heptner *et al.,* 1976; Burns, 1981; Nelson, 1981; Smith, 1981), and Svalbard (Kovacs and Lydersen, 2008) use haul-out sites ashore in late summer and early autumn. In these locations, sea ice either melts completely or recedes beyond the limits of shallow waters where seals are able to feed (Burns and Frost, 1979; Burns, 1981). By far the largest and most numerous and predictable of these terrestrial haul-out sites are in the Sea of Okhotsk, where they are distributed continuously throughout the bearded seal range, and may comprise tens to more than a thousand individuals (Scheffer, 1958; Tikhomorov, 1961; Krylov *et al.,* 1964; Chugunkov, 1970; Tavrovskii, 1971; Heptner *et al.,* 1976; Burns, 1981). Indeed, the Sea of Okhotsk is the only portion of the range of *E. b. nauticus* reported to have any such aggregation of adult haul-out sites (Fay, 1974; Burns and Frost, 1979; Burns, 1981; Nelson, 1981). Although it is not clear for how long bearded seals have exhibited this haul-out behavior, its commonness is unique to the Sea of Okhotsk, possibly reflecting responses or adaptations to changing conditions at the range extremes. This difference in haul-out behavior may also provide insights about the resilience of the species to the effects of climate warming in other regions.

The Sea of Okhotsk covers a vast area and is home to many thousands of bearded seals. Similarly, the range of the Beringia population segment includes a vast area that provides habitat for many thousands of bearded seals. Loss of either segment of the subspecies' range would result in a substantially large gap in the overall range of the subspecies.

The existence of bearded seals in the unusual or unique ecological setting found in the Sea of Okhotsk, as well as the fact that loss of either the Okhotsk or Beringia segment would result in a significant gap in the range of the taxon, support our conclusion that the Beringia and Okhotsk population segments of *E. b. nauticus* are each significant to the subspecies as a whole.

DPS Conclusions

In summary, the Beringia and Okhotsk population segments of *E. b. nauticus* are discrete because they are markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, and behavioral factors. They are significant because the loss of either of the two DPSs would result in a significant gap in the range of the taxon, and the Okhotsk DPS exists in an ecological setting that is unusual or unique for the taxon. We therefore conclude that these two population segments meet both the discreteness and significance criteria of the DPS policy. We consider these two population segments to be DPSs (the Beringia DPS and the Okhotsk DPS) (Figure 1).

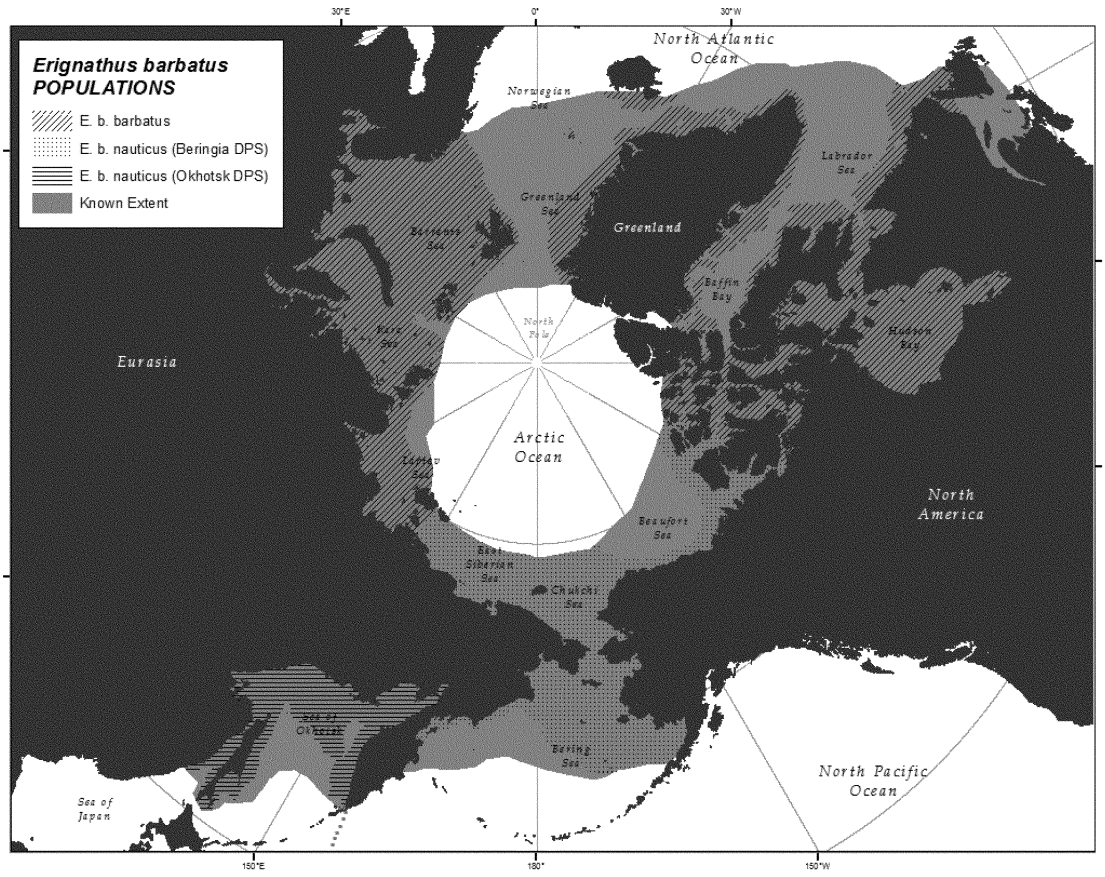

Figure 1. The global distribution of bearded seals as adapted by Cameron et al. (2010) from maps of known extent in Burns (1981) and Kovacs (2002). Two bearded seal subspecies are currently recognized: E. b. nauticus, which is sub-divided into the Beringia DPS and the Okhotsk DPS, and E. b. barbatus. The core distributions (defined as areas of known extent in water <500 m deep) of E. b. barbatus and the two DPSs are also illustrated (represented by the patterned areas). The boundary between the Beringia DPS and the Okhotsk DPS (dotted line) is considered to be 157° E. longitude, and the subspecies boundaries were approximated from the literature.

Abundance and Trends

No accurate worldwide abundance estimates exist for bearded seals. Several factors make it difficult to accurately assess the bearded seal's abundance and trends. The remoteness and dynamic nature of their sea ice habitat, time spent below the surface and their broad distribution and seasonal movements make surveying bearded seals expensive and logistically challenging. Additionally, the species' range crosses political boundaries, and there has been limited international cooperation to conduct range-wide surveys. Details of survey methods and data are often limited or have not been published, making it difficult to judge the reliability of the reported numbers. Logistical challenges also make it difficult to collect the necessary behavioral data to make proper adjustments to seal counts. Until very recently, no suitable behavioral data have been available to correct for the proportion of seals in the water at the time of surveys. Research is just beginning to address these limitations, and so current and accurate abundance estimates are not yet available. We make estimates based on the best scientific and commercial data available, combining recent and historical data.

Beringia DPS

Data analyzed from aerial surveys conducted in April and May 2007 produced an abundance estimate of 63,200 bearded seals in an area of 81,600 sq km in the eastern Bering Sea (Ver Hoef *et al.,* 2010). This is a partial estimate for bearded seals in the U.S. waters of the Bering Sea because the survey area did not include some known bearded seal habitat in the eastern Bering Sea and north of St. Lawrence Island. The estimate is similar in magnitude to the western Bering Sea estimates reported by Fedoseev (2000) from surveys in 1974–1987, which ranged from 57,000 to 87,000. The BRT considers the current total Bering Sea bearded seal population to be about double the partial estimate reported by Ver Hoef *et al.* (2010) for U.S. waters, or approximately 125,000 individuals.

Aerial surveys flown along the coast from Shishmaref to Barrow during May–June 1999 and 2000 provided average annual bearded seal density estimates. A crude abundance estimate based on these densities, and without any correction for seals in the water, is 13,600 bearded seals. These surveys covered only a portion (U.S. coastal) of the Chukchi Sea. Assuming that the waters along the Chukchi Peninsula on the Russian side of the Chukchi Sea contain similar numbers of bearded seals, the combined total would be about 27,000 individuals.

Aerial surveys of the eastern Beaufort Sea conducted in June during 1974–1979, provided estimates that averaged 2,100 bearded seals, uncorrected for seals in the water. The ice-covered continental shelf of the western Beaufort Sea is roughly half the area surveyed, suggesting a crude estimate for the entire Beaufort Sea in June of about 3,150, uncorrected for seals in the water. For such a large area in which the subsistence use of bearded seals is important to Alaska Native and Inuvialuit communities, this number is likely to be a substantial underestimate. A possible explanation is that many of the subsistence harvests of bearded seals in this region may occur after a rapid seasonal influx of seals from the Bering and Chukchi Seas in the early summer, later than the period in which the surveys were flown.

In the East Siberian Sea, Obukhov (1974) described bearded seals as rare, but present during July–September, based on year-round observations (1959–1965) of a region extending about 350 km east from the mouth of the Kolyma River. Typically, one bearded seal was seen during 200–250 km of travel. Geller (1957) described the zone between the Kola Peninsula and Chukotka as comparatively poor in marine mammals relative to the more western and eastern portions of the northern Russian coasts. We are not aware of any other information about bearded seal abundance in the East Siberian Sea.

Although the present population size of the Beringia DPS is very uncertain, based on these reported abundance estimates, the current population size is estimated at 155,000 individuals.

Okhotsk DPS

Fedoseev (2000) presented multiple years of unpublished seal survey data from 1968 to 1990; however, specific methodologies were not provided for any of the surveys or analyses. Most of these surveys were designed primarily for ringed and ribbon seals, as they were more abundant and of higher commercial value. Recognizing the sparse documentation of the survey methods and data, as well as the 20 years or more that have elapsed since the last survey, the BRT recommends considering the 1990 estimate of 95,000 individuals to be the current estimated population size of the Okhotsk DPS.

Erignathus barbatus barbatus

Cleator (1996) suggested that a minimum of 190,000 bearded seals inhabit Canadian waters based on summing the different available indices for bearded seal abundance. The BRT recommends considering the current bearded seal population in Hudson Bay, the Canadian Archipelago, and western Baffin Bay to be 188,000 individuals. This value was chosen based on the estimate for Canadian waters of 190,000, minus 2,000 to account for the average number estimated to occur in the Canadian portion of the Beaufort Sea (which is part of the *E. b. nauticus* subspecies). There are few estimates of abundance available for other parts of the range of *E. b. barbatus,* and there is sparse documentation of the methods used to produce these estimates. Consequently, the BRT considered all regional estimates for *E. b. barbatus* to be unreliable, except for those in Canadian waters. The population size of *E. b. barbatus* is therefore very uncertain, but NMFS experts estimate it to be 188,000 individuals.

