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The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2010–0817]

RIN 1625–AA00

Safety Zone; Ocean City Beachfront Air Show, Ocean City, NJ

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone in an area of the Atlantic Ocean, Ocean City, NJ. The temporary safety zone will restrict vessel traffic from a portion of the Atlantic Ocean during the Ocean City Beachfront Air Show, which is an aerial demonstration to be held over the waters of the Atlantic Ocean. The temporary safety zone is necessary to provide for the safety of mariners on navigable waters during the aerial demonstration.

DATES: This rule is effective from 12 p.m. to 3 p.m. on September 18, 2010 and from 12 p.m. to 4 p.m. on September 19, 2010.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2010–0817 and are available online by going to *http://www.regulations.gov,* inserting USCG–2010–0817 in the "Keyword" box, and then clicking "Search." They are also available for inspection or copying at the 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, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call or e-mail Lieutenant Corrina Ott, Chief of Waterways Management Branch, Coast Guard; telephone 215–271–4902, e-mail *Corrina.Ott@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because publishing an NPRM is impracticable and contrary to the public interest. Delaying the effective date by first publishing an NPRM and holding a comment period would be contrary to the rule's objectives of ensuring safety of life on the navigable waters during this air show, as immediate action is needed to protect persons and vessels from hazards associated with air shows.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Any delay in the effective date of this regulation would be contrary to the public interest as immediate action is necessary to protect persons and vessels from hazards associated with air shows over the water.

Basis and Purpose

On September 18–19, 2010, the Ocean City Business and Neighborhood Development, Inc. will sponsor the Ocean City Beachfront Air Show. The event will consist of high performance jet aircraft performing low altitude aerial maneuvers over the waters of the Atlantic Ocean adjacent to Ocean City, New Jersey. A fleet of spectator vessels are expected to gather nearby to view the aerial demonstration. The temporary zone is necessary in order to prevent injury or damage to property from any falling object associated with the air show. This rule is required due to the inherent dangers of high-speed aerial maneuvers involved with these types of events.

Discussion of Rule

The Coast Guard is establishing a temporary safety zone in the waters of the Atlantic Ocean in Ocean City, NJ from 12 p.m. to 3 p.m. on September 18, 2010 and from 12 p.m. to 4 p.m. on September 19, 2010. The temporary safety zone will restrict vessel traffic in the Atlantic Ocean in the immediate area of the Ocean City Airshow taking place inside a boundary described as originating at 39°16′28″ N, 074°33′38″ W, then southeasterly to 39°16′20″ N, 074°33′30″ W, then southwesterly to latitude 39°15′38″ N, 074°34′41″ W, then northwesterly to 39°15′47″ N, 074°34′51″ W, then returning northeasterly to 39°16′28″ N, 074°33′38″ W.

During the enforcement period of the safety zone, all persons and vessels will be prohibited from entering, transiting, mooring, or remaining within the zone unless specifically authorized by the Captain of the Port Delaware Bay, or designated representative.

Regulatory Analyses

We developed this 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 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. Due to the short duration of the safety zone and the ability of vessel traffic to transit around the safety zone, the regulatory impact is expected to be minimal.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this 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 rule will not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which may be small entities: the owners or operators of vessels intending to transit coastal waters in the vicinity of Ocean City, New Jersey during the event.

This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons. This rule will be in effect for only a short period, from 12 p.m. to 3 p.m. on September 18, 2010 and from 12 p.m. to 4 p.m. on September 19, 2010. Vessel traffic will be allowed to pass through the zone with the permission of the Coast Guard patrol commander. Before the enforcement period, the Coast Guard will issue maritime advisories so mariners can adjust their plans accordingly.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offer to assist small entities in understanding the rule so that they can better evaluate its effects on them and participate in the rulemaking process.

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

Collection of Information

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

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 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 rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule will 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 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 rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

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

Energy Effects

We have analyzed this 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 rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 0023.1 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 concluded this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction and neither an environmental assessment or environmental impact statement is required. This rule involves a limited-in-duration safety zone around an aerial display intended to protect life and property on the navigable waterways of the Atlantic Ocean. An environmental analysis checklist and a categorical exclusion determination will be available in the docket where indicated under **ADDRESSES**.

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 amends 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.T05–0817, to read as follows:

§ 165.T05–0817 Safety Zone; Ocean City Beachfront Air Show, Ocean City, New Jersey.

(a) *Location.* The safety zone includes all coastal waters of the North Atlantic Ocean, immediately adjacent to the shoreline at Ocean City, NJ, inside a boundary described as originating from 39°16′28″ N., 074°33′38″ W., then southeasterly to 39°16′20″ N., 074°33′30″ W., then southwesterly to 39°15′38″ N., 074°34′41″ W., then northwesterly to 39°15′47″ N., 074°34′51″ W., then returning northeasterly to 39°16′28″ N., 074°33′38″ W.

(b) *Regulations:*

(1) Except for persons or vessels authorized by the Captain of the Port Delaware Bay or designated representative, no person or vessels may enter or remain in the regulated area.

(2) The operator of any vessel in the regulated area shall;

(i) Stop the vessel immediately when directed to do so by any Official Patrol.

(ii) Proceed as directed by any Official Patrol.

(c) *Definitions.*

(1) *Designative representative* means any Coast Guard commissioned, warrant, or petty officer who has been authorized by the Captain of the Port Delaware Bay to act on his or her behalf.

(2) *Official Patrol* means any vessel assigned or approved by Captain of the Port Delaware Bay with a commissioned, warrant, or petty officer on board and displaying a Coast Guard ensign as well as any assisting local law enforcement vessels.

(d) Enforcement period. This rule will be enforced from 12 pm. to 3 p.m. on September 18, 2010 and from 12 p.m. to 4 p.m. on September 19, 2010.

Dated: August 30, 2010.

R.T. Gatlin,

Captain, U.S. Coast Guard, Acting Captain of the Port Delaware Bay.

[FR Doc. 2010–23177 Filed 9–15–10; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2010–0723]

RIN 1625–AA00

Safety Zone; Ohio River, Wheeling, WV, Wheeling Heritage Port Sternwheel Foundation Fireworks Display

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a safety zone from Mile Marker 90.2 to Mile Marker 90.5 on the Ohio River extending the full width of the river. The safety zone is needed to protect spectators and marine traffic during the Wheeling Heritage Port Sternwheel Foundation fireworks display. Entry into the safety zone is prohibited, unless specifically authorized by the Captain of the Port Pittsburgh or a designated representative.

DATES: This rule is effective from September 18, 2010 through September 19, 2010.

ADDRESSES: Documents indicated in this preamble as being available in the docket, are part of docket USCG–2010–0723 and are available online by going to *http://www.regulations.gov,* inserting USCG–2010–0723 in the "Keyword" box, and then clicking "Search." This material is also available for inspection or copying at the 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, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call or e-mail ENS Robyn Hoskins, Marine Safety Unit Pittsburgh, Coast Guard; telephone 412–644–5808 Ext. 2140, e-mail *Robyn.G.Hoskins@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM). A NPRM would be impracticable with respect to this rule because immediate action is needed to protect spectators and marine traffic during the Wheeling Heritage Port Sternwheel Foundation fireworks display that will occur in the city of Wheeling, WV.

Under 5 U.S.C. 553 (d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date would be impracticable and contrary to public interest because immediate action is needed to protect spectators and marine traffic during the Wheeling Heritage Port Sternwheel Foundation fireworks display.

Basis and Purpose

The Coast Guard is establishing a safety zone from Mile Marker 90.2 to Mile Marker 90.5 on the Ohio River extending the full width of the river. The safety zone is needed to protect spectators and marine traffic during the Wheeling Heritage Port Sternwheel Foundation fireworks display.

Discussion of Rule

Vessels shall not enter into, depart from, or move within the safety zone without permission from the Captain of the Port Pittsburgh or his authorized representative. Persons or vessels requiring entry into or passage through the safety zone must request permission from the Captain of the Port Pittsburgh, or a designated representative. They may be contacted on VHF–FM Channel 13 or 16, or through Coast Guard Sector Ohio Valley at 1–800–253–7465. This safety zone will be enforced from 8:45 p.m. to 10:15 p.m. on September 18, 2010. In the event of rain, this safety zone will be enforced from 8:45 p.m. to 10:15 p.m. on September 19, 2010. The Captain of the Port Pittsburgh will inform the public through broadcast notices to mariners of the enforcement period for the safety zone as well as any changes in the planned schedule.

Regulatory Analyses

We developed this 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 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. We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Assessment is unnecessary. This rule will only be in effect for a short period of time and notifications to the marine community will be made through broadcast notice to mariners. The impacts on routine navigation are expected to be minimal.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this 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 rule would not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which may be small entities: the owners or operators of vessels intending to transit that portion of the waterways from Mile Marker 90.2 to Mile Marker 90.5 on the Ohio River extending the full width of the, from 8:45 p.m. to 10:15 p.m. The safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons. This safety zone would be activated, and thus subject to enforcement, for only a short period of time and during a time period where vessel traffic is low. Before activation of the safety zone, we would issue maritime advisories widely available to users of the rivers.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offer to assist small entities in understanding the rule so that they can better evaluate its effects on them and participate in the rulemaking process.

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

Collection of Information

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

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 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 rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule will 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 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 rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

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

Energy Effects

We have analyzed this 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 rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969

(NEPA) (42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction. This rule involves establishing, disestablishing, or changing Regulated Navigation Areas and security or safety zones.

An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

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 amends 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(g), 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T08–0723 to read as follows:

§ 165.T08–0723 Wheeling Heritage Port Sternwheel Foundation fireworks display, Ohio River, Pittsburgh, PA.

(a) *Location.* All waters of the Ohio River, from surface to bottom, from Mile Marker 90.2 to Mile Marker 90.5 on the Ohio River, extending the width of the river. These markings are based on the USACE's *Ohio River Navigation Charts* (Chart 1, January 2000).