Summary of Factors Affecting the Bearded Seal

Section 4(a)(1) of the ESA and the listing regulations (50 CFR part 424) set forth procedures for listing species. We must determine, through the regulatory process, if a species is endangered or threatened because of any one or a combination of the following factors: (1) The present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) inadequacy of existing regulatory mechanisms; or (5) other natural or human-made factors affecting its continued existence. These factors are discussed below, with the Beringia DPS, the Okhotsk DPS, and *E. b. barbatus* considered under each factor. The reader is also directed to section 4.2 of the status review report for a more detailed discussion of the factors affecting bearded seals (*see* **ADDRESSES**). As discussed above, data on bearded seal abundance and trends of most populations are unavailable or imprecise, and there is little basis for quantitatively linking projected environmental conditions or other factors to bearded seal survival or reproduction. Our risk assessment therefore primarily evaluated important habitat features and was based upon the best available scientific and commercial data and the expert opinion of the BRT members.

A. Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range

The main concern about the conservation status of bearded seals stems from the likelihood that their sea ice habitat has been modified by the warming climate and, more so, that the scientific consensus projections are for continued and perhaps accelerated warming in the foreseeable future. A second concern, related by the common driver of carbon dioxide (CO_2) emissions, is the modification of habitat by ocean acidification, which may alter prey populations and other important aspects of the marine ecosystem. A reliable assessment of the future conservation status of bearded seals therefore requires a focus on observed and projected changes in sea ice, ocean temperature, ocean pH (acidity), and associated changes in bearded seal prey species.

The threats (analyzed below) associated with impacts of the warming climate on the habitat of bearded seals, to the extent that they may pose risks to these seals, are expected to manifest throughout the current breeding and molting range (for sea ice related threats) or throughout the entire range (for ocean warming and acidification) of each of the population units, since the spatial resolution of data pertaining to these threats is currently limited.

Overview of Global Climate Change and Effects on the Annual Formation of the Bearded Seal's Sea Ice Habitat

Sea ice in the Northern Hemisphere can be divided into first-year sea ice that formed in the most recent autumn-winter period, and multi-year sea ice that has survived at least one summer melt season. The Arctic Ocean is covered by a mix of multi-year sea ice. More southerly regions, such as the Bering Sea, Barents Sea, Baffin Bay, Hudson Bay, and the Sea of Okhotsk are known as seasonal ice zones, where first year sea ice is renewed every winter. Both the observed and the projected effects of a warming global climate are most extreme in northern high-latitude regions, in large part due to the ice-albedo feedback mechanism in which melting of snow and sea ice lowers reflectivity and thereby further increases surface warming by absorption of solar radiation.

Sea ice extent at the end of summer (September) 2007 in the Arctic Ocean was a record low (4.3 million sq km), nearly 40 percent below the long-term average and 23 percent below the previous record set in 2005 (5.6 million sq km) (Stroeve *et al.,* 2008). Sea ice extent in September 2010 was the third lowest in the satellite record for the month, behind 2007 and 2008 (second lowest). Most of the loss of sea ice was on the Pacific side of the Arctic. Of even greater long-term significance was the loss of over 40 percent of Arctic multi-year sea ice over the last 5 years (Kwok *et al.,* 2009). While the annual minimum of sea ice extent is often taken as an index of the state of Arctic sea ice, the recent reductions of the area of multi-year sea ice and the reduction of sea ice thickness is of greater physical importance. It would take many years to restore the ice thickness through annual growth, and the loss of multi-year sea ice makes it unlikely that the Arctic will return to previous climatological conditions. Continued loss of sea ice will be a major driver of changes across the Arctic over the next decades, especially in late summer and autumn.

Sea ice and other climatic conditions that influence bearded seal habitats are quite different between the Arctic and seasonal ice zones. In the Arctic, sea ice loss is a summer feature with a delay in freeze up occurring into the following fall. Sea ice persists in the Arctic from late fall through mid-summer due to cold and dark winter conditions. Sea ice variability is primarily determined by radiation and melting processes during the summer season. In contrast, the seasonal ice zones are free of sea ice during summer. The variability in extent, thickness, and other sea ice characteristics important to marine mammals is determined primarily by changes in the number, intensity, and track of winter and spring storms in the sub-Arctic. Although there are connections between sea ice conditions in the Arctic and the seasonal ice zones, the early loss of summer sea ice in the Arctic cannot be extrapolated to the seasonal ice zones, which are behaving differently than the Arctic. For example, the Bering Sea has had 4 years of colder than normal winter and spring conditions from 2007 to 2010, with near record sea ice extents, rivaling the sea ice maximum in the mid-1970s, despite record retreats in summer.

IPCC Model Projections

The analysis and synthesis of information presented by the IPCC in its *Fourth Assessment Report* (AR4) represents the scientific consensus view on the causes and future of climate change. The IPCC AR4 used a range of future greenhouse gas (GHG) emissions produced under six "marker" scenarios from the *Special Report on Emissions Scenarios* (SRES) (IPCC, 2000) to project plausible outcomes under clearly-stated assumptions about socio-economic factors that will influence the emissions. Conditional on each scenario, the best estimate and likely range of emissions were projected through the end of the 21st century. It is important to note that the SRES scenarios do not contain explicit assumptions about implementation of agreements or protocols on emission limits beyond current mitigation policies and related sustainable development practices.

Conditions such as surface air temperature and sea ice area are linked in the IPCC climate models to GHG emissions by the physics of radiation processes. When CO_2 is added to the atmosphere, it has a long residence time and is only slowly removed by ocean absorption and other processes. Based on IPCC AR4 climate models, expected global warming—defined as the change in global mean surface air temperature (SAT)—by the year 2100 depends strongly on the assumed emissions of CO_2 and other GHGs. By contrast, warming out to about 2040–2050 will be primarily due to emissions that have already occurred and those that will occur over the next decade. Thus, conditions projected to mid-century are less sensitive to assumed future emission scenarios. Uncertainty in the amount of warming out to mid-century is primarily a function of model-to-model differences in the way that the physical processes are incorporated, and this uncertainty can be addressed in predicting ecological responses by incorporating the range in projections from different models.

Comprehensive Atmosphere-Ocean General Circulation Models (AOGCMs) are the major objective tools that scientists use to understand the complex interaction of processes that determine future climate change. The IPCC used the simulations from about two dozen AOGCMs developed by 17 international modeling centers as the basis for the AR4 (IPCC, 2007). The AOGCM results are archived as part of the Coupled Model Intercomparison Project-Phase 3 (CMIP3) at the Program for Climate Model Diagnosis and Intercomparison (PCMDI). The CMIP3 AOGCMs provide reliable projections, because they are built on well-known dynamical and physical principles, and they simulate quite well many large scale aspects of present-day conditions. However, the coarse resolution of most current climate models dictates careful application on small scales in heterogeneous regions.

There are three main contributors to divergence in AOGCM climate projections: Large natural variations, the range in emissions scenarios, and across-model differences. The first of these, variability from natural variation, can be incorporated by averaging the projections over decades, or, preferably, by forming ensemble averages from several runs of the same model. The second source of variation arises from the range in plausible emissions scenarios. As discussed above, the impacts of the scenarios are rather similar before mid-21st century. For the second half of the 21st century, however, and especially by 2100, the choice of the emission scenario becomes the major source of variation among climate projections and dominates over natural variability and model-to-model differences (IPCC, 2007). Because the current consensus is to treat all SRES emissions scenarios as equally likely, one option for representing the full range of variability in potential outcomes would be to project from any model under all of the six "marker" scenarios. This can be impractical in many situations, so the typical procedure for projecting impacts is to use an intermediate scenario, such as A1B or B2 to predict trends, or one intermediate and one extreme scenario (*e.g.,* A1B and A2) to represent a significant range of variability. The third primary source of variability results from differences among models in factors such as spatial resolution. This variation can be addressed and mitigated in part by using the ensemble means from multiple models.

There is no universal method for combining AOGCMs for climate projections, and there is no one best model. The approach taken by the BRT for selecting the models used to project future sea ice conditions is summarized below.

Data and Analytical Methods

NMFS scientists have recognized that the physical basis for some of the primary threats faced by the species had been projected, under certain assumptions, through the end of the 21st century, and that these projections currently form the most widely accepted version of the best available data about future conditions. In our risk assessment for bearded seals, we therefore considered the full 21st century projections to analyze the threats stemming from climate change.

The CMIP3 (IPCC) model simulations used in the BRT analyses were obtained from PCMDI on-line (PCMDI, 2010). The

six IPCC models previously identified by Wang and Overland (2009) as performing satisfactorily at reproducing the magnitude of the observed seasonal cycle of sea ice extent in the Arctic under the A1B ("medium") and A2 ("high") emissions scenarios were used to project monthly sea ice concentrations in the Northern Hemisphere in March–July for each of the decadal periods 2025–2035, 2045–2055, and 2085–2095.

Climate models generally perform better on continental or larger scales, but because habitat changes are not uniform throughout the hemisphere, the six IPCC models used to project sea ice conditions in the Northern Hemisphere were further evaluated independently on their performance at reproducing the magnitude of the observed seasonal cycle of sea ice extent in 12 different regions throughout the bearded seal's range, including five regions for the Beringia DPS, one region for the Okhotsk DPS, and six regions for *E. b. barbatus.* Models that met the performance criteria were used to project sea ice extent for the months of November and April–July through 2100. For the Beringia DPS, in two regions (Chukchi and east Siberian Seas) six of the models simulated sea ice conditions in reasonable agreement with observations, in two regions (Beaufort and eastern Bering Seas) four models met the performance criteria, and in the western Bering Sea a single model met the performance criteria. For *E. b. barbatus,* none of the models performed satisfactorily in six of the seven regions (a single model was retained in the Barents Sea). The models also did not meet the performance criteria for the Sea of Okhotsk. Other less direct means of predicting regional ice cover, such as comparison of surface air temperature predictions with past climatology (Sea of Okhotsk), evaluation of other existing analyses (Hudson Bay) or results from the hemispheric predictions (the Canadian Arctic Archipelago, Baffin Bay, Greenland Sea, and the Kara and Laptev Seas), were used for regions where ice projections could not be obtained. For Hudson Bay we referred to the analysis of Joly *et al.* (2010). They used a regional sea ice-ocean model to investigate the response of sea ice and oceanic heat storage in the Hudson Bay system to a climate-warming scenario. These predicted regional sea ice conditions are summarized below in assessing the potential impacts of changes in sea ice on bearded seals.