(b) *Effective period.* This section is effective from 8:45 p.m. through 10:15 p.m. on September 18, 2010 (rain date September 19, 2010).

(c) *Periods of Enforcement.* This section will be enforced from 8:45 p.m. through 10:15 p.m. on September 18, 2010 (rain date September 19, 2010). The Captain of the Port Pittsburgh or a designated representative will inform the public through broadcast notices to mariners of the enforcement period for the safety zone as well as any changes in the planned schedule.

(d) *Regulations.*

(1) In accordance with the general regulations in § 165.23 of this part, entry into this zone is prohibited unless authorized by the Captain of the Port Pittsburgh.

(2) Persons or vessels requiring entry into, departure from, or passage through a safety zone must request permission from the Captain of the Port Pittsburgh or a designated representative. They may be contacted on VHF–FM Channel 13 or 16, or through Coast Guard Sector Ohio Valley at 1–800–253–7465.

(3) All persons and vessels shall comply with the instructions of the Captain of the Port Pittsburgh and designated on-scene U.S. Coast Guard patrol personnel. On-scene U.S. Coast Guard patrol personnel includes Commissioned, Warrant, and Petty Officers of the U.S. Coast Guard.

Dated: August 16, 2010.

S.T. Higman,

Lieutenant Commander, U.S. Coast Guard, Acting, Captain of the Port Pittsburgh.

[FR Doc. 2010–23178 Filed 9–15–10; 8:45 am]

BILLING CODE 9110–04–P

POSTAL SERVICE

39 CFR Part 501

Revisions to the Requirements for Authority To Manufacture and Distribute Postage Evidencing Systems

AGENCY: Postal Service™.

ACTION: Final rule.

SUMMARY: The Postal Service is revising its regulations to require that companies that manufacture and distribute postage evidencing systems ("Company or Companies") engage a qualified, independent audit firm to perform an examination of and provide an opinion on the design and operating effectiveness of relevant internal control activities performed by the Companies as service providers to the Postal Service under the Statement on Auditing Standards (SAS) No. 70 ("SAS 70").

DATES: Effective Date: September 16, 2010.

FOR FURTHER INFORMATION CONTACT: Marlo Kay Ivey, Marketing Specialist, Postage Technology Management, U.S. Postal Service, at 202–268–7613.

SUPPLEMENTARY INFORMATION: Postage Evidencing Systems are devices or systems of components that a customer uses to print evidence that the prepaid postage required for mailing has been paid. They include, but are not limited to, postage meters and PC Postage systems. The Postal Service regulates these systems and their use in order to protect postal revenue. Only Postal Service–authorized product service providers may design, produce, and distribute Postage Evidencing Systems. The Postal Service published a proposed rule in the **Federal Register** on June 1, 2010 at 73 FR 30309–30310 to amend the requirements for authority to manufacture and distribute postage evidencing systems. This revision clarifies the internal controls required in 39 CFR 501.15(i), Computerized Meter Resetting System, and 501.16(f), PC Postage Payment Methodology. The internal controls requirement was added as part of a final rule published in the **Federal Register** on November 9, 2006, at 71 FR 65732.

Comments: Two comments were received from the Companies (that manufacture or distribute postage evidencing systems). The first was notification of intent to comply. The second requested that the proposed amendment be modified to allow a Company with qualified internal audit departments, which meets the independence requirements under the Standards for the Professional Practice of the Institute of Internal Auditors ("IIA"), to utilize its internal audit department to perform the internal controls examination in lieu of engaging an independent audit firm.

The Postal Service gave thorough consideration to this comment. While the Postal Service recognizes the IIA as the authoritative body over internal audit activities, SAS 70 (Type II) examinations are subject to the American Institute of Certified Public Accountants ("AICPA") professional standards, which impose more stringent independence requirements and a requirement that the examination be performed by a licensed CPA. Therefore, the Postal Service will not modify the proposed amendments as requested and will require the Companies to annually obtain an SAS 70 (Type II) examination of relevant internal controls by a qualified, independent, external audit firm. The Postal Service gave through consideration to the comments it received, and now announces the adoption of the final rule.

List of Subjects in 39 CFR Part 501

Postal Service.

■ Accordingly, 39 CFR part 501 is amended as follows:

PART 501—[AMENDED]

■ 1. The authority citation for 39 CFR part 501 continues to read as follows:

Authority: 5 U.S.C. 552(a); 39 U.S.C. 101, 401, 403, 404, 410, 2601, 2605, Inspector General Act of 1978, as amended (Pub. L. 95–452, as amended); 5 U.S.C. App. 3.

■ 2. Section 501.15 is amended by revising paragraph (i) to read as follows:

§ 501.15 Computerized Meter Resetting System.

* * * * *

(i) *Security and Revenue Protection.* To receive Postal Service approval to continue to operate systems in the CMRS environment, the RC must submit to a periodic examination of its CMRS system and any other applications and technology infrastructure that may have a material impact on Postal Service revenues, as determined by the Postal Service. The examination shall be performed by a qualified, independent audit firm and shall be conducted in accordance with the Statement on Auditing Standards (SAS) No. 70, Service Organizations, developed by the American Institute of Certified Public Accountants (AICPA), as amended or superseded. The examination shall include testing of the operating effectiveness of relevant RC internal controls (Type II SAS70 Report). If the service organization uses another service organization (sub-service provider), Postal Service Management should consider the nature and materiality of the transactions processed by the sub-service organization and the contribution of the sub-service organization's processes and controls in the achievement of the Postal Service's information processing objectives. The Postal Service should have access to the sub-service organization's SAS 70 report. The control objectives to be covered by the SAS 70 report are subject to Postal Service review and approval and are to be provided to the Postal Service 30 days prior to the initiation of each examination period. As a result of the examination, the auditor shall provide the RC and the Postal Service with an opinion on the design and operating effectiveness of the RC's internal controls related to the CMRS system and any other applications and technology infrastructure considered material to the services provided to the Postal Service by the RC. Such examinations are to be conducted on no less than an annual basis, and are to be as of and for the twelve months ended June 30 of each year (except for the period ending June 30, 2010, for which the period of coverage will be no less than six months, and except for new contracts for which the examination period will be no less than the period from the contract date to the following June 30, unless otherwise agreed to by the Postal Service). The examination reports are to be provided to the Postal Service by August 15 of each year. To the extent that internal control weaknesses are identified in a Type II SAS 70 report, the Postal Service may require the remediation of such weaknesses and review working papers and engage in discussions about the work performed with the auditor. Postal Service requires that all remediation efforts (if applicable) are completed and reported by the RC prior to the Postal Service's fiscal year end (September 30). The RC will be responsible for all costs to conduct these examinations.

* * * * *

■ 3. Section 501.16 is amended by revising paragraph (f) to read as follows:

§ 501.16 PC postage payment methodology.

* * * * *

(f) *Security and revenue protection.* To receive Postal Service approval to continue to operate PC Postage systems, the provider must submit to a periodic examination of its PC Postage system and any other applications and technology infrastructure that may have a material impact on Postal Service revenues, as determined by the Postal Service. The examination shall be performed by a qualified, independent audit firm and shall be conducted in accordance with the Statement on Auditing Standards (SAS) No. 70, Service Organizations, developed by the American Institute of Certified Public Accountants (AICPA), as amended or superseded. The examination shall include testing of the operating effectiveness of relevant provider internal controls (Type II SAS 70 Report). If the service organization uses another service organization (sub-service provider), Postal Service Management should consider the nature and materiality of the transactions processed by the sub-service organization and the contribution of the sub-service organization's processes and controls in the achievement of the Postal Service's information processing objectives. The Postal Service should have access to the sub-service organization's SAS 70 report. The control objectives to be covered by the SAS 70 report are subject to Postal Service review and approval and are to be provided to the Postal Service 30 days prior to the initiation of each examination period. As a result of the examination, the auditor shall provide the provider, and the Postal Service, with an opinion on the design and operating effectiveness of the internal controls related to the PC Postage system and any other applications and technology infrastructure considered material to the services provided to the Postal Service by the provider. Such examinations are to be conducted on no less than an annual basis, and are to be as of and for the twelve months ended June 30 of each year (except for the period ending June 30, 2010 for which the period of coverage will be no less than six months, and except for new contracts for which the examination period will be no less than the period from the contract date to the following June 30, unless otherwise agreed to by the Postal Service). The examination reports are to be provided to the Postal Service by August 15 of each year. To the extent that internal control weaknesses are identified in a Type II SAS 70 report, the Postal Service may require the remediation of such weaknesses and review working papers and engage in discussions about the work performed with the auditor. The provider will be responsible for all costs to conduct these examinations.

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Neva R. Watson,

Attorney, Legislative.

[FR Doc. 2010–23031 Filed 9–15–10; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 790

[EPA–HQ–OPPT–2009–0894; FRL–8832–8]

RIN 2070–AJ59

Amendments to Enforceable Consent Agreement Procedural Rules

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is revising the procedures for developing Enforceable Consent Agreements (ECAs) to generate test data under the Toxic Substances Control Act (TSCA). The main features of the ECA process that EPA is changing include when and how to initiate negotiations and inserting a firm deadline at which negotiations will terminate. EPA is also deleting, modifying, or consolidating several sections of 40 CFR part 790 to place the ECA provisions in one section and the Interagency Testing Committee (ITC) provisions in a separate section, to make it clearer that there is one ECA negotiation procedure applicable to all circumstances when an ECA would be appropriate, and to make conforming changes in other sections that reference the ECA procedures.

DATES: This final rule is effective October 18, 2010.

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPPT–2009–0894. All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPPT Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA West Bldg., 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

FOR FURTHER INFORMATION CONTACT: *For technical information contact*: Jessica Barkas, Chemical Control Division (7405M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 250–8880; e-mail address: *barkas.jessica@epa.gov*.