While our inferences about future regional ice conditions are based upon the best available scientific and commercial data, we recognize that there are uncertainties associated with predictions based on hemispheric projections or indirect means. We also note that judging the timing of onset of potential impacts to bearded seals is complicated by the coarse resolution of the IPCC models.

Northern Hemisphere Predictions

Projections of Northern Hemisphere sea ice extent for November indicate a major delay in fall freeze-up by 2050 north of Alaska and in the Barents Sea. By 2090, the average sea ice concentration is below 50 percent in the Russian Arctic and some models show a nearly ice free Arctic, except for the region of the Canadian Arctic Archipelago. In March and April, winter type conditions persist out to 2090. There is some reduction of sea ice by 2050 in the outer portions of the seasonal ice zones, but the sea ice south of Bering Strait, eastern Barents Sea, Baffin Bay, and the Kara and Laptev Seas remains substantial. May shows diminishing sea ice cover at 2050 and 2090 in the Barents and Bering Seas and Sea of Okhotsk. The month of June begins to show substantial changes as the century progresses. Current conditions occasionally exhibit a lack of sea ice near the Bering Strait by June. By 2050, however, this sea ice loss becomes a major feature, with open water continuing along the northern Alaskan coast in most models. Open water in June spreads to the East Siberian Shelf by 2090. The eastern Barents Sea experiences a reduction in sea ice between 2030 and 2050. The models indicate that sea ice in Baffin Bay will be affected very little until the end of the century.

In July, the Arctic Ocean shows a marked effect of global warming, with the sea ice retreating to a central core as the century progresses. The loss of multi-year sea ice over the last 5 years has provided independent evidence for this conclusion. By 2050, the continental shelves of the Beaufort, Chukchi, and East Siberian Seas are nearly ice free in July, with ice concentrations less than 20 percent in the ensemble mean projections. The Kara and Laptev Seas also show a reduction of sea ice in coastal regions by mid-century in most but not all models. The Canadian Arctic Archipelago and the adjacent Arctic Ocean north of Canada and Greenland, however, are predicted to become a refuge for sea ice through the end of the century. This conclusion is supported by typical Arctic wind patterns, which tend to blow onshore in this region. Indeed, this refuge region is why sea ice scientists use the phrase: A nearly sea ice free summer Arctic by mid-century.

Potential Impacts of Changes in Sea Ice on Bearded Seals

In order to feed on the seafloor, bearded seals are known to nearly always occupy shallow waters (Fedoseev, 2000; Kovacs, 2002). The preferred depth range is often described as less than 200 m (Kosygin, 1971; Heptner *et al.,* 1976; Burns and Frost, 1979; Burns, 1981; Fedoseev, 1984; Nelson *et al.,* 1984; Kingsley *et al.,* 1985; Fedoseev, 2000; Kovacs, 2002), though adults have been known to dive to around 300 m (Kovacs, 2002; Cameron and Boveng, 2009), and six of seven pups instrumented near Svalbard have been recorded at depths greater than 488 m (Kovacs, 2002). The BRT defined the core distribution of bearded seals (*e.g.,* whelping, nursing, breeding, molting, and most feeding) as those areas of known extent that are in water less than 500 m deep.

An assessment of the risks to bearded seals posed by climate change must consider the species' life-history functions, how they are linked with sea ice, and how altering that link will affect the vital rates of reproduction and survival. The main functions of sea ice relating to the species' life-history are: (1) A dry and stable platform for whelping and nursing of pups in April and May (Kovacs *et al.,* 1996; Atkinson, 1997); (2) a rearing habitat that allows mothers to feed and replenish energy reserves lost while nursing; (3) a habitat that allows a pup to gain experience diving, swimming, and hunting with its mother, and that provides a platform for resting, relatively isolated from most terrestrial and marine predators; (4) a habitat for rutting males to hold territories and attract post-lactating females; and (5) a platform suitable for extended periods of hauling out during molting.

Whelping and nursing: Pregnant females are considered to require sea ice as a dry birthing platform (Kovacs *et al.,* 1996; Atkinson, 1997). Similarly, pups are thought to nurse only while on ice. If suitable ice cover is absent from shallow feeding areas during whelping and nursing, bearded seals would be forced to seek either sea ice habitat over deeper water or coastal regions in the vicinity of haul-out sites on shore. A shift to whelping and nursing on land would represent a major behavioral change that could compromise the ability of bearded seals, particularly pups, to escape predators, as this is a highly developed response on ice versus land. Further, predators abound on continental shorelines, in contrast with

sea ice habitat where predators are sparse; and small islands where predators are relatively absent offer limited areas for whelping and nursing as compared to the more extensive substrate currently provided by suitable sea ice.

Bearded seal mothers feed throughout the lactation period, continuously replenishing fat reserves lost while nursing pups (Holsvik, 1998; Krafft *et al.,* 2000). Therefore, the presence of a sufficient food resource near the nursing location is also important. Rearing young in poorer foraging grounds would require mothers to forage for longer periods and (or) compromise their own body condition, both of which could impact the transfer of energy to offspring and affect survival of pups, mothers, or both.

Pup maturation: When not on the ice, there is a close association between mothers and pups, which travel together at the surface and during diving (Lydersen *et al,* 1994; Gjertz *et al.,* 2000; Krafft *et al.,* 2000). Pups develop diving, swimming, and foraging skills over the nursing period, and perhaps beyond (Watanabe *et al.,* 2009). Learning to forage in a sub-optimal habitat could impair a pup's ability to learn effective foraging skills, potentially impacting its long-term survival. Further, hauling out reduces thermoregulatory demands which, in Arctic climates, may be critical for maintaining energy balance. Hauling out is especially important for growing pups, which have a disproportionately large skin surface and rate of heat loss in the water (Harding *et al.,* 2005; Jansen *et al.,* 2010).

Mating: Male bearded seals are believed to establish territories under the sea ice and exhibit complex acoustic and diving displays to attract females. Breeding behaviors are exhibited by males up to several weeks in advance of females' arrival at locations to give birth. Mating takes place soon after females wean their pups. The stability of ice cover is believed to have influenced the evolution of this mating system.

Molting: There is a peak in the molt during May–June, when most bearded seals (except young of the year) tend to haul out on ice to warm their skin. Molting in the water during this period could incur energetic costs which might reduce survival rates.

For any of these life history events, a greater tendency of bearded seals to aggregate while hauled out on land or in reduced ice could increase intra- and inter-specific competition for resources, the potential for disease transmission, and predation; all of which could affect annual survival rates. In particular, a reduction in suitable sea ice habitat would likely increase the overlap in the distribution of bearded seals and walrus (*Odobenus rosmarus*), another ice-associated benthic feeder with similar habitat preferences and diet. The walrus is also a predator of bearded seal, though seemingly infrequent. Hauling out closer to shore or on land could also increase the risks of predation from polar bears, terrestrial carnivores, and humans.

For a long-lived and abundant animal with a large range, the mechanisms identified above (*i.e.,* low ice extent or absence of sea ice over shallow feeding areas) are not likely to be significant to an entire population in any one year. Rather, the overall strength of the impacts is likely a function of the frequency of years in which they occur, and the proportion of the population's range over which they occur. The low ice years, which will occur more frequently than in the past, may have impacts on recruitment via reduced pup survival if, for example, pregnant females are ineffective or slow at adjusting their breeding locales for variability of the position of the sea ice front.

Potential mechanisms for resilience on relatively short time scales include adjustments to the timing of breeding in response to shorter periods of ice cover, and adjustments of the breeding range in response to reduced ice extent. The extent to which bearded seals might adapt to more frequent years with early ice melt by shifting the timing of reproduction is uncertain. There are many examples of shifts in timing of reproduction by pinnipeds and terrestrial mammals in response to body condition and food availability. In most of these cases, sub-optimal conditions led to reproduction later in the season, a response that would not likely be beneficial to bearded seals. A shift to an earlier melt date may, however, over the longer term provide selection pressure for an evolutionary response over many generations toward earlier reproduction.

It is impossible to predict whether bearded seals would be more likely to occupy ice habitats over the deep waters of the Arctic Ocean basin or more terrestrial habitats if sea ice failed to extend over the shelf. Outside the critical life history periods related to reproduction and molting there is evidence that bearded seals might not require the presence of sea ice for hauling out, and instead remain in the water for weeks or months at a time. Even during the spring and summer bearded seals also appear to possess some plasticity in their ability to occupy different habitats at the extremes of their range. For example, throughout most of their range, adult bearded seals are seldom found on land; however, in the Sea of Okhotsk, bearded seals are known to use haul-out sites ashore regularly and predictably during the ice free periods in late summer and early autumn. Also, western and central Baffin Bay are unique among whelping areas as mothers with dependent pups have been observed on pack ice over deep water (greater than 500 m). These behaviors are extremely rare in the core distributions of bearded seals; therefore, the habitats that necessitate them should be considered sub-optimal. Consequently, predicted reductions in sea ice extent, particularly when such reductions separate ice from shallow water feeding habitats, can be reasonably used as a proxy for predicting years of reduced survival and recruitment, though not the magnitude of the impact. In addition, the frequency of predicted low ice years can serve as a useful tool for assessing the cumulative risks posed by climate change.

Assessing the potential impacts of the predicted changes in sea ice cover and the frequency of low ice years on the conservation status of bearded seals requires knowledge or assumptions about the relationships between sea ice and bearded seal vital rates. Because no quantitative studies of these relationships have been conducted, we relied upon two studies in the Bering Sea that estimated bearded seal preference for ice concentrations based on aerial survey observations of seal densities. Simpkins *et al.* (2003) found that bearded seals near St. Lawrence Island in March preferred 70–90 percent ice coverage, as compared with 0–70 percent and 90–100 percent. Preliminary results from another study in the Bering Sea (Ver Hoef *et al., In review*) found substantially lower probability of bearded seal occurrence in areas of 0–25 percent ice coverage during April–May. Lacking a more direct measure of the relationship between bearded seal vital rates and ice coverage, we considered areas within the current core distribution of bearded seals where the decadal averages and minimums of ice projections (centered on the years 2050 and 2090) were below 25 percent concentrations as inadequate for whelping and nursing. We also assumed that the sea ice requirements for molting in May–June are less stringent than those for whelping and rearing pups, and that 15 percent ice concentration in June would be minimally sufficient for molting.

Beringia DPS: In the Bering Sea, early springtime sea ice habitat for bearded seal whelping should be sufficient in most years through 2050 and out to the second half of the 21st century, when the average ice extent in April is forecasted to be approximately 50 percent of the present-day extent. The general trend in projections of sea ice for May (nursing, rearing and some molting) through June (molting) in the Bering Sea is toward a longer ice-free period resulting from more rapid spring melt. Until at least the middle of the 21st century, projections show some years with near-maximum ice extent; however, less ice is forecasted on average, manifested as more frequent years in which the spring retreat occurs earlier and the peak ice extent is lower. By the end of the 21st century, projections for the Bering Sea indicate that there will commonly be years with little or no ice in May, and that sea ice in June is expected to be non-existent in most years.