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; e-mail address: *TSCA-Hotline@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. Does this Action Apply to Me?

You may be potentially affected by this action if you manufacture (defined by statute to include import) or process chemical substances or mixtures (defined as "chemical" in 40 CFR part 790). Potentially affected entities may include, but are not limited to:

- Manufacturers (defined by statute to include importers) of chemical substances (NAIC codes 325 and 324110), e.g., chemical manufacturing and petroleum refineries.
- Processors of chemical substances (NAIC codes 325 and 324110), e.g., chemical manufacturing and petroleum refineries.

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

II. Background

A. What is the Agency's Authority for Taking this Action?

Section 4 of TSCA authorizes EPA to require manufacturers and processors of chemical substances and mixtures to test these chemical substances to generate data that is relevant to determining whether the chemical substances present an unreasonable risk. Section 4(a) of TSCA empowers the Agency to promulgate rules which require such testing. Section 4 of TSCA provides implied authority to enter into ECAs requiring testing where such agreements provide procedural safeguards equivalent to those that apply where testing is conducted by rule.

B. What Action is the Agency Taking?

EPA is finalizing a rule revising the procedures for initiating and negotiating an ECA. ECAs are enforceable agreements between EPA and one or more chemical manufacturers or processors to conduct specific testing on a particular chemical substance. These agreements are designed to provide EPA with data identified as necessary to evaluate a particular chemical substance without the need for EPA to first make the risk- or exposure-based findings for, or promulgate, a TSCA section 4 test rule, and without introducing delays inherent in the rulemaking process. ECAs were intended to permit EPA to obtain test data more quickly than test rules, while preserving opportunity for input from the public and the affected manufacturer(s).

The main features of the ECA process that EPA is changing include when and how to initiate negotiations and inserting a firm deadline at which negotiations will terminate. EPA is also deleting, modifying, or consolidating several parts of 40 CFR part 790 to place the ECA provisions in one section and the ITC provisions in a separate section, to make it clearer that there is one ECA negotiation procedure applicable to all circumstances when an ECA would be appropriate, and to make conforming changes in other sections that reference the ECA procedures.

The proposed rule was published in the **Federal Register** of February 19, 2010 (75 FR 7428) (FRL–8802–6). Additional detail about ECAs, the specific changes, and the rationale for those changes can be found in that **Federal Register** document. One comment was received on the proposed rule. No changes have been made to the rule since it was proposed.

C. What Was EPA's Response to Comment?

The comment period for the proposed rule ended on March 22, 2010. One comment was received, from the American Chemistry Council (ACC). The ACC comments indicated support for the ECA procedural changes, and had a few specific suggestions:

Comment 1: EPA should include in the ECA rule what "office or program and level of management within EPA will have the organizational authority to officially speak on behalf of the Agency on such perceived [testing] needs, and how EPA will communicate this request to industry and through what vehicle."

EPA response: Under the current delegation, the EPA Assistant Administrator for the Office of Chemical Safety and Pollution Prevention (OCSPP) (formerly the Office of Prevention, Pesticides and Toxic Substances (OPPTS)) has the authority to make the final decision on whether testing is necessary under TSCA section 4. As explained in the preamble to the proposed rule, EPA will invite testing proposals through **Federal Register** documents, EPA's website, and other forms of public communication. Depending on the circumstances (e.g., the size and geographical distribution of the group potentially required to conduct testing), EPA may use more than one of these methods, as necessary to reach the affected companies. For instance, one of the public forms of communication that EPA may use is speeches or presentations by Agency officials at industry conferences, where representatives from individual companies and trade associations will be present, and able to pass the word along to their companies and members. Of course, individual companies, trade associations and other organizations, and their representatives can always

contact EPA, using the contact information provided in the **Federal Register** document, EPA website, or other public communication of testing needs, with questions about specific testing requirements and other details for individual chemical substances.

Comment 2: EPA should describe in greater detail what EPA believes should be contained in the proposed consent agreement.

EPA response: The testing needs, timeline, and other details will necessarily vary for each individual chemical substance, so it is impossible for EPA to generalize about what will form an adequate proposal in each circumstance. The standard provisions that must be included in all consent agreements are listed in 40 CFR 790.60, "Contents of consent agreements," which this action will not change. Again, individual companies, trade associations, and other organizations, and their representatives can always contact EPA, using the contact information provided in the **Federal Register** document, EPA website, or other public communication of testing needs, with questions about specific testing requirements and other details for individual chemicals. In addition, as stated in the rule, "EPA may request additional clarifications of or revisions to the proposal(s)." This statement in the rule makes it explicit that submitters will have an opportunity to clarify, correct, and otherwise revise their proposal(s), if EPA decides that clarification is needed, or the proposal needs expansion or elaboration to adequately meet testing needs.

Comment 3: The ECA procedures should include a provision that would permit the Agency to agree to an ECA where some or most, but not all, data needs might be filled.

EPA response: There is nothing in the original or revised ECA procedural rules that would prohibit EPA from agreeing to an ECA that covers some, but not all, needed testing, then pursuing a test rule or follow-up ECA, to fill remaining data needs—if no other interested parties submit a timely written objection, and if EPA concludes that such a multi-part process is likely to be an efficient and successful means of obtaining the needed test data.

III. Statutory and Executive Order Reviews

A. Regulatory Review

Under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993), the Office of Management and Budget (OMB) has determined that this final rule is not a "significant regulatory action" subject to review under Executive Order 12866, because it does not meet the criteria in section 3(f)(4) of the Executive Order. Accordingly, EPA did not submit this final rule to OMB for review under Executive Order 12866.

B. Paperwork Reduction Act

This action does not impose any new information collection burden, because the development of the ECA regulations does not involve information collection activities as defined by the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq*. However, the information collection requirements contained in an ECA are already approved by OMB pursuant to PRA under OMB control number 2070–0033 (EPA ICR No. 1139). Under PRA, an agency may not conduct or sponsor, and a person is not required to respond to, an information collection request unless it displays a currently valid control number assigned by OMB. The OMB control numbers for EPA's regulations in title 40 of the CFR are listed in 40 CFR part 9, and will be included in the individual ECAs.

C. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), after considering the potential economic impacts of this final rule on small entities, the Agency hereby certifies that this final rule would not have a significant adverse 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 this final rule on small entities, small entity is defined as:

1. A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201.
2. 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.
3. A small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

This action will not have a significant economic impact on a substantial number of small entities. In determining whether a final rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of regulatory flexibility analysis is to identify and address regulatory alternatives "which minimize any significant economic impact of the rule on small entities." 5 U.S.C. 603 and 604. Thus, an agency may certify that a final rule will not have a significant economic impact on a substantial number of small entities if the final rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the final rule.

The changes discussed in this document are expected to streamline and improve the ECA procedures in a way that will benefit all participants. EPA has therefore concluded that this final rule will not have any adverse impacts on affected small entities. EPA did not receive any comments on the proposed rule regarding the impact on small entities.

D. Unfunded Mandates Reform Act

This action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), (2 U.S.C. 1531–1538). Therefore, this action is not subject to the requirements of UMRA.

E. Federalism

Pursuant to Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999), EPA has determined that this final rule does not have "federalism implications," because it will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Thus, Executive Order 13132 does not apply to this final rule.

F. Tribal Implications

Under Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000), EPA has determined that this final rule does not have tribal implications because it will not have any effect on tribal governments, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified in the Order. Thus, Executive Order 13175 does not apply to this action.

G. Children's Health Protection

Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997), does not apply to this action because this is not designated as an

"economically significant'' regulatory action as defined by Executive Order 12866 (see Unit III.A.), nor does this action establish an environmental standard that is intended to have a disproportionate effect on children. To the contrary, this action will revise procedures which will facilitate the development of data and information that EPA and others can use to assess the risks of chemical substances, including potential risks to children.

H. Energy Effects

This action is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001), because this action is not expected to affect energy supply, distribution, or use.

I. Technology Standards

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), section 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. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This final rule does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

J. Environmental Justice

This action does not involve special considerations of environmental justice related issues as delineated by Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

IV. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 790

Environmental protection, Chemicals, Hazardous substances, Reporting and recordkeeping requirements.

Dated: September 8, 2010.

Stephen A. Owens,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 790—[AMENDED]

■ 1. The authority citation for part 790 continues to read as follows:

Authority: 15 U.S.C. 2603.

§ 790.1 [Amended]

■ 2. Section 790.1 is amended by removing the last sentence of paragraph (c) and by removing paragraph (d).

■ 3. Section 790.20 is revised to read as follows:

§790.20 Recommendation, recommendation with an intent to designate, and designation of testing candidates by the ITC.

(a) *ITC recommendations and recommendations with intent to designate.* The ITC has advised EPA that it will discharge its responsibilities under section 4(e) of TSCA in the following manner:

(1) When the ITC identifies a chemical substance or mixture that it believes should receive expedited consideration by EPA for testing, the ITC may add the substance or mixture to its list of chemicals recommended for testing and include a statement that the ITC intends to designate the substance or mixture for action by EPA in accordance with section 4(e)(1)(B) of TSCA.

(2) Chemical substances or mixtures selected for expedited review under paragraph (a)(1) of this section may, at a later time, be designated for EPA action within 12 months of such designation. The ITC's subsequent decision would be based on the ITC's review of TSCA sections 8(a) and 8(d) data and other relevant information.

(3) Where the ITC concludes that a chemical substance or mixture warrants testing consideration but that expedited EPA review of testing needs is not justified, the ITC will add the substance or mixture to its list of testing recommendations without expressing an intent to designate the substance or mixture for EPA action in accordance with section 4(e)(1)(B) of TSCA.

(4) The ITC reserves its right to designate any chemical substance or mixture that it determines the Agency should, within 12 months of the date first designated, initiate a proceeding under section 4(a) of TSCA.