Projections of sea ice concentration indicate that there will typically be 25 percent or greater ice concentration in April–May over a substantial portion of the shelf zone in the Bering Sea through 2055. By 2095 ice concentrations of 25 percent or greater are projected only in small zones of the Gulf of Anadyr and in the area between St. Lawrence Island and Bering Strait by May. In the minimal ice years the projections indicate there will be little or no ice of 25 percent or greater concentration over the shelf zone in the Bering Sea during April and May, perhaps commencing as early as the next decade. Conditions will be particularly poor for the molt in June when typical ice predictions suggest less than 15 percent ice by mid-century. Projections suggest that the spring and summer ice edge could retreat to deep waters of the Arctic Ocean basin, potentially separating sea ice suitable for pup maturation and molting from benthic feedings areas.

In the East Siberian, Chukchi, and Beaufort Seas, the average ice extents during April and May (*i.e.,* the period of whelping, nursing, mating and some molting) are all predicted to be very close to historical averages out to the end of the 21st century. However, the annual variability of this extent is forecasted to continue to increase, and single model runs indicate the possibility of a few years in which April and May sea ice would cover only half (or in the case of the Chukchi Sea, none) of the Arctic shelf in these regions by the end of the century. In June, also a time of molting, the average sea ice extent is predicted to cover no more than half of the shelf in the Chukchi and Beaufort Seas by the end of the century. By the end of the century, the East Siberian Sea is not projected to experience losses in ice extent of these magnitudes until July.

The projections indicate that there will typically be 25 percent or greater ice concentration in April–June over the entire shelf zones in the Beaufort, Chukchi, and East Siberian Seas through the end of the century. In the minimal ice years 25 percent or greater ice concentration is projected over the shelf zones in April and May in these regions through the end of the century, except in the eastern Chukchi and central Beaufort Seas. By June 2095, ice suitable for molting (i.e., 15 percent or more concentration) is projected to be mostly absent in these regions in minimal years, except in the western Chukchi Sea and northern East Siberian Sea.

A reduction in spring and summer sea ice concentrations could conceivably result in the development of new areas containing suitable habitat or enhancement of existing suboptimal habitat. For example, the East Siberian Sea has been said to be relatively low in bearded seal numbers and has historically had very high ice concentrations and long seasonal ice coverage. Ice concentrations projected for May–June near the end of the century in this region include substantial areas with 20–80 percent ice, potentially suitable for bearded seal reproduction, molting, and foraging. However, it is prudent to assume that the net difference between sea ice related habitat creation and loss will be negative, especially because other factors like ocean warming and acidification (discussed below) are likely to impact habitat.

A substantial portion of the Beringia DPS currently whelps in the Bering Sea, where a longer ice-free period is forecasted in May and June. To adapt to this sea ice regime, bearded seals would likely have to shift their nursing, rearing, and molting areas to the ice covered seas north of the Bering Strait, potentially with poor access to food, or to coastal haul-out sites on shore, potentially with increased risks of disturbance, predation, and competition. Both of these scenarios would require bearded seals to adapt to novel (i.e., suboptimal) conditions, and to exploit habitats to which they may not be well adapted, likely compromising their reproduction and survival rates. Further, the spring and summer ice edge may retreat to deep waters of the Arctic Ocean basin, which could separate sea ice suitable for pup maturation and molting from benthic feeding areas. Accordingly, we conclude that the projected changes in sea ice habitat pose significant threats to the persistence of the Beringia DPS, and it is likely to become an endangered species in the foreseeable future throughout all or a significant portion of its range.

Okhotsk DPS: As noted above, none of the IPCC models performed satisfactorily at projecting sea ice for the Sea of Okhotsk, and so projected surface air temperatures were examined relative to current climate conditions as a proxy to predict sea ice extent and duration. The Sea of Okhotsk is located southwest of the Bering Sea, and thus can be expected to have earlier radiative heating in the spring. The region is dominated in winter and spring, however, by cold continental air masses and offshore flow. Sea ice is formed rapidly and is generally advected southward. As this region is dominated by cold air masses for much of the winter and spring, we would expect that the present seasonal cycle of first year sea ice will continue to dominate the future habitat of the Sea of Okhotsk.

Based on the temperature proxies, a continuation of sea ice formation or presence is expected for March (some whelping and nursing) in the Sea of Okhotsk through the end of this century, though the ice may be limited to the northern region in most years after mid-century. However, little to no sea ice is expected in May by 2050, and in April by the end of the century, months critical for whelping, nursing, pup maturation, breeding, and molting. Hence, the most significant threats posed to the Okhotsk DPS were judged to be decreases in sea ice habitat suitable for these important life history events.

Over the long term, bearded seals in the Sea of Okhotsk do not have the prospect of following a shift in the average position of the ice front northward. Therefore, the question of whether a future lack of sea ice will cause the Okhotsk DPS of bearded seals to go extinct depends in part on how successful the populations are at moving their reproductive activities from ice to haul-out sites on shore. Although some bearded seals in this area are known to use land for hauling out, this only occurs in late summer and early autumn. We are not aware of any occurrence of bearded seals whelping or nursing young on land, so this predicted loss of sea ice is expected to be significantly detrimental to the long term viability of the population. We conclude that the expected changes in sea ice habitat pose a significant threat to the Okhotsk DPS and it is likely to become an endangered species in the

foreseeable future throughout all or a significant portion of its range.

E. b. barbatus: The models predict that ice in April–June will continue to persist in the Canadian Arctic Archipelago throughout this century. Even in the low ice years at the end of the century, the many channels throughout the archipelago are still expected to contain ice. Predictions for Baffin Bay were similar, showing April–June ice concentrations near historical levels out to 2050. Sea ice cover and extent is predicted to diminish somewhat during the last half of the century, but average conditions should still provide sufficient ice for the life history needs of bearded seals. At least until the end of the 21st century, some ice is always predicted along eastern Greenland in April and May. In June, however, the low ice concentrations in minimum years will not be sufficient for molting.

Joly *et al.* (2010) used a regional sea ice-ocean model and air temperature projections to predict sea ice conditions in Hudson Bay out to 2070. Compared to present averages, the extent of sea ice in April is expected to change very little by 2070, though reductions of 20 percent in June ice and 60 percent in July ice are expected by 2070. The authors also predict that sea ice in Hudson Bay would become up to 50 percent thinner over this time, though this would still likely provide enough buoyancy for bearded seals.

Projections of sea ice extent for the Barents Sea indicate that ice in April will continue to decline in a relatively constant linear trend throughout the 21st century. The trend for May declines faster, predicting half as much ice by 2050, and less than a quarter as much ice by 2090. The White Sea (a southern inlet of the Barents Sea) is forecast to be ice-free in May by 2050. The trend in ice loss for June is faster still, predicting that ice will all but disappear in the Barents Sea region in the next few decades. Whelping is believed to occur in the drifting pack ice throughout the Barents Sea. Concentrations of mothers with pups have been observed in loose pack ice along several hundred kilometers of the seasonal ice edge from southern Svalbard to the north-central Barents Sea. Observations also suggest whelping occurs in the White Sea, with lower densities of pups reported in the central and southern White Sea and in the western Kara Sea. Bearded seals in the Barents Sea are believed to conduct seasonal migrations following the ice edge. The impacts of an ice-free Barents Sea would depend largely on the ability of bearded seals to relocate to more ice covered waters. However, there is little or no basis to determine the likelihood of this occurring.

Although sea ice has covered the Kara and Laptev Seas throughout most of the year in the past, a west-to-east reduction in the concentration of springtime sea ice is predicted over the next century. By the end of the century, in some years half of the Kara Sea could be ice free in May, and in June by mid-century. In most years however, ice (albeit in low concentrations) is forecasted to cover the Kara Sea shelf. Similarly, out to the end of the century, the Laptev Sea is predicted to always have springtime ice. In July, by century's end, significant portions of both seas are predicted to be ice free in most years. Unlike most regions, the peak of molting in these seas is reportedly well into July (Chapskii, 1938; Heptner *et al.,* 1976), so bearded seals in these areas would need to modify the location or timing of their molt to avoid the consequences of increased metabolism by molting in the water and/or incomplete molting. Bearded seals in the White and Laptev Seas are known to occasionally haul out on shore during late-summer and early-autumn (Heptner *et al.,* 1976). This behavior could mitigate the impacts of an ice-free July.

Bearded seals are considered rare in the Laptev Sea (Heptner *et al.,* 1976), which currently has extremely high concentrations of ice throughout most of the year. As such, an effect of global warming may well be to increase suitable haul-out habitat for bearded seals in the Kara and Laptev Seas, potentially offsetting to some extent a decrease of habitat further west. It is prudent to assume, though, that the net difference between sea ice related habitat creation and loss will be negative, especially because other factors like ocean warming and acidification (discussed below) are likely to impact habitat and there is no information about the quality of feeding habitat that may underlie the haul-out habitat in the future.

Given the projected reductions in spring and summer sea ice, the threat posed to *E. b. barbatus* by potential spatial separation of sea ice resting areas from benthic feeding habitat appears to be moderate to high (but lower than for the Beringia DPS). A decline in sea ice suitable for molting also appears to pose a moderate threat. If suitable sea ice is absent during molting, bearded seals would have to relocate to other ice-covered waters, potentially with poorer access to food, or to coastal regions in the vicinity of haul-out sites on shore. Further, these behavioral changes could increase the risks of disturbance, predation, and competition. Both scenarios would require bearded seals to adapt to novel (i.e., suboptimal) conditions, and to exploit habitats to which they may not be well adapted, likely compromising their survival rates.

Nevertheless, conditions during April–June should still provide sufficient ice for the life history needs of bearded seals within major portions of the range of *E. b. barbatus* through the end of this century, including in the Canadian Arctic Archipelago, Baffin Bay, and Hudson Bay. The BRT estimated that 188,000 bearded seals occur in these areas. We therefore conclude the threats posed by the projected changes in sea ice habitat are not likely to place *E. b. barbatus* in danger of extinction within the foreseeable future throughout all of its range.

We also analyzed whether *E. b. barbatus* is threatened or endangered within a significant portion of its range. To address this issue, we first considered whether the subspecies is threatened in any portion of its range and then whether that portion is significant. We find that the greatest threats posed by the projected changes in sea ice habitat are in the Barents, White, and Kara Seas. As discussed above, by 2090 the Barents Sea is predicted to show a loss in sea ice of more than 75 percent in May, and to be virtually ice-free in June and July. The White Sea, a southern inlet of the Barents Sea, is forecast to be ice-free in May by 2050. In addition, half of the Kara Sea is expected to be ice-free in May by 2090, and in June by 2050. We noted above that the BRT considered all regional estimates of abundance for *E. b. barbatus* to be unreliable, except those in Canadian waters. We similarly have no information on the relative significance of these regions to bearded seals. We do not, however, have any information indicating that these areas are significant to the subspecies' biology, ecology, or general conservation needs. These areas do not appear to contain particularly high-quality habitat for bearded seals, or to have characteristics that would make bearded seals less susceptible to the threats posed by climate change (i.e., contribute significantly to the resilience of the subspecies). By contrast, the large habitat areas in Hudson Bay, the Canadian Arctic Archipelago, and Baffin Bay, which support an estimated 188,000 bearded seals, are expected to persist through the end of the century. Accordingly, we conclude that *E. b. barbatus* is not likely to become endangered in the foreseeable future in a significant portion of its range.

Impacts on Bearded Seals Related to Changes in Ocean Conditions

Ocean acidification is an ongoing process whereby chemical reactions occur that reduce both seawater pH and the concentration of carbonate ions when CO_2 is absorbed by seawater. Results from global ocean CO_2 surveys over the past 2 decades have shown that ocean acidification is a predictable consequence of rising atmospheric CO_2 levels. The process of ocean acidification has long been recognized, but the ecological implications of such chemical changes have only recently begun to be appreciated. The waters of the Arctic and adjacent seas are among the most vulnerable to ocean acidification. The most likely impact of ocean acidification on bearded seals will be through the loss of benthic calcifiers and lower trophic levels on which the species' prey depends. Cascading effects are likely both in the marine and freshwater environments. Our limited understanding of planktonic and benthic calcifiers in the Arctic (*e.g.*, even their baseline geographical distributions) means that future changes will be difficult to detect and evaluate.

Warming of the oceans is predicted to drive species ranges toward higher latitudes. Additionally, climate change can strongly influence fish distribution and abundance. What can be predicted with some certainty is that further shifts in spatial distribution and northward range extensions are inevitable, and that the species composition of the plankton and fish communities will continue to change under a warming climate.

Bearded seals of different age classes are thought to feed at different trophic levels, so any ecosystem change could be expected to impact bearded seals in a variety of ways. Changes in bearded seal prey, anticipated in response to ocean warming and loss of sea ice and, potentially, ocean acidification, have the potential for negative impacts, but the possibilities are complex. These ecosystem responses may have very long lags as they propagate through trophic webs. Because of bearded seals' apparent dietary flexibility, these threats are of less concern than the direct effects of potential sea ice degradation.

B. Overutilization for Commercial, Subsistence, Recreational, Scientific, or Educational Purposes

Recreational, scientific, and educational utilization of bearded seals is currently at low levels and is not expected to increase to significant threat levels in the foreseeable future. The solitary nature of bearded seals has made them less suitable for commercial exploitation than many other seal species. Still, they may have been depleted by commercial harvests in some areas of the Sea of Okhotsk and the Bering, Barents, and White Seas during the mid-20th century. There is currently no significant commercial harvest of bearded seals and significant harvests seem unlikely in the foreseeable future.

Bearded seals have been a very important species for subsistence of indigenous people in the Arctic for thousands of years. The current subsistence harvest is substantial in some areas, but there is little or no evidence that subsistence harvests have or are likely to pose serious risks to the species. Climate change is likely to alter patterns of subsistence harvest of marine mammals by changing their densities or distributions in relation to hunting communities. Predictions of the impacts of climate change on subsistence hunting pressure are constrained by the complexity of the interacting variables and imprecision of climate and sea models at small scales. Accurate information on both harvest levels and species' abundance and trends will be needed in order to assess the impacts of hunting as well as to respond appropriately to potential climate-induced changes in populations. We conclude that overutilization does not currently threaten the Beringia DPS, the Okhotsk DPS, or *E. b. barbatus.*

C. Diseases, Parasites, and Predation

A variety of diseases and parasites have been documented to occur in bearded seals. The seals have likely co-evolved with many of these and the observed prevalence is typical and similar to other species of seals. The transmission of many known diseases of pinnipeds is often facilitated by animals crowding together and by the continuous or repeated occupation of a site. The pack ice habitat and the more solitary behavior of bearded seals may therefore limit disease transmission. Other than at shore-based haul-out sites in the Sea of Okhotsk in summer and fall, bearded seals do not crowd together and rarely share small ice floes with more than a few other seals, so conditions that would favor disease transmission do not exist for most of the year. Abiotic and biotic changes to bearded seal habitat potentially could lead to exposure to new pathogens or new levels of virulence, but we consider the potential threats to bearded seals as low.

Polar bears are the primary predators of bearded seals. Other predators include brown bears (*Ursus arctos*), killer whales (*Orcinus orca*), sharks, and walruses. Predation under the future scenario of reduced sea ice is difficult to assess. Polar bear predation may decrease, but predation by killer whales, sharks, and walrus may increase. The range of plausible scenarios is large, making it impossible to predict the direction or magnitude of the net impact on bearded seal mortality.

D. Inadequacy of Existing Regulatory Mechanisms

A primary concern about the conservation status of the bearded seal stems from the likelihood that its sea ice habitat has been modified by the warming climate and, more so, that the scientific consensus projections are for continued and perhaps accelerated warming in the foreseeable future. A second major concern, related by the common driver of CO_2 emissions, is the modification of habitat by ocean acidification, which may alter prey populations and other important aspects of the marine ecosystem. There are currently no effective mechanisms to regulate GHG emissions, which are contributing to global climate change and associated modifications to bearded seal habitat. The risk posed to bearded seals due to the lack of mechanisms to regulate GHG emissions is directly correlated to the risk posed by the effects of these emissions. The projections we used to assess risks from GHG emissions were based on the assumption that no regulation will take place (the underlying IPPC emissions scenarios were all "non-mitigated" scenarios). Therefore, the lack of mechanisms to regulate GHG emissions is already included in our risk assessment. We recognize that the lack of effective mechanisms to regulate global GHG emissions is contributing to the risks posed to bearded seals by these emissions.

E. Other Natural or Manmade Factors Affecting the Species' Continued Existence

Pollution and Contaminants

Research on contaminants and bearded seals is limited compared to the extensive information available for ringed seals. Pollutants such as organochlorine compounds (OC) and heavy metals have been found in most bearded seal populations. The variety, sources, and transport mechanisms of the contaminants vary across the bearded seal's range, but these compounds appear to be ubiquitous in the Arctic marine food chain. Statistical analysis of OCs in marine mammals has

shown that, for most OCs, the European Arctic is more contaminated than the Canadian and U.S. Arctic. Present and future impacts of contaminants on bearded seal populations should remain a high priority issue. Climate change has the potential to increase the transport of pollutants from lower latitudes to the Arctic, highlighting the importance of continued monitoring of bearded seal contaminant levels.

Oil and Gas Activities

Extensive oil and gas reserves coupled with rising global demand make it very likely that oil and gas activity will increase throughout the U.S. Arctic and internationally in the future. Climate change is expected to enhance marine access to offshore oil and gas reserves by reducing sea ice extent, thickness, and seasonal duration, thereby improving ship access to these resources around the margins of the Arctic Basin. Oil and gas exploration, development, and production activities include, but are not limited to: seismic surveys; exploratory, delineation, and production drilling operations; construction of artificial islands, causeways, ice roads, shore-based facilities, and pipelines; and vessel and aircraft operations. These activities have the potential to impact bearded seals, primarily through noise, physical disturbance, and pollution, particularly in the event of a large oil spill or blowout.

Within the range of the bearded seal, offshore oil and gas exploration and production activities are currently underway in the United States, Canada, Greenland, Norway, and Russia. In the United States, oil and gas activities have been conducted off the coast of Alaska since the 1970s, with most of the activity occurring in the Beaufort Sea. Although five exploratory wells have been drilled in the past, no oil fields have been developed or brought into production in the Chukchi Sea to date. In December 2009, an exploration plan was approved by the Bureau of Ocean Energy Management, Regulation, and Enforcement (formerly the Minerals Management Service) for drilling at five potential sites within three prospects in the Chukchi Sea in 2010. These plans have been put on hold until at least 2011 pending further review following the Deepwater Horizon blowout in the Gulf of Mexico. There are no offshore oil or gas fields currently in development or production in the Bering Sea.

Of all the oil and gas produced in the Arctic today, about 80 percent of the oil and 99 percent of the gas comes from the Russian Arctic (AMAP, 2007). With over 75 percent of known Arctic oil, over 90 percent of known Arctic gas, and vast estimates of undiscovered oil and gas reserves, Russia will continue to be the dominant producer of Arctic oil and gas in the future (AMAP, 2007). Oil and gas developments in the Kara and Barents Seas began in 1992, and large-scale production activities were initiated during 1998–2000. Oil and gas production activities are expected to grow in the western Siberian provinces and Kara and Barents Seas in the future. Recently there has also been renewed interest in the Russian Chukchi Sea, as new evidence emerges to support the notion that the region may contain world-class oil and gas reserves. In the Sea of Okhotsk, oil and natural gas operations are active off the northeastern coast of Sakhalin Island, and future developments are planned in the western Kamchatka and Magadan regions.

Large oil spills or blowouts are considered to be the greatest threat of oil and gas exploration activities in the marine environment. In contrast to spills on land, large spills at sea are difficult to contain and may spread over hundreds or thousands of kilometers. Responding to a spill in the Arctic environment would be particularly challenging. Reaching a spill site and responding effectively would be especially difficult, if not impossible, in winter when weather can be severe and daylight extremely limited. Oil spills under ice or in ice-covered waters are the most challenging to deal with, simply because they cannot be contained or recovered effectively with current technology. The difficulties experienced in stopping and containing the oil blowout at the Deepwater Horizon well in the Gulf of Mexico, where environmental conditions and response preparedness are comparatively good, point toward even greater challenges of attempting a similar feat in a much more environmentally severe and geographically remote location.

Although planning, management, and use of best practices can help reduce risks and impacts, the history of oil and gas activities, including recent events, indicates that accidents cannot be eliminated. Tanker spills, pipeline leaks, and oil blowouts are likely to occur in the future, even under the most stringent regulatory and safety systems. In the Sea of Okhotsk, an accident at an oil production complex resulted in a large (3.5 ton) spill in 1999, and in winter 2009, an unknown quantity of oil associated with a tanker fouled 3 km of coastline and hundreds of birds in Aniva Bay. To date, there have been no large spills in the Arctic marine environment from oil and gas activities.