(b) *Preliminary EPA evaluation of ITC recommendations with intent to designate.* Following receipt of an ITC report containing a recommendation with an intent to designate, EPA will use the following procedure for completing a preliminary evaluation of testing needs on those chemical substances that the ITC has recommended with intent to designate:

(1) EPA will publish the ITC report in the **Federal Register** and announce that interested persons have 30 days to submit comments on the ITC's testing recommendations.

(2) EPA will publish a **Federal Register** document adding all ITC-recommended chemicals to the automatic reporting provisions of its rules under sections 8(a) and 8(d) of TSCA (40 CFR parts 712 and 716).

(3) EPA will hold a public ''focus meeting'' to discuss the ITC's testing recommendations and obtain comments and information from interested parties.

(4) EPA will evaluate submissions received under TSCA sections 8(a) and 8(d) reporting requirements, comments filed on the ITC's recommendations, and other information and data compiled by the Agency.

(5) EPA will make a preliminary staff determination of the need for testing and, where testing appears warranted, will tentatively select the studies to be performed.

(6) EPA will hold a public meeting to announce its preliminary testing determinations.

(c) *EPA response to ITC designations and recommendations*—(1) Where a chemical substance or mixture is designated for EPA action under section 4(e)(1)(B) of TSCA, the Agency will take either one of the following actions within 12 months after receiving the ITC designation:

(i) Initiate rulemaking proceedings under section 4(a) of TSCA. Where the testing recommendations of the ITC raise unusually complex and novel issues that require additional Agency review and opportunity for public comment, the Agency may initiate rulemaking by publishing an Advance Notice of Proposed Rulemaking (ANPRM).

(ii) Publish a **Federal Register** notice explaining the Agency's reasons for not initiating such rulemaking proceedings. EPA may conclude that rulemaking

proceedings under section 4(a) of TSCA are unnecessary if it determines that the findings specified in section 4(a) of TSCA cannot be made or if the Agency entered into a consent agreement requiring the testing identified by the ITC.

(2) Where a chemical substance or mixture has been recommended for testing by the ITC, whether with or without an intent to designate, EPA will use its best efforts to act on the ITC's recommendations as rapidly as possible consistent with its other priorities and responsibilities. EPA may respond to the ITC's recommendations with action such as:

(i) Initiating rulemaking proceedings under section 4(a) of TSCA,

(ii) Publishing a **Federal Register** notice explaining the Agency's reasons for concluding that testing is unnecessary, or

(iii) Entering into a consent agreement in accordance with this subpart.

■ 4. Section 790.22 is revised to read as follows:

§ 790.22 Procedures for developing consent agreements.

(a) *Preliminary EPA evaluation of proposed consent agreement.* Where EPA believes that testing of a chemical substance or mixture may be needed, and wishes to explore whether a consent agreement may satisfy the identified testing needs, EPA will invite manufacturers and/or processors of the affected chemical substance or mixture to submit a proposed consent agreement to EPA. EPA will evaluate the proposal(s) and may request additional clarifications of or revisions to the proposal(s).

(b) *Negotiation procedures for consent agreements.* If, after evaluating the proposed consent agreement(s), EPA believes it is likely that proceeding with negotiation of a consent agreement would be an efficient means of developing the data, EPA will use the following procedures to conduct such negotiations:

(1) In the **Federal Register**, EPA will give notice of the availability of the proposal(s) that is the basis for negotiation, invite persons interested in participating in or monitoring negotiations to contact the Agency in writing, set a deadline for interested parties to contact the Agency in writing, and set a date for the negotiation meeting(s).

(2) The Agency will meet with interested parties at the negotiation meeting(s) for the purpose of attempting to negotiate a consent agreement. Only the submitter(s) of the proposal(s) that is the basis for negotiation and those persons who submit written requests to participate in or monitor negotiations by the deadline established under paragraph (b)(1) of this section will be deemed "interested parties" for purposes of this section.

(3) All negotiation meetings will be open to members of the public, but only interested parties will be permitted to participate in negotiations. The minutes of each meeting will be prepared by EPA. Meeting minutes, the proposed consent agreement(s), background documents, and other materials distributed at negotiation meetings will be placed in an Internet-accessible public docket established by EPA.

(4) If EPA concludes at any time that negotiations are unlikely to produce a final agreement, EPA will terminate negotiations and may proceed with rulemaking. If EPA terminates negotiations, no further opportunity for negotiations will be provided. EPA will notify all interested parties of the termination.

(5) The period between the first negotiation meeting and final agreement, if any ("the negotiation period"), will be no longer than 6 months, unless extended prior to its expiration in accordance with paragraph (b)(7) of this section. This period will include all negotiation meetings, and the processes discussed in paragraphs (b)(6) and (b)(9) of this section. If the negotiation period passes without the production of a final agreement, negotiations and development of the subject ECA will terminate automatically.

(6) EPA will circulate a draft of the consent agreement to all interested parties if EPA concludes that such draft is likely to achieve final agreement. A period of 30 days will be provided for submitting comments or written objections under paragraph (b)(8)(i)(B) of this section.

(7) If, prior to the expiration of the negotiation period, final agreement has not been reached, EPA may at its discretion provide one or more extensions, each of which may be up to 60 days, if it seems likely to EPA that a final agreement will be reached during that time. EPA will notify all interested parties of any extension(s).

(8) (i) EPA will enter into consent agreements only where there is a consensus among the Agency, one or more manufacturers and/or processors who agree to conduct or sponsor the testing, and all other interested parties who identify themselves in accordance with paragraph (b)(2) of this section. EPA will not enter into a consent agreement in either of the following circumstances:

(A) EPA and affected manufacturers and/or processors cannot reach a consensus in the timeframe described in paragraph (b)(5) of this section.

(B) A draft consent agreement is considered inadequate by other interested parties who have submitted timely written objections to the draft consent agreement, which provide a specific explanation of the grounds on which the draft agreement is objectionable.

(ii) EPA may reject objections described in paragraph (b)(8)(i)(B) of this section only where the Agency concludes the objections:

(A) Are not made in good faith;

(B) Are untimely;

(C) Do not involve the adequacy of the proposed testing program or other features of the agreement that may affect EPA's ability to fulfill the goals and purposes of TSCA; or

(D) Are not accompanied by a specific explanation of the grounds on which the draft agreement is considered objectionable.

(iii) The unwillingness of some manufacturers and/or processors to sign the draft consent agreement does not, in itself, establish a lack of consensus if EPA concludes that those manufacturers and/or processors who are prepared to sign the agreement are capable of accomplishing the testing to be required and that the draft agreement will achieve the purposes of TSCA in all other respects.

(9) Where a consensus exists, as described in paragraph (b)(8) of this section, concerning the contents of a draft consent agreement, the draft consent agreement will be circulated to EPA management and the parties that are to conduct or sponsor testing under the agreement, for final approval and signature.

(10) Upon final approval and signature of a consent agreement, EPA will publish a **Federal Register** document announcing the availability of the consent agreement and codifying (in subpart C of 40 CFR part 799) the name of the chemical substance(s) and/or mixture(s) to be tested and the citation to the **Federal Register** document.

§§ 790.24, 790.26, and 790.28 [Removed]

■ 5. Remove §§ 790.24, 790.26, and 790.28.

§ 790.68 [Amended]

■ 6. Remove the cross-reference "§ 790.24" in "§ 790.68(a)(2)" and add in its place "§ 790.22(b)(8)."

Appendix A to subpart E of part 790 [Removed]

■ 7. Remove Appendix A to subpart E of part 790.

[FR Doc. 2010–23131 Filed 9–15–10 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 1060

[EPA–HQ–OAR–2010–0270; FRL–9202–4]

RIN 2060–AQ18

Technical Amendments for Marine Spark-Ignition Engines and Vessels

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: In the final rulemaking for new exhaust and evaporative emissions standards for nonroad spark-ignition engines, vessels, and equipment (73 FR 59034, October 8, 2008), EPA established first-ever evaporative emissions standards for marine vessels. These requirements included portable marine fuel tanks commonly used in recreational boating. During their efforts to certify portable fuel tanks to these new requirements, manufacturers working together on systems integration identified several technical issues with the performance of the tanks/fuel systems in use that were not fully apparent to them before these standards were developed. Systems integration work conducted by the fuel tank, boat and engine manufacturers highlighted that under some circumstances there was the potential for fuel spillage to occur. Work conducted by these parties indicated that this issue applies to existing systems and tanks as well as those built to comply with EPA's evaporative emission design standard. We have engaged the industry to identify a simple, safe, and emissions neutral solution to this concern. EPA is taking direct final action to make technical amendments to the design standard for portable tanks that will allow for this solution. In addition, we are incorporating safe recommended practices, developed through industry consensus, for portable marine fuel tanks. This action is emissions neutral with respect to the diurnal emissions standard; however, to the extent that it helps reduce fuel spillage, incorporating safe recommended practices will result in a net benefit to the environment and lead to fuel savings.

DATES: This rule is effective on November 15, 2010 without further notice, unless EPA receives adverse comment by October 18, 2010 If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. Similarly, the incorporation by reference of the published standard listed in this regulation is approved by the Director of the Federal Register as of November 15, 2010 without further notice, unless EPA receives adverse comment.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2010–0270, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: a-and-r-docket@epa.gov.*
- *Fax:* (202) 566–9744.
- *Mail:* Environmental Protection Agency, Air Docket, Mail-Code 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attn: Desk Officer for EPA, 725 17th St., NW., Washington, DC 20503.
- *Hand Delivery:* EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC, Attention Docket No. EPA–HQ–OAR–2010–0270. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2010–0270. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the 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 *www.regulations.gov* or e-mail. The *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 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 difficulties and 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.* For additional instructions on submitting comments, go to Unit III of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the *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 *www.regulations.gov* or in hard copy at the "Technical Amendments for Marine Spark-Ignition Engines and Vessels" 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 "Technical Amendments for Marine Spark-Ignition Engines and Vessels" Docket is (202) 566–2426.

FOR FURTHER INFORMATION CONTACT: Michael Samulski, Environmental Protection Agency, Office of Transportation and Air Quality, Assessment and Standards Division, 2000 Traverwood Drive, Ann Arbor, Michigan 48105; telephone number: 734–214–4532; fax number: 734–214–4050; e-mail address: *samulski.michael@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Why is EPA using a Direct Final Rule?

EPA is publishing this rule without a prior proposed rule because we view this as a noncontroversial action and anticipate no adverse comment. However, in the "Proposed Rules" section of today's **Federal Register**, we are publishing a separate document that will serve as the proposed rule to adopt

the provisions in this Direct Final Rule if adverse comments are received on this direct final rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information about commenting on this rule, *see* the **ADDRESSES** section of this document.

If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that this direct final rule will not take effect. We would address all public comments in any subsequent final rule based on the proposed rule.

II. Does this action apply to me?

This action will affect companies that manufacture and certify portable marine fuel tanks for sale in the United States. The following table gives some examples of entities that may have to follow the regulations; however, since these are only examples, you should carefully examine the proposed regulations. You may direct questions regarding the applicability of this action as noted in **FOR FURTHER INFORMATION CONTACT**.

Category	NAICS codes[a]	SIC codes[b]	Examples of potentially regulated entities
Industry	333618	3519	Manufacturers of new engines.
Industry	336612	3731, 3732	Manufacturers of marine vessels.

[a] North American Industry Classification System (NAICS).
[b] Standard Industrial Classification (SIC) system code.

III. What should I consider as I prepare my comments for EPA?

A. Submitting CBI. Do not submit this information to EPA through *www.regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI). In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

B. Tips for Preparing Your Comments. When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, Federal Register date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

IV. Summary of Rule

A. Overview

In the final rulemaking for new exhaust and evaporative emissions standards for nonroad spark-ignition engines, vessels, and equipment (73 FR 59034, October 8, 2008), EPA established first-ever evaporative emissions standards for marine vessels. These requirements included portable marine fuel tanks specifically designed for and commonly used in recreational boating. These are normally used to power gasoline outboard engines. During their efforts to certify portable fuel tanks to these new requirements, manufacturers working together on systems integration identified several technical issues with the performance of the tanks/fuel systems in use that were not fully apparent to them before these standards were developed. Systems integration work conducted by the fuel tank, boat and engine manufacturers highlighted that under some circumstances there was the potential for fuel spillage to occur. Work conducted by these parties indicated that this issue applies to existing fuel systems and tanks as well as those built to comply with EPA's evaporative emission design standard. We have engaged the industry to identify a simple, safe, and emissions neutral solution to this concern. This action is emissions neutral with respect to the diurnal emissions standard; however, to the extent that it helps reduce fuel spillage, incorporating safe recommended practices will result in a net benefit to the environment and lead to fuel savings.

B. Background

Often, gasoline-powered outboard marine engines are used on boats that do not have installed fuel tanks. This is most common for smaller engines and vessels. In these instances, portable marine fuel tanks are used as a fuel supply. In many ways, portable marine fuel tanks resemble portable gasoline containers, like those used to carry gasoline for use in lawnmowers and other equipment. The primary difference from portable gasoline containers is that portable marine fuel tanks are designed to be connected directly to the outboard engine during operation. These portable marine fuel tanks can be easily disconnected from the engine and removed from the boat for purposes of refueling and storage.

Because outboard engines draw fuel directly from portable marine fuel tanks when operating, there are three design elements unique to these fuel tanks. The first (and most obvious) is that there is a fuel line connecting the fuel tank to the engine. Second, these fuel tanks are typically equipped with an indicator for fuel fill level. Third, portable marine fuel tanks have traditionally been equipped with a manually actuated vent on the fuel cap. In this design, the manual valve was intended to be left open during engine operation to prevent a vacuum from forming in the fuel tank as the engine draws the fuel level down. Such a vacuum in the fuel tank could prevent fuel from being drawn into the engine, thereby resulting in a stalled engine.

During storage and transport, this same manual valve could be closed to prevent fuel spillage and loss of fuel due to evaporation. By closing the valve, the user can prevent fuel vapor from escaping through the vent. However, because the vapor cannot escape, pressure builds in the fuel tank during heating events. For this reason, portable

marine fuel tanks are designed to withstand pressures caused by fuel heating. Because this valve is manually actuated, any emission control associated with sealing the tank would be dependent on user behavior.

In our recent rulemaking, we adopted a design standard requiring portable marine fuel tanks to remain sealed up to a pressure of 5.0 psi, starting on January 1, 2010 (*see* § 1060.105). This can be achieved by replacing the user-controlled manual valve with a simple one-way automatic valve in the fuel cap. For instance, a diaphragm valve that is common in many automotive applications seals when under positive pressure (up to a set pressure limit) but opens under low-vacuum conditions. The 5.0 psi pressure relief provision is not mandatory, but rather is intended to provide the option to limit the amount of pressure that a fuel tank must hold. It should be noted that portable fuel tank manufacturers are expected to add an additional manual valve that will allow the user to override the pressure relief valve so that the fuel tanks can be completely sealed during transportation and storage.

Under the requirements finalized in 2008, portable fuel tanks must continue to be self-sealing when disconnected from an engine. Typically, the hose connections have spring loaded mechanisms that close off fuel flow when the connection is broken. As such, this provision is consistent with current industry practice.

C. Technical Issues and Solutions

After the final rule was published in 2008, marine engine and fuel tank manufacturers became aware of fuel spillage issues that may occur, under certain circumstances, if a portable marine fuel tank is stored in the sealed condition (either on or outside the vessel). These issues were identified during the manufacturers' efforts to develop and certify portable marine fuel tanks to the diurnal emission requirements. Testing conducted by the manufacturers indicates that these fuel spillage issues apply to existing fuel tanks as well as those designed to the diurnal requirements finalized in 2008. Existing tanks have a manual valve that is intended to be closed when the vessel is not in use and when the tank is stored. When the user closes this manual valve, the tank is in a similar configuration as a tank that is compliant with the design requirements for diurnal emission control.

Diurnal evaporative emissions are released from a fuel tank when the fuel temperature increases due to daily temperature changes. This increase in fuel temperature increases the vapor pressure of the fuel and therefore the vapor mixture expands in volume. This expansion forces some of the fuel-air mixture to be vented out of the tank. When the vent is in the closed position, the expanded volume cannot escape the tank, resulting in increased pressure in the fuel tank. This increased pressure is a function of the fuel temperature, the amount of fuel in the tank, and the volatility of the fuel.

Three potential fuel spillage mechanisms have been identified for a tank under pressure: (1) Through the engine, (2) when connecting/disconnecting the fuel line from the engine and (3) when opening the fuel cap. These three potential fuel spillage issues are discussed below along with the associated technical solutions to these issues. Further information is provided in the docket.

1. Through Engine

When an engine is operating, vacuum generated by the action of the piston(s) draws fuel from the tank to the engine. When the engine is shut down, it no longer draws fuel from the fuel tank. It is common to disconnect the fuel tank from the engine during periods of inactivity. However, if this does not occur, and if the fuel tank is sealed and sufficient pressure develops in the fuel tank, this pressure can push fuel to the engine. This can occur in existing fuel tanks when the manual valve is sealed or in a self-sealing fuel tank meeting the design standard finalized in 2008. In most cases, the needle valve in the engine's fuel system would prevent the fuel from reaching the engine intake.

However, if the pressure in the fuel tank is high enough, this pressure may force fuel through the engine, which would then spill out of the engine intake. Based on test data supplied by outboard marine engine manufacturers, many engine designs can withstand 5.0 psi of fuel pressure from the fuel tank without leaking. However, some engine designs will see fuel leakage at pressures as low as 1.0 psi. This testing was performed on engines in a static position, either upright or tilted. Based on this testing, fuel leakage was shown to occur in either position, but was more likely when the engine is stored in the tilted position.

Dynamic testing was also performed, wherein the engine was fitted on a trailer boat and towed of various surfaces. This testing suggested fuel leakage was much more likely under dynamic conditions (such as towing) than static conditions, when the portable marine fuel tank was sealed, pressurized, and left connected to the engine. It was thought that the vibration caused the needle valve in the engine to vibrate and lift from its seat. The test data referenced here is included in the docket.

The simplest solution to this fuel spillage issue is for the user to disconnect the fuel tank from the engine when storing the fuel tank, especially when towing the boat. At a minimum, portable marine fuel tank manufacturers should provide the user with information on proper storage practices, such as disconnecting the fuel tank from the engine when not in use. As discussed in IV.D.3 below, this is included in the safe recommended practices for portable marine fuel tanks recently developed by the boating industry.

A more sophisticated technical solution would be to include a valve in the fuel line that would prevent transfer of fuel under pressure from the fuel tank to the engine. One example would be a vacuum-actuated valve which would remain closed unless a vacuum was drawn from the engine. Because new portable marine fuel tanks may be used with old engines for many years to come, it is important that the near-term solution to this issue be independent of the engine design.

2. During Connection/Disconnection of Fuel Line

Portable marine fuel tanks are typically equipped with "quick-connect" fittings for easy connection and disconnection of the fuel line from either the engine or fuel tank. Under this design, the connector remains closed until it is pressed on to the mating fitting. When the fuel is under pressure, it is possible that some fuel will spray as the connector begins to open, but is not yet completely seated on the fitting. For example, this could occur when the fuel line is connected to the fuel tank and the tank is under a positive pressure. Similar to the other spillage mechanisms described here, this can occur in existing fuel tanks when the manual valve is sealed or in a self-sealing fuel tank meeting the design standard finalized in 2008.