Researchers have suggested that pups of ice-associated seals may be particularly vulnerable to fouling of their dense lanugo coat. Though bearded seal pups exhibit some prenatal molting, they are generally not fully molted at birth, and thus would be particularly prone to physical impacts of contacting oil. Adults, juveniles, and weaned young of the year rely on blubber for insulation, so effects on their thermoregulation are expected to be minimal. Other acute effects of oil exposure which have been shown to reduce seal's health and possibly survival include skin irritation, disorientation, lethargy, conjunctivitis, corneal ulcers, and liver lesions. Direct ingestion of oil, ingestion of contaminated prey, or inhalation of hydrocarbon vapors can cause serious health effects including death.

It is important to evaluate the effects of anthropogenic perturbations, such as oil spills, in the context of historical data. Without historical data on distribution and abundance, it is difficult to predict the impacts of an oil spill on bearded seals. Population monitoring studies implemented in areas where significant industrial activities are likely to occur would allow for comparison of future impacts with historical patterns, and thus to determine the magnitude of potential effects.

In summary, the threats to bearded seals from oil and gas activities are greatest where these activities converge with breeding aggregations or in migration corridors such as in the Bering Strait. In particular, bearded seals in ice-covered remote regions are most vulnerable to oil and gas activities, primarily due to potential oil spill impacts.

Commercial Fisheries Interactions and Bycatch

Commercial fisheries may impact bearded seals through direct interactions (i.e., incidental take or bycatch) and indirectly through competition for prey resources and other impacts on prey populations. Estimates of bearded seal bycatch could only be found for commercial fisheries that operate in Alaska waters. Based on data from 2002–2006, there has been an annual average of 1.0 mortalities of bearded seals incidental to commercial fishing operations. Although no information could be found regarding bearded seal bycatch in the Sea of Okhotsk, given the intensive levels of commercial fishing that occur in this

sea, bycatch of bearded seals likely occurs there as well.

For indirect impacts, we note that commercial fisheries target a number of known bearded seal prey species, such as walleye pollock (*Theragra chalcogramma*) and cod. These fisheries may affect bearded seals indirectly through reduction in prey biomass and through other fishing mediated changes in their prey species. Bottom trawl fisheries also have the potential to indirectly affect bearded seals through destruction or modification of benthic prey and/or their habitat.

Shipping

The extraordinary reduction in Arctic sea ice that has occurred in recent years has renewed interest in using the Arctic Ocean as a potential waterway for coastal, regional, and trans-Arctic marine operations. Climate models predict that the warming trend in the Arctic will accelerate, causing the ice to begin melting earlier in the spring and resume freezing later in the fall, resulting in an expansion of potential shipping routes and lengthening the potential navigation season.

The most significant risk posed by shipping activities to bearded seals in the Arctic is the accidental or illegal discharge of oil or other toxic substances carried by ships, due to their immediate and potentially long-term effects on individual animals, populations, food webs, and the environment. Shipping activities can also affect bearded seals directly through noise and physical disturbance (*e.g.,* icebreaking vessels), as well as indirectly through ship emissions and possible effects of introduction of exotic species on the lower trophic levels of bearded seal food webs.

Current and future shipping activities in the Arctic pose varying levels of threats to bearded seals depending on the type and intensity of the shipping activity and its degree of spatial and temporal overlap with bearded seal habitats. These factors are inherently difficult to know or predict, making threat assessment highly uncertain. Most ships in the Arctic purposefully avoid areas of ice and thus prefer periods and areas which minimize the chance of encountering ice. This necessarily mitigates many of the risks of shipping to populations of bearded seals, since they are closely associated with ice throughout the year. Icebreakers pose special risks to bearded seals because they are capable of operating year-round in all but the heaviest ice conditions and are often used to escort other types of vessels (*e.g.,* tankers and bulk carriers) through ice-covered areas. If icebreaking activities increase in the Arctic in the future as expected, the likelihood of negative impacts (*e.g.,* oil spills, pollution, noise, disturbance, and habitat alteration) occurring in ice-covered areas where bearded seals occur will likely also increase.

The potential threats and general threat assessment in the Sea of Okhotsk are largely the same as they are in the Arctic, though with less detail available regarding the spatial and temporal correspondence of ships and bearded seals, save one notable exception. Though noise and oil pollution from vessels are expected to have the same general relevance in the Sea of Okhotsk, oil and gas activities near Sakhalin Island are currently at high levels and poised for another major expansion of the offshore oil fields that would require an increasing number of tankers. About 25 percent of the Okhotsk bearded seal population uses this area during whelping and molting, and as a migration corridor (Fedoseev, 2000).

The main aggregations of bearded seals in the northern Sea of Okhotsk are likely within the commercial shipping routes, but vessel frequency and timing relative to periods when seals are hauled out on ice are presently unknown. Some ports are kept open year-round by icebreakers, largely to support year-round fishing, so there is greater probability here of spatial and temporal overlaps with bearded seals hauled out on ice. In a year with reduced ice, bearded seals were more concentrated close to shore (Fedoseev, 2000), suggesting that seals could become increasingly prone to shipping impacts as ice diminishes.

As is the case with the Arctic, a quantitative assessment of actual threats and impacts in the Sea of Okhotsk is unrealistic due to a general lack of published information on shipping patterns. Modifications to shipping routes, and possible choke points (where increases in vessel traffic are focused at sensitive places and times for bearded seals) due to diminishing ice are likely, but there is little data on which to base even qualitative predictions. However, the predictions regarding shipping impacts in the Arctic are generally applicable, and because of significant increases in predicted shipping, it appears that bearded seals inhabiting the Sea of Okhotsk, in particular the shelf area off central and northern Sakhalin Island, are at increased risk of impacts. Winter shipping activities in the southern Sea of Okhotsk are expected to increase considerably as oil and gas production pushes the development and use of new classes of icebreaking ships, thereby increasing the potential for shipping accidents and oil spills in the ice-covered regions of this sea.

Summary for Factor E

We find that the threats posed by pollutants, oil and gas industry activities, fisheries, and shipping do not individually or cumulatively raise concern about them placing bearded seals at risk of becoming endangered. We recognize, however, that the significance of these threats would increase for populations diminished by the effects of climate change or other threats. This is of particular note for bearded seals in the Sea of Okhotsk, where oil and gas related activities are expected to increase, and are judged to pose a moderate threat.

Analysis of Demographic Risks

Threats to a species' long-term persistence are manifested demographically as risks to its abundance; productivity; spatial structure and connectivity; and genetic and ecological diversity. These demographic risks provide the most direct indices or proxies of extinction risk. A species at very low levels of abundance and with few populations will be less tolerant to environmental variation, catastrophic events, genetic processes, demographic stochasticity, ecological interactions, and other processes. A rate of productivity that is unstable or declining over a long period of time can indicate poor resiliency to future environmental change. A species that is not widely distributed across a variety of well-connected habitats is at increased risk of extinction due to environmental perturbations, including catastrophic events. A species that has lost locally adapted genetic and ecological diversity may lack the raw resources necessary to exploit a wide array of environments and endure short- and long-term environmental changes.

The degree of risk posed by the threats associated with the impacts of global climate change on bearded seal habitat is uncertain due to a lack of quantitative information linking environmental conditions to bearded seal vital rates, and a lack of information about how resilient bearded seals will be to these changes. The BRT considered the current risks (in terms of abundance, productivity, spatial structure, and diversity) to the persistence of the Beringia DPS, the Okhotsk DPS, and *E. b. barbatus* as low or very low. The BRT judged the risks to the persistence of the Beringia DPS within the foreseeable future to be moderate (abundance and diversity) to

high (productivity and spatial structure), and to the Okhotsk DPS to be high for abundance, productivity, and spatial structure, and moderate for diversity. The risks to persistence of *E. b. barbatus* within the foreseeable future were judged to be moderate.

Conservation Efforts

When considering the listing of a species, section 4(b)(1)(A) of the ESA requires us to consider efforts by any State, foreign nation, or political subdivision of a State or foreign nation to protect the species. Such efforts would include measures by Native American tribes and organizations, local governments, and private organizations. Also, Federal, tribal, state, and foreign recovery actions (16 U.S.C. 1533(f)), and Federal consultation requirements (16 U.S.C. 1536) constitute conservation measures. In addition to identifying these efforts, under the ESA and our Policy on the Evaluation of Conservation Efforts (PECE) (68 FR 15100; March 28, 2003), we must evaluate the certainty of implementing the conservation efforts and the certainty that the conservation efforts will be effective on the basis of whether the effort or plan establishes specific conservation objectives, identifies the necessary steps to reduce threats or factors for decline, includes quantifiable performance measures for the monitoring of compliance and effectiveness, incorporates the principles of adaptive management, and is likely to improve the species' viability at the time of the listing determination.

International Agreements

The International Union for the Conservation of Nature and Natural Resources (IUCN) Red List identifies and documents those species believed by its reviewers to be most in need of conservation attention if global extinction rates are to be reduced, and is widely recognized as the most comprehensive, apolitical global approach for evaluating the conservation status of plant and animal species. In order to produce Red Lists of threatened species worldwide, the IUCN Species Survival Commission draws on a network of scientists and partner organizations, which uses a standardized assessment process to determine species' risks of extinction. However, it should be noted that the IUCN Red List assessment criteria differ from the listing criteria provided by the ESA. The bearded seal is currently classified as a species of "Least Concern" on the IUCN Red List. These listings highlight the conservation status of listed species and can inform conservation planning and prioritization.

The Agreement on Cooperation in Research, Conservation, and Management of Marine Mammals in the North Atlantic (North Atlantic Marine Mammal Commission [NAMMCO]) was established in 1992 by a regional agreement among the governments of Greenland, Iceland, Norway, and the Faroe Islands to cooperatively conserve and manage marine mammals in the North Atlantic. NAMMCO has provided a forum for the exchange of information and coordination among member countries on bearded seal research and management.

There are no known regulatory mechanisms that effectively address the factors believed to be contributing to reductions in bearded seal sea ice habitat at this time. The primary international regulatory mechanisms addressing GHG emissions and global warming are the United Nations Framework Convention on Climate Change and the Kyoto Protocol. However, the Kyoto Protocol's first commitment period only sets targets for action through 2012. There is no regulatory mechanism governing GHG emissions in the years beyond 2012. The United States, although a signatory to the Kyoto Protocol, has not ratified it; therefore, the Kyoto Protocol is non-binding on the United States.