Two solutions may be used to address this fuel spillage issue. The first is to simply relieve the pressure in the fuel system prior to connecting or disconnecting the fuel line from the engine. This could be accomplished by simply opening the fuel cap or through the use of the "pressure relief method" described below (*see* section IV.C.3).

Alternatively, the fittings could be modified to prevent fuel spray under pressure. One approach would be to improve the fittings such that, when the

connector and fitting are mated, the seal is seated sufficiently to withstand 5 psi of pressure, before the connecting valve opens. Another modification could be the use of an integrated or manual valve that would close to shut off fuel pressure to the fitting prior to connecting or disconnecting the fuel line from the engine.

3. When Opening Fuel Cap

In rare circumstances, the fuel in the tank can reach an unstable condition where opening the fuel cap can result in significant fuel spray from the tank opening. This would occur when the fuel tank is filled with a high volatility gasoline, sealed, and subjected to high ambient temperatures. This can occur in existing fuel tanks when the manual valve is sealed or in a self-sealing fuel tank meeting the design standard finalized in 2008. An example of a high volatility gasoline would be 13 RVP wintertime fuel. Under certain circumstances, this fuel may be sold in the spring for use in boats. If a fuel tank containing this fuel were left in the sun on a hot day, the fuel could reach a "boiling" condition where butane bubbles are formed in the fuel. In many ways, gasoline under this condition could be likened to soda pop in a bottle that has been shaken.

Manufacturers performed testing on a fuel tank filled to the top with 13 RVP gasoline that was sealed and heated from 16°C (60°F) to 40°C (104°F). When the fuel cap was opened, a significant amount of fuel sprayed from the fuel tank. This fuel spray was less, but still significant when the fuel tank was filled to the recommended fill line rather than filled all the way up to the top. Fuel spillage under these circumstances is not only an adverse environmental outcome, but could result in a safety hazard as well.

One solution to this issue is to relieve pressure slowly prior opening the fuel cap. For example, when opening a soda pop bottle that has been shaken, we commonly crack the cap slightly, to slowly relieve pressure and prevent spray. Similarly, spraying of fuel from a fuel tank can be addressed through the addition of a small valve that can be opened to slowly relieve pressure before opening the fuel cap. The marine industry refers to this approach as the "pressure relief method," which is defined as "an integrated or external manually activated device designed to temporarily relieve pressure prior to fuel filling or connection to the engine." The intent is that the valve would only remain open for a short period of time, when needed, and the default condition of the valve would be in the closed position.

The simplest design under the "pressure relief method" may be a button on the fuel cap that can be pressed to allow pressure to slowly escape. Once the pressure equalizes, the button would be released and the vent would return to the closed position. The fuel cap would then be opened without any risk of fuel spray.

D. Regulatory Action

EPA is taking direct final action to address the potential spillage problems discussed above which exist for current tank designs as well as for tanks meeting the diurnal design standard finalized in 2008. First, we are making technical amendments to the design standard for portable tanks that will allow for the use of the "pressure relief method" described above. In addition, to incorporate the other solutions described above, we are incorporating safe recommended practices, developed through industry consensus, for portable marine fuel tanks. EPA does not expect that this action will have an adverse cost impact to the manufacturers beyond that envisioned in the original rule. This direct final rule merely modifies existing design-based certification provisions to incorporate safe recommended practices, developed through industry consensus, for portable marine fuel tanks. Adopting these amendments, which are discussed below, is expected to lead to environmental, cost, and safety benefits through reduced fuel spillage.

1. Pressure Relief Method

The current regulatory text in § 1060.105(c)(1) states that portable fuel tanks "must be self-sealing (without any manual vents) when not attached to the engines. The tanks may not vent to the atmosphere when attached to an engine." Based on this text, the pressure relief method described above (*see* section IV.C.3) is not permitted under the current regulations.

When this regulation was drafted, the concept of the pressure relief method was not envisioned. The intent for this regulatory text was simply to ensure that any vent on the fuel tank could not be left in the open position. The concern was that a manual vent could be left in the open position, and it was not envisioned that a manual vent would be added that would default to the closed position when released. There is no environmental harm for a vent that can be temporarily opened prior to opening the fuel cap, but that returns to the closed position when not activated. The reason is that any vapor that is released through this vent just prior to opening the fuel tank would be released from fuel tank anyway when the cap is removed. As such, this action is emissions neutral with respect to diurnal emissions. To the extent that it helps prevent fuel spillage, allowing such a valve actually results in a net benefit to the environment and leads to fuel savings.

To address this issue, we are revising the text in § 1060.105(c)(1) to allow for an integrated or external manually activated device to be included in the fuel tank design to temporarily relieve pressure prior to fuel filling or connection to the engine. In this way, there will be no prohibition on using the "pressure relief method" in new fuel tank designs.

2. Timing

Although the diurnal requirements for portable marine fuel tanks began on January 1, 2010, each portable marine fuel tank manufacturer selling product into the U.S. has requested and received a 12 month extension for compliance with this regulation. EPA granted these requests under § 1068.40, to allow development of the industry consensus methods and practices to address these concerns. Beginning on January 1, 2011 each manufacturer will be required to comply with the diurnal emissions standards contained in § 1060.105. Taking action through a direct final rule will allow for the technical amendments to enter into force prior to this date.

3. Safe Recommended Practices

Under the auspices of the American Boat and Yacht Council (ABYC), the recreational marine industry has developed safe recommended practices for portable marine fuel tanks. These practices, which are housed in ABYC H25,[1] include recent modifications to address the fuel spillage issues described above for existing fuel tanks and fuel tanks meeting the diurnal design standard finalized in 2008. These modifications include the creation of design requirements and system testing that must be performed to ensure that fuel spillage will not occur under pressure relief method and to ensure that fuel spray will not occur when quick connect fittings are connected or disconnected. In addition, ABYC H25 now includes labeling requirements to inform boaters of potential hazards associated with fuel under pressure and what steps to take. These steps may include disconnecting the fuel line from

[1] American Boat and Yacht Council (ABYC), "ABYC H–25: Portable Marine Gasoline Fuel Systems," July, 2010.

the engine when not in use and activating the pressure relief method prior to opening the fuel cap.

To help ensure that the potential fuel spillage issues described above are addressed properly, we are incorporating, by reference, the ABYC H25 pressure relief method system testing and informational (*e.g.* labeling) provisions into our regulations.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

This action is not a "significant regulatory action" under the terms of Executive Order (EO) 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the EO. This direct final rule merely modifies existing design-based certification requirements to incorporate safe recommended practices, developed through industry consensus, for portable marine fuel tanks. There are no costs with this rule beyond those envisioned in the original rule.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq*. Burden is defined at 5 CFR 1320.3(b). This direct final rule does not include any new collection requirements, as it simply modifies existing design-based certification requirements to incorporate safe recommended practices, developed through industry consensus, for portable marine fuel tanks. There are no new paperwork requirements associated with this rule.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure 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 as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) 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 (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final rule on small entities, EPA has concluded that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives "which minimize any significant economic impact of the rule on small entities." 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

This direct final rule merely modifies existing design-based certification requirements to incorporate safe recommended practices, developed through industry consensus, for portable marine fuel tanks. We have therefore concluded that today's final rule will not increase regulatory burden for affected small entities.

D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for State, local, or tribal governments or the private sector. The action imposes no enforceable duty on any State, local or tribal governments or the private sector. Therefore, this action is not subject to the requirements of sections 202 or 205 of the UMRA.

This action 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. This direct final rule merely modifies existing design-based certification requirements to incorporate safe recommended practices, developed through industry consensus, for portable marine fuel tanks.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This direct final rule merely modifies existing design-based certification requirements to incorporate safe recommended practices, developed through industry consensus, for portable marine fuel tanks. Thus, Executive Order 13132 does not apply to this action.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This direct final rule merely modifies existing design-based certification requirements to incorporate safe recommended practices, developed through industry consensus, for portable marine fuel tanks. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children From Environmental Health 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 in EO 12866, and because the Agency does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. This direct final rule merely modifies existing design-based certification requirements to incorporate safe recommended practices, developed through industry consensus, for portable marine fuel tanks.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer 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 technical standards. This direct final rule modifies existing design-based certification requirements to incorporate safe recommended practices, developed through industry consensus, for portable marine fuel tanks. Specifically, it incorporates by reference ABYC H–25, "Portable Marine Gasoline Fuel Systems," July 2010. Anyone may purchase copies of these materials from the American Boat and Yacht Council, 613 Third Street, Suite 10 Annapolis, MD 21403 or *http://www.abycinc.org/.*

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order (EO) 12898 (59 FR 7629 (Feb. 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 without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. This direct final rule merely modifies existing design-based certification requirements to incorporate safe recommended practices, developed through industry consensus, for portable marine fuel tanks.

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. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. 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 on November 15, 2010.

L. Statutory Authority

The statutory authority for this action comes from section 213 of the Clean Air Act as amended (42 U.S.C. 7547). This action is a rulemaking subject to the provisions of Clean Air Act section 307(d). *See* 42 U.S.C. 7607(d).

List of Subjects in 40 CFR Part 1060

Environmental protection, Administrative practice and procedure, Air pollution control, Confidential business information, Imports, Incorporation by reference, Labeling, Penalties, Reporting and recordkeeping requirements, Warranties.

Dated: September 9, 2010.

Lisa P. Jackson,

Administrator.

■ For the reasons set out in the preamble, Title 40, Chapter I of the Code of Federal Regulations is amended as follows:

PART 1060—CONTROL OF EVAPORATIVE EMISSIONS FROM NEW AND INUSE NONROAD AND STATIONARY EQUIPMENT

■ 1. The authority citation for part 1060 continues to read as follows:

Authority: 42 U.S.C. 7401–7671q.

■ 2. Section 1060.105 is amended by revising paragraphs (c)(1) and (d) and adding a new paragraph (f)(3) to read as follows:

§ 1060.105 What diurnal requirements apply for equipment?

* * * * *

(c) * * *

(1) They must be self-sealing when detached from the engines. The tanks may not vent to the atmosphere when attached to an engine. An integrated or external manually activated device may be included in the fuel tank design to temporarily relieve pressure before refueling or connecting the fuel tank to the engine. However, the default setting for such a vent must be consistent with the requirement in paragraph (c)(2) of this section.

* * * * *

(d) Detachable fuel lines that are intended for use with portable marine fuel tanks must have connection points that are self-sealing when not attached to the engine or fuel tank.

* * * * *

(f) * * *

(3) You must meet the following provisions from ABYC H–25, July 2010 (incorporated by reference in § 1060.810) with respect to portable marine fuel tanks:

(i) Provide information related to the pressure relief method (25.8.2.1 and 25.8.2.1.1).

(ii) Perform system testing (25.10 through 25.10.5).

■ 3. Section 1060.810 is amended by adding a new paragraph (d) to read as follows:

§ 1060.810 What materials does this part reference?

* * * * *

(d) American Boat and Yacht Council Material. Table 4 to this section lists material from the American Boat and Yacht Council that we have incorporated by reference. The first column lists the number and name of the material. The second column lists the sections of this part where we reference it. Anyone may purchase copies of these materials from the American Boat and Yacht Council, 613 Third Street, Suite 10, Annapolis, MD 21403 or *http://www.abycinc.org/.* Table 4 follows:

TABLE 4 TO § 1060.810—AMERICAN BOAT AND YACHT COUNCIL MATERIALS

Document No. and name	Part 1060 reference
ABYC H–25, Portable Marine Gasoline Fuel Systems, July 2010	1060.105

[FR Doc. 2010–23126 Filed 9–15–10; 8:45 am]
BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 0910131363–0087–02]

RIN 0648–XZ08

Fisheries of the Exclusive Economic Zone Off Alaska; Reallocation of Crab and Halibut Prohibited Species Catch Allowances in the Bering Sea and Aleutian Islands Management Area

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

ACTION: Temporary rule; reallocation.

SUMMARY: NMFS is reallocating the projected unused amounts of the 2010 crab and halibut prohibited species catch (PSC) allowances assigned to the Bering Sea and Aleutian Islands trawl limited access sector to the Amendment 80 cooperative in the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to allow the Amendment 80 cooperative to fully harvest their 2010 groundfish allocations.

DATES: Effective September 13, 2010, through 2400 hrs, Alaska local time (A.l.t.), December 31, 2010.

FOR FURTHER INFORMATION CONTACT: Steve Whitney, 907–586–7269.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2010 halibut PSC assigned to the Bering Sea and Aleutian Islands trawl limited access sector is 875 metric tons (mt) and to the Amendment 80 cooperative is 1,754 mt in the BSAI as established by the final 2010 and 2011 harvest specifications for groundfish in the BSAI (75 FR 11778, March 12, 2010).

The Administrator, Alaska Region, NMFS, has determined that 358 mt of the halibut PSC assigned to the BSAI trawl limited access sector will not be needed to support BSAI trawl limited access fisheries. Therefore, in accordance with § 679.91(f)(4), NMFS is reallocating 340 mt of halibut PSC assigned to the BSAI trawl limited access sector to the Amendment 80 cooperative in the BSAI.

The Administrator, Alaska Region, NMFS, has also determined that 290,000 crabs of Zone 1 *C. bairdi* tanner crab PSC, 880,000 crabs of Zone 2 *C. bairdi* tanner crab PSC, and 48,000 crabs of Zone 1 red king crab PSC assigned to the BSAI trawl limited access sector will not be needed to support BSAI trawl limited access fisheries. Therefore, in accordance with § 679.91(f)(5), NMFS is reallocating these crab PSC amounts assigned to BSAI trawl limited access sector to the Amendment 80 cooperative in the BSAI.

In accordance with § 679.91(f)(1), NMFS will reissue cooperative quota permits for the reallocated crab and halibut PSC following the procedures set forth in § 679.91(f)(4) and § 679.91(f)(5).

The harvest specifications for crab and halibut PSC included in the final harvest specifications for crab and halibut PSC in the BSAI (75 FR 11778, March 12, 2010) are revised as follows in Tables 8a, 8c, and 8d:

TABLE 8A—FINAL 2010 AND 2011 APPORTIONMENT OF PROHIBITED SPECIES CATCH ALLOWANCES TO NON-TRAWL GEAR, THE CDQ PROGRAM, AMENDMENT 80, AND THE BSAI TRAWL LIMITED ACCESS SECTORS

PSC species	Total non-trawl PSC	Non-trawl PSC remaining after CDQ PSQ [1]	Total trawl PSC	Trawl PSC remaining after CDQ PSQ [1]	CDQ PSQ reserve [1]	Amendment 80 sector		BSAI trawl limited access fishery
						2010	2011	
Halibut mortality (mt) BSAI	900	832	3,675	3,349	393	2,765	2,375	517
Herring (mt) BSAI	n/a	n/a	1,974	n/a	n/a	n/a	n/a	n/a
Red king crab (animals) Zone 1 [1]	n/a	n/a	197,000	175,921	21,079	146,920	93,432	5,797
C. *opilio* (animals) COBLZ [2]	n/a	n/a	4,350,000	3,884,550	465,450	2,148,156	2,028,512	1,248,494
C. *bairdi* crab (animals) Zone 1 [2]	n/a	n/a	830,000	741,190	88,810	641,176	331,608	58,285
C. *bairdi* crab (animals) Zone 2	n/a	n/a	2,520,000	2,250,360	269,640	1,479,271	565,966	173,394

[1] Section 679.21(e)(3)(*i*)(A)(*2*) allocates 326 mt of the trawl halibut mortality limit and § 679.21(e)(4)(*i*)(A) allocates 7.5 percent, or 67 mt, of the non-trawl halibut mortality limit as the PSQ reserve for use by the groundfish CDQ program. The PSQ reserve for crab species is 10.7 percent of each crab PSC limit.
[2] Refer to § 679.2 for definitions of zones.

TABLE 8C—FINAL 2010 AND 2011 PROHIBITED SPECIES BYCATCH ALLOWANCES FOR THE BSAI TRAWL LIMITED ACCESS SECTOR AND NON-TRAWL FISHERIES

BSAI trawl limited access fisheries	Prohibited species and area [1]				
	Halibut mortality (mt) BSAI	Red king crab (animals) Zone 1	*C. opilio* (animals) COBLZ	*C. bairdi* (animals)	
				Zone 1	Zone 2
Yellowfin sole	47	4,000	1,176,494	27,285	160,304
Rock sole/flathead sole/other flatfish [2]	0	0	0	0	0
Turbot/arrowtooth/sablefish [3]	0	0	0	0	0
Rockfish April 15–December 31	5	0	2,000	0	848
Pacific cod	275	1,700	50,000	20,000	8,000

TABLE 8C—FINAL 2010 AND 2011 PROHIBITED SPECIES BYCATCH ALLOWANCES FOR THE BSAI TRAWL LIMITED ACCESS SECTOR AND NON-TRAWL FISHERIES—Continued

BSAI trawl limited access fisheries	Prohibited species and area [1]					
	Halibut mortality (mt) BSAI		Red king crab (animals) Zone 1	*C. opilio* (animals) COBLZ	*C. bairdi* (animals)	
					Zone 1	Zone 2
Pollock/Atka mackerel/other species	190		97	20,000	1,000	4,242
Total BSAI trawl limited access PSC	517		5,797	1,248,494	58,285	173,394
Non-trawl fisheries	Catcher processor	Catcher vessel				
Pacific cod-Total	760	15				
January 1–June 10	314	10				
June 10–August 15	0	3				
August 15–December 31	446	2				
Other non-trawl-Total	58					
May 1–December 31	58					
Groundfish pot and jig	Exempt					
Sablefish hook-and-line	Exempt					
Total non-trawl PSC	833					

[1] Refer to § 679.2 for definitions of areas.
[2] "Other flatfish" for PSC monitoring includes all flatfish species, except for halibut (a prohibited species), flathead sole, Greenland turbot, rock sole, yellowfin sole, and arrowtooth flounder.
[3] Greenland turbot, arrowtooth flounder, and sablefish fishery category.

TABLE 8D—FINAL 2010 PROHIBITED SPECIES BYCATCH ALLOWANCE FOR THE BSAI AMENDMENT 80 COOPERATIVES

Year	Prohibited species and zones[1]				
	Halibut mortality (mt) BSAI	Red king crab (animals) Zone 1	*C. opilio* (animals) COBLZ	*C. bairdi* (animals)	
				Zone 1	Zone 2
2010	2,094	118,237	1,461,309	547,715	1,320,277

[1] Refer to § 679.2 for definitions of zones.

This will enhance the socioeconomic well-being of harvesters of groundfish dependent upon these PSC amounts. The Regional Administrator considered the following factors in reaching this decision: (1) the current catch and stated future harvesting intent of BSAI trawl limited access sector fisheries and, (2) the harvest capacity and stated intent on future harvesting patterns of the Amendment 80 cooperative that participates in this BSAI fishery. The Regional Administrator also has determined that this action will create no threats of exceeding TACs for any species or species group.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the reallocation of crab and halibut PSC from the BSAI trawl limited access sector to the Amendment 80 cooperative in the BSAI. Since the fisheries are currently open, it is important to immediately inform the industry as to the revised allocations. Immediate notification is necessary to allow for the orderly conduct and efficient operation of these fisheries, to allow the industry to plan for the fishing season, and to avoid potential disruption to the fishing fleet as well as processors. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of September 8, 2010.

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

This action is required by § 679.91 and is exempt from review under Executive Order 12866.

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

Dated: September 13, 2010.