Domestic U.S. Regulatory Mechanisms

Several laws exist that directly or indirectly promote the conservation and protection of bearded seals. These include the Marine Mammal Protection Act of 1972, as Amended, the National Environmental Policy Act, the Outer Continental Shelf Lands Act, the Coastal Zone Management Act, and the Marine Protection, Research and Sanctuaries Act. Although there are some existing domestic regulatory mechanisms directed at reducing GHG emissions, these mechanisms are not expected to be effective in counteracting the growth in global GHG emissions within the foreseeable future.

At this time, we are not aware of any formalized conservation efforts for bearded seals that have yet to be implemented, or which have recently been implemented, but have yet to show their effectiveness in removing threats to the species. Therefore, we do not need to evaluate any conservation efforts under the PECE.

NMFS has established a co-management agreement with the Ice Seal Committee (ISC) to conserve and provide co-management of subsistence use of ice seals by Alaska Natives. The ISC is an Alaska Native Organization dedicated to conserving seal populations, habitat, and hunting in order to help preserve native cultures and traditions. The ISC co-manages ice seals with NMFS by monitoring subsistence harvest and cooperating on needed research and education programs pertaining to ice seals. NMFS' National Marine Mammal Laboratory is engaged in an active research program for bearded seals. The new information from research will be used to enhance our understanding of the risk factors affecting bearded seals, thereby improving our ability to develop effective management measures for the species.

Proposed Determinations

We have reviewed the status of the bearded seal, fully considering the best scientific and commercial data available, including the status review report. We have reviewed threats to the Beringia DPS, the Okhotsk DPS, and *E. b. barbatus,* as well as other relevant factors, and given consideration to conservation efforts and special designations for bearded seals by states and foreign nations. In consideration of all of the threats and potential threats to bearded seals identified above, the assessment of the risks posed by those threats, the possible cumulative impacts, and the uncertainty associated with all of these, we draw the following conclusions:

Beringia DPS: (1) The present population size of the Beringia DPS is very uncertain, but is estimated to be about 155,000 individuals. (2) It is highly likely that reductions will occur in both the extent and timing of sea ice in the range of the Beringia DPS, in particular in the Bering Sea. To adapt to this ice regime, bearded seals would likely have to shift their nursing, rearing, and molting areas to ice-covered seas north of the Bering Strait, where projections suggest there is potential for the ice edge to retreat to deep waters of the Arctic basin. (3) There appears to be a moderate to high threat that reductions in spring and summer sea ice could result in spatial separation of sea ice resting areas from benthic feeding habitat. Reductions in sea ice suitable for molting and pup maturation also appear to pose moderate to high threats. (4) Within the foreseeable future, the risks to the persistence of the Beringia DPS appear to be moderate (abundance and diversity) to high (productivity and spatial structure). We conclude that the Beringia DPS is likely to become endangered within the foreseeable future throughout all or a significant portion of its range, and we propose to

list this DPS as threatened under the ESA.

Okhotsk DPS: (1) The present population size of the Okhotsk DPS is very uncertain, but is estimated to be about 95,000 individuals. (2) Decreases in sea ice habitat suitable for whelping, nursing, pup maturation, and molting pose the greatest threats to the persistence of the Okhotsk DPS. As ice conditions deteriorate, Okhotsk bearded seals will be limited in their ability to shift their range northward because the Sea of Okhotsk is bounded to the north by land. (3) Although some bearded seals in the Sea of Okhotsk are known to use land for hauling out, this only occurs in late summer and early autumn. We are not aware of any occurrence of bearded seals whelping or nursing young on land, so the predicted loss of sea ice is expected to be significantly detrimental to the long term viability of the population. (4) Within the foreseeable future the risks to the persistence of the Okhotsk DPS due to demographic problems associated with abundance, productivity, and spatial structure are expected to be high. We conclude that the Okhotsk DPS of bearded seals is likely to become endangered within the foreseeable future throughout all or a significant portion of its range, and we propose to list this DPS as threatened under the ESA.

E. b. barbatus: (1) The present population size of *E. b. barbatus* is very uncertain, but is estimated to be about 188,000 individuals in Canadian waters. (2) Although significant loss of sea ice habitat is projected in the range of *E. b. barbatus* in this century, major portions of the current range are predicted to be at the core of future ice distributions. (3) Within the foreseeable future, the risks to the persistence of *E. b. barbatus* in terms of abundance, productivity, spatial structure, and diversity appear to be moderate, reflecting the expected persistence of favorable sea ice habitat in major portions of the subspecies' range. We find that *E. b. barbatus* is not in danger of extinction nor likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. We therefore conclude that listing *E. b. barbatus* as threatened or endangered under the ESA is not warranted.

Prohibitions and Protective Measures

Section 9 of the ESA prohibits certain activities that directly or indirectly affect endangered species. These prohibitions apply to all individuals, organizations and agencies subject to U.S. jurisdiction. Section 4(d) of the ESA directs the Secretary of Commerce (Secretary) to implement regulations "to provide for the conservation of [threatened] species" that may include extending any or all of the prohibitions of section 9 to threatened species. Section 9(a)(1)(g) also prohibits violations of protective regulations for threatened species implemented under section 4(d). Based on the status of the Beringia DPS and the Okhotsk DPS of the bearded seal and their conservation needs, we conclude that the ESA section 9 prohibitions are necessary and advisable to provide for their conservation. We are therefore proposing protective regulations pursuant to section 4(d) for the Okhotsk DPS and the Beringia DPS of the bearded seal to include all of the prohibitions in section 9(a)(1).

Sections 7(a)(2) and (4) of the ESA require Federal agencies to consult with us to ensure that activities they authorize, fund, or conduct are not likely to jeopardize the continued existence of a listed species or a species proposed for listing, or to adversely modify critical habitat or proposed critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with us. Examples of Federal actions that may affect the Beringia DPS of bearded seals include permits and authorizations relating to coastal development and habitat alteration, oil and gas development (including seismic exploration), toxic waste and other pollutant discharges, and cooperative agreements for subsistence harvest.

Sections 10(a)(1)(A) and (B) of the ESA provide us with authority to grant exceptions to the ESA's section 9 "take" prohibitions. Section 10(a)(1)(A) scientific research and enhancement permits may be issued to entities (Federal and non-Federal) for scientific purposes or to enhance the propagation or survival of a listed species. The type of activities potentially requiring a section 10(a)(1)(A) research/enhancement permit include scientific research that targets bearded seals. Section 10(a)(1)(B) incidental take permits are required for non-Federal activities that may incidentally take a listed species in the course of otherwise lawful activity.

Our Policies on Endangered and Threatened Wildlife

On July 1, 1994, we and FWS published a series of policies regarding listings under the ESA, including a policy for peer review of scientific data (59 FR 34270) and a policy to identify, to the maximum extent possible, those activities that would or would not constitute a violation of section 9 of the ESA (59 FR 34272). We must also follow the Office of Management and Budget policy for peer review as described below.

Role of Peer Review

In December 2004, the Office of Management and Budget (OMB) issued a Final Information Quality Bulletin for Peer Review establishing minimum peer review standards, a transparent process for public disclosure of peer review planning, and opportunities for public participation. The OMB Bulletin, implemented under the Information Quality Act (Pub. L. 106–554), is intended to enhance the quality and credibility of the Federal Government's scientific information, and applies to influential or highly influential scientific information disseminated on or after June 16, 2005. The scientific information contained in the bearded seal status review report (Cameron *et al.,* 2010) that supports this proposal to list the Beringia DPS and the Okhotsk DPS as threatened species under the ESA received independent peer review.

The intent of the peer review policy is to ensure that listings are based on the best scientific and commercial data available. Prior to a final listing, we will solicit the expert opinions of three qualified specialists, concurrent with the public comment period. Independent specialists will be selected from the academic and scientific community, Federal and state agencies, and the private sector.

Identification of Those Activities That Would Constitute a Violation of Section 9 of the ESA

The intent of this policy is to increase public awareness of the effect of our ESA listing on proposed and ongoing activities within the species' range. We will identify, to the extent known at the time of the final rule, specific activities that will be considered likely to result in violation of section 9, as well as activities that will not be considered likely to result in violation. Because the Okhotsk DPS occurs outside of the jurisdiction of the United States, we are presently unaware of any activities that could result in violation of section 9 of the ESA for that DPS; however, because the possibility for violations exists (for example, import into the United States), we have proposed maintaining the section 9 protection. Activities that we believe could result in violation of section 9 prohibitions against "take" of the Beringia DPS of bearded seals include: (1) Unauthorized harvest or lethal takes of bearded seals in the Beringia DPS; (2) in-water activities that

produce high levels of underwater noise, which may harass or injure bearded seals in the Beringia DPS; and (3) discharging or dumping toxic chemicals or other pollutants into areas used by the Beringia DPS of bearded seals.

We believe, based on the best available information, the following actions will not result in a violation of section 9: (1) federally funded or approved projects for which ESA section 7 consultation has been completed and mitigated as necessary, and that are conducted in accordance with any terms and conditions we provide in an incidental take statement accompanying a biological opinion; and (2) takes of bearded seals in the Beringia DPS that have been authorized by NMFS pursuant to section 10 of the ESA. These lists are not exhaustive. They are intended to provide some examples of the types of activities that we might or might not consider as constituting a take of bearded seals in the Beringia DPS.

Critical Habitat

Section 3 of the ESA (16 U.S.C. 1532(5A)) defines critical habitat as "(i) the specific areas within the geographical area occupied by the species, at the time it is listed * * * on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed * * * upon a determination by the Secretary that such areas are essential for the conservation of the species." Section 3 of the ESA also defines the terms "conserve," "conserving," and "conservation" to mean "to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." (16 U.S.C. 1532(3)).

Section 4(a)(3) of the ESA requires that, to the extent practicable and determinable, critical habitat be designated concurrently with the listing of a species. Designation of critical habitat must be based on the best scientific data available, and must take into consideration the economic, national security, and other relevant impacts of specifying any particular area as critical habitat. Once critical habitat is designated, section 7 of the ESA requires Federal agencies to ensure that they do not fund, authorize, or carry out any actions that are likely to destroy or adversely modify that habitat. This requirement is in addition to the section 7 requirement that Federal agencies ensure their actions do not jeopardize the continued existence of the species.

In determining what areas qualify as critical habitat, 50 CFR 424.12(b) requires that NMFS "consider those physical or biological features that are essential to the conservation of a given species including space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, and rearing of offspring; and habitats that are protected from disturbance or are representative of the historical geographical and ecological distribution of a species." The regulations further direct NMFS to "focus on the principal biological or physical constituent elements * * * that are essential to the conservation of the species," and specify that the "known primary constituent elements shall be listed with the critical habitat description." The regulations identify primary constituent elements (PCEs) as including, but not limited to: "roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types."

The ESA directs the Secretary of Commerce to consider the economic impact, the national security impacts, and any other relevant impacts from designating critical habitat, and under section 4(b)(2), the Secretary may exclude any area from such designation if the benefits of exclusion outweigh those of inclusion, provided that the exclusion will not result in the extinction of the species. At this time, the Beringia DPS's critical habitat is not determinable. We will propose critical habitat for the Beringia DPS of the bearded seal in a separate rulemaking. To assist us with that rulemaking, we specifically request information to help us identify the PCEs or "essential features" of this habitat, and to what extent those features may require special management considerations or protection, as well as the economic attributes within the range of the Beringia DPS that could be impacted by critical habitat designation. 50 CFR 424.12(h) specifies that critical habitat shall not be designated within foreign countries or in other areas outside U.S. jurisdiction. Therefore, we request information only on potential areas of critical habitat within the United States or waters within U.S. jurisdiction.

Because the known distribution of the Okhotsk DPS of the bearded seal occurs in areas outside the jurisdiction of the United States, no critical habitat will be designated as part of the proposed listing action for this DPS.

Public Comments Solicited

Relying on the best scientific and commercial information available, we exercised our best professional judgment in developing this proposal to list the Beringia DPS and the Okhotsk DPS of the bearded seal. To ensure that the final action resulting from this proposal will be as accurate and effective as possible, we are soliciting comments and suggestions concerning this proposed rule from the public, other concerned governments and agencies, Alaska Natives, the scientific community, industry, and any other interested parties. Comments are encouraged on this proposal as well as on the status review report (*See* **DATES** and **ADDRESSES**).

Comments are particularly sought concerning:

(1) The current population status of bearded seals;

(2) Biological or other information regarding the threats to bearded seals;

(3) Information on the effectiveness of ongoing and planned bearded seal conservation efforts by states or local entities;

(4) Activities that could result in a violation of section 9(a)(1) of the ESA if such prohibitions applied to the Beringia DPS of the bearded seal;

(5) Information related to the designation of critical habitat, including identification of those physical or biological features which are essential to the conservation of the Beringia DPS of the bearded seal and which may require special management consideration or protection; and

(6) Economic, national security, and other relevant impacts from the designation of critical habitat for the Beringia DPS of the bearded seal.

You may submit your comments and materials concerning this proposal by any one of several methods (*see* **ADDRESSES**). We will review all public comments and any additional information regarding the status of the Beringia DPS and the Okhotsk DPS and will complete a final determination within 1 year of publication of this proposed rule, as required under the ESA. Final promulgation of the regulation(s) will consider the comments and any additional information we receive, and such communications may lead to a final regulation that differs from this proposal.

Public Hearings

50 CFR 424.16(c)(3) requires the Secretary to promptly hold at least one public hearing if any person requests one within 45 days of publication of a proposed rule to list a species. Such hearings provide the opportunity for interested individuals and parties to give opinions, exchange information, and engage in a constructive dialogue concerning this proposed rule. We encourage the public's involvement in this matter. If hearings are requested, details regarding the location(s), date(s), and time(s) will be published in a forthcoming **Federal Register** notice.

Classification

National Environmental Policy Act (NEPA)

The 1982 amendments to the ESA, in section 4(b)(1)(A), restrict the information that may be considered when assessing species for listing. Based on this limitation of criteria for a listing decision and the opinion in *Pacific Legal Foundation* v. *Andrus,* 657 F.2d 829 (6th Cir. 1981), we have concluded that NEPA does not apply to ESA listing actions. (*See* NOAA Administrative Order 216–6.)

Executive Order (E.O.) 12866, Regulatory Flexibility Act, and Paperwork Reduction Act

As noted in the Conference Report on the 1982 amendments to the ESA, economic impacts cannot be considered when assessing the status of a species. Therefore, the economic analyses required by the Regulatory Flexibility Act are not applicable to the listing process. In addition, this rule is exempt from review under E.O. 12866. This rule does not contain a collection of information requirement for the purposes of the Paperwork Reduction Act.

E.O. 13132, Federalism

E.O. 13132 requires agencies to take into account any federalism impacts of regulations under development. It includes specific directives for consultation in situations where a regulation will preempt state law or impose substantial direct compliance costs on state and local governments (unless required by statute). Neither of those circumstances is applicable to this rule.

E.O. 13175, Consultation and Coordination With Indian Tribal Governments

The longstanding and distinctive relationship between the Federal and tribal governments is defined by treaties, statutes, executive orders, judicial decisions, and co-management agreements, which differentiate tribal governments from the other entities that deal with, or are affected by, the Federal government. This relationship has given rise to a special Federal trust responsibility involving the legal responsibilities and obligations of the United States toward Indian Tribes and the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights. E.O. 13175—Consultation and Coordination with Indian Tribal Governments—outlines the responsibilities of the Federal Government in matters affecting tribal interests. Section 161 of Public Law 108–199 (188 Stat. 452), as amended by section 518 of Public Law 108–447 (118 Stat. 3267), directs all Federal agencies to consult with Alaska Native corporations on the same basis as Indian tribes under E.O. 13175.

We intend to coordinate with tribal governments and native corporations which may be affected by the proposed action. We will provide them with a copy of this proposed rule for review and comment, and offer the opportunity to consult on the proposed action.

References Cited

A complete list of all references cited in this rulemaking can be found on our Web site at *http://alaskafisheries.noaa.gov/* and is available upon request from the NMFS office in Juneau, Alaska (*see* **ADDRESSES**).

List of Subjects in 50 CFR Part 223

Endangered and threatened species, Exports, Imports, Transportation.

Dated: December 3, 2010.

Eric C. Schwaab,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 223 is proposed to be amended as follows:

PART 223—THREATENED MARINE AND ANADROMOUS SPECIES

1. The authority citation for part 223 continues to read as follows:

Authority: 16 U.S.C. 1531 1543; subpart B, § 223.201–202 also issued under 16 U.S.C. 1361 *et seq.;* 16 U.S.C. 5503(d) for § 223.206(d)(9).

2. In § 223.102, in the table, amend paragraph (a) by adding paragraphs (a)(8) and (a)(9) to read as follows:

§ 223.102 Enumeration of threatened marine and anadromous species.

* * * * *

Species [1]		Where listed	Citation(s) for listing determination(s)	Citation(s) for critical habitat designation(s)
Common name	Scientific name			
(a) * * *				
(8) Bearded seal, Beringia DPS.	*Erignathus barbatus nauticus.*	The Beringia DPS includes all breeding populations of bearded seals east of 157 degrees east longitude, and east of the Kamchatka Peninsula, in the Pacific Ocean.	[INSERT FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA.
(9) Bearded seal, Okhotsk DPS.	*Erignathus barbatus nauticus.*	The Okhotsk DPS includes all breeding populations of bearded seals west of 157 degrees east longitude, or west of the Kamchatka Peninsula, in the Pacific Ocean.	[INSERT FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA.
*	*	* * *	*	*

[1] Species includes taxonomic species, subspecies, distinct population segments (DPSs) (for a policy statement; see 61 FR 4722, February 7, 1996), and evolutionarily significant units (ESUs) (for a policy statement; see 56 FR 58612, November 20, 1991).

* * * * *

3. In Subpart B of part 223, add § 223.216 to read as follows:

§ 223.216 Beringia DPS of Bearded Seal.

The prohibitions of section 9(a)(1)(A) through 9(a)(1)(G) of the ESA (16 U.S.C. 1538) relating to endangered species shall apply to the Beringia DPS of bearded seal listed in § 223.102(a)(8).

4. In Subpart B of part 223, add § 223.217 to read as follows:

§ 223.217 Okhotsk DPS of Bearded Seal.

The prohibitions of section 9(a)(1)(A) through 9(a)(1)(G) of the ESA (16 U.S.C. 1538) relating to endangered species shall apply to the Okhotsk DPS of bearded seal listed in § 223.102(a)(9).

[FR Doc. 2010–30931 Filed 12–9–10; 8:45 am]

BILLING CODE 3510–22–P

Federal Register

Friday,
December 10, 2010

Part VIII

The President

Proclamation 8615—National Influenza Vaccination Week, 2010

Federal Register
Vol. 75, No. 237
Friday, December 10, 2010

Presidential Documents

Title 3—

The President

Proclamation 8615 of December 7, 2010

National Influenza Vaccination Week, 2010

By the President of the United States of America

A Proclamation

Last year, as the world prepared for a pandemic of the 2009 H1N1 influenza virus, we were reminded of the severity and unpredictability of this serious disease. Thousands of Americans suffered serious complications from the 2009 H1N1 influenza virus, resulting in hospitalization or even death. Tragically, influenza and flu-related complications take American lives each year. During National Influenza Vaccination Week, we remind all Americans that the flu vaccine is safe and effective in preventing the spread of flu viruses.

Annual flu vaccination is recommended for all people 6 months of age and older. Under the new health reform law, the Affordable Care Act, individuals enrolled in new group or individual private health plans have no co-payment or deductible for influenza vaccinations. While the flu can make even healthy children and adults very sick, certain individuals are at greater risk for serious complications from the flu. Pregnant women, young children, older adults, as well as people living with HIV, chronic lung disease, diabetes, heart disease, neurologic conditions, and certain other chronic health conditions are especially encouraged to get a flu vaccine. Our Nation's health care workers and those caring for infants under 6 months of age should also be vaccinated to protect themselves and those within their care. I encourage all Americans to visit www.Flu.gov for information and resources on vaccinations and how to prevent and treat the flu.

Everyone can take steps to promote America's health this flu season. Though there is no way to accurately predict the course or severity of influenza, we know from experience that it will pose serious health risks for thousands of Americans this season. We can all take common-sense precautions to prevent infection with influenza, including washing hands frequently, covering coughs or sneezes with sleeves and not hands, and staying home when ill.

However, vaccination is the best protection against contracting and spreading the flu. The vaccine is available through doctors' offices, clinics, State and local health departments, pharmacies, college and university health centers, as well as through many employers and some primary and secondary schools. Seasonal flu activity is usually most intense between January and March, and vaccinating now can help curb the spread of this disease. Together, we can prepare as individuals and as a Nation for this year's flu season and help ensure that our fellow Americans remain healthy and safe.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim December 5 through December 11, 2010, as National Influenza Vaccination Week. I encourage Americans to get vaccinated this week if they have not yet done so, and to urge their families, friends, and co-workers to do the same.

IN WITNESS WHEREOF, I have hereunto set my hand this seventh day of December, in the year of our Lord two thousand ten, and of the Independence of the United States of America the two hundred and thirty-fifth.

[FR Doc. 2010–31292
Filed 12–9–10; 11:15 am]
Billing code 3195–W1–P

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