Carrie Selberg,

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

[FR Doc. 2010–23166 Filed 9–13–10; 4:15 pm]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 680

[Docket No. 0910051335–0151–01]

RIN 0648–AY28

Groundfish Fisheries of the Exclusive Economic Zone Off Alaska; Bering Sea/Aleutian Islands Crab Rationalization Program; Recordkeeping and Reporting

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

ACTION: Final rule.

SUMMARY: NMFS issues regulations to remove the Crab Rationalization Program requirements for catcher/processors to weigh all offloaded crab on a state-approved scale that produces a printed record and to submit a catcher/processor offload report. The purpose of this action is to reduce unnecessary paperwork burdens on the fishing industry. NMFS determined that these requirements are no longer necessary. This action promotes the goals and objectives of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and other applicable laws.

DATES: Effective *September 16, 2010.*

ADDRESSES: Electronic copies of this rule, the Regulatory Impact Review (RIR), and the categorical exclusion memorandum may be obtained from the Alaska Region Web site at *http://alaskafisheries.noaa.gov.*

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be submitted by mail to NMFS, Alaska Region, P. O. Box 21668, Juneau, AK 99802–1668, Attn: Ellen Sebastian, Records Officer; in person at NMFS, Alaska Region, 709 West 9th Street, Room 420A, Juneau, Alaska to NMFS, Alaska Region; and by e-mail to *OIRA_Submission@omb.eop.gov,* or fax to 202–395–7285.

FOR FURTHER INFORMATION CONTACT: Patsy A. Bearden, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the U.S. crab fisheries under the Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crabs (FMP). The FMP was prepared by the North Pacific Fishery Management Council under the Magnuson-Stevens Act. Regulations implementing the FMP appear at 50 CFR parts 679 and 680. General regulations that pertain to U.S. fisheries appear at subpart H of 50 CFR part 600.

Background

The Crab Rationalization (CR) Program is a limited-access system that allocates crab managed under the FMP among harvesters, processors, and coastal communities. Prior to publication of this final rule, NMFS required that all crab harvested and processed by catcher/processors as individual fishing quota (IFQ) be weighed at sea prior to processing and that crab weights be reported to NMFS on an IFQ crab landings report (*see* § 679.5(e)(8)). The weights reported on the IFQ crab landings report were used to debit crab IFQ from a quota holder's account. In addition, catcher/processors were required prior to publication of this final rule to weigh the crab again when it is offloaded from the vessel and report this weight to NMFS on a catcher/processor offload report (*see* § 680.5(e)).

The original purpose of the offload report was to provide information so that NMFS could audit the IFQ crab landing reports. Completing this report required a crab catcher/processor to offload all processed crab product shoreside at a designated port and weigh that product on a scale approved by the state in which the crab is removed from the vessel. CR catcher/processors were required to complete the offload report when crab were offloaded from the vessel and to attach a scale printout showing gross product offload weight. The weight reported on the offload report included not only the weight of crab but also the weight of packaging, pallets, and glaze. While NMFS could make deductions for these items, the deductions created variance in the total weight of crab landed shoreside. For this reason, NMFS found it difficult to use the weights from the offload report to audit the weight obtained from the at-sea hopper scales as originally intended.

Advancements in at-sea reporting of crab catch (eLandings) and the improved reliability of the at-sea motion-compensated hopper scales have changed the need for CR catcher/processors to report offloads. Catcher/processors use eLandings to report total harvest of crab to NMFS weekly while at sea, which provides NMFS with up-to-date accounting of total crab harvested. Motion-compensated hopper scales provide reliable, independent estimates of the total catch by quota sector for all crab harvested.

Removal of the regulatory requirements for CR catcher/processors to weigh offloaded crab product and submit offload reports does not diminish NMFS' ability to verify reported CR crab catch weight. NMFS still requires that all crab be weighed at sea and scale weights of crab be submitted to NMFS on eLandings weekly reports. Alaska Department of Fish and Game observers are onboard crab vessels and have the opportunity to observe hopper scale activities for consistency with the regulatory requirement that vessels weigh all landed IFQ crab. NOAA Fisheries Office for Law Enforcement (OLE) uses eLandings weekly reports, the printouts from the hopper scales showing the total weight of crab harvested, and additional auditing methods to verify CR quota accounting instead of using the catcher/processor offload reports. Further, even without the requirement to weigh and report the gross weight of offloaded product, the OLE will still have the authority and ability to conduct a full audit of offload weights to verify reported crab catch weight.

Specifically, this rule removes the requirement at § 680.5(e) for the owner or operator of a catcher/processor to complete and submit to NMFS a catcher/processor offload report with its attached scale printout showing gross product offload weight. It also removes § 680.5(a)(2)(i)(H) because it only serves as a cross-reference to § 680.5(e), which is removed. This rule also removes the requirement at § 680.23(b)(4) for catcher/processors to weigh all offloaded CR Program crab on a state-approved scale.

NMFS published the proposed rule for this action in the **Federal Register** on August 10, 2010 (75 FR 48298), with a public comment period that closed August 25, 2010. One comment was received from a private citizen during this comment period and is summarized and responded to below.

Response to Comments

Comment 1: The commenter supports the removal of the regulatory requirement for catcher/processors to weigh all offloaded CR Program crab on a state-approved scale, saying the requirement is redundant and unnecessary.

Response: NMFS agrees.

Classification

The Administrator, Alaska Region, NMFS, has determined that this rule is necessary for the conservation and management of the Bering Sea and Aleutian Islands crab fisheries and that

it is consistent with the Magnuson-Stevens Act and other applicable laws.

This final rule removes weighing and reporting requirements that NMFS has determined are no longer necessary for management and monitoring of the crab fisheries. These requirements constitute a restriction on CR catcher/processors because operators of these vessels currently may not legally land processed crab without complying with these requirements. After NMFS removes these requirements, fewer restrictions will apply to landings of processed crab by CR catcher/processors. Specifically, operators of CR catcher/processors that do not weigh the offloaded product on approved scales and submit the offload report to NMFS will be able to legally land processed crab. The elimination of these weighing and reporting requirements reduces the costs associated with legally landing processed crab by relieving a restriction on crab landings by catcher/processor vessels. Therefore, this final rule is not subject to the 30-day delayed effectiveness provision of the Administrative Procedure Act, 5 U.S.C. 553(d)(1).

This final rule has been determined to be not significant for purposes of Executive Order 12866.

The Chief Council for Regulation of the Department of Commerce certified to the Chief Council for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification, and no changes have been made to the proposed rule. As a result, a regulatory flexibility analysis was not required and none was prepared.

This action will not increase recordkeeping and reporting costs.

Collection-of-Information Requirements

This rule contains collection-of-information requirements subject to the Paperwork Reduction Act (PRA) and which have been approved by the Office for Management and Budget (OMB) under OMB Control No. 0648–0570.

Public reporting burden per response is estimated to average 20 minutes for a catcher/processor crab offload report. This rule removes this offload report and the associated reporting burden without imposing any new, additional reporting burden..

These estimates of public reporting burden include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection-of-information.

Send comments regarding this burden estimate or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS (*see* **ADDRESSES**); e-mail to *OIRA_Submission@omb.eop.gov* or fax to 202–395–7285.

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

List of Subjects in 50 CFR Part 680

Alaska, Fisheries, Reporting and recordkeeping requirements.

Dated: September 13, 2010.

Eric C. Schwaab,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

■ For the reasons set out in the preamble, 50 CFR part 680 is amended as follows:

PART 680—SHELLFISH FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

■ 1. The authority citation for part 680 continues to read as follows:

Authority: 16 U.S.C. 1862; Pub. L. 109–241; Pub. L. 109–479.

§ 680.5 [Amended]

■ 2. In § 680.5, remove and reserve paragraph (a)(2)(i)(H) and paragraph (e).

■ 3. In § 680.23, revise paragraph (b)(4) to read as follows:

§ 680.23 Equipment and operational requirements.

* * * * *

(b) * * *

(4) Offload all CR crab product processed onboard at a shoreside location in the United States accessible by road or regularly scheduled air service; and

* * * * *

§ 680.23 [Amended]

■ 4. At each of the locations shown in the "Location" column, remove the phrase indicated in the "Remove" column and replace it with the phrase indicated in the "Add" column for the number of times indicated in the "Frequency" column.

Location	Remove	Add	Frequency
§ 680.23(f)(3)(i)	delivery or offload are	delivery are	1
§ 680.23(f)(3)(ii)	CR crab or an offload of CR crab product must	CR crab must	1

[FR Doc. 2010–23165 Filed 9–13–10; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 75, No. 179
Thursday, September 16, 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.

FARM CREDIT ADMINISTRATION

12 CFR Part 614

RIN 3052–AC62

Loan Policies and Operations; Loan Purchases From FDIC

AGENCY: Farm Credit Administration.

ACTION: Proposed rule; reopening of comment period.

SUMMARY: The Farm Credit Administration (FCA) is reopening the comment period on our proposed rule that would permit Farm Credit System institutions with direct lending authority to purchase from the Federal Deposit Insurance Corporation loans to farmers, ranchers, producers or harvesters of aquatic products and cooperatives that meet eligibility and scope of financing requirements. We are reopening the comment period, so that interested parties have additional time to provide comments.

DATES: You may send comments on or before October 18, 2010.

ADDRESSES: We offer a variety of methods for you to submit your comments. For accuracy and efficiency reasons, commenters are encouraged to submit comments by e-mail or through the FCA's Web site. As facsimiles (faxes) are difficult for us to process and achieve compliance with section 508 of the Rehabilitation Act, we are no longer accepting comments submitted by fax. Regardless of the method you use, please do not submit your comment multiple times via different methods. FCA requests that comments to the proposed amendment include the reference RIN 3052–AC62. You may submit comments by any of the following methods:

- E-mail: Send us an e-mail at *reg-comm@fca.gov.*
- FCA Web site: *http://www.fca.gov.* Select "Public Commenters," then "Public Comments," and follow the directions for "Submitting a Comment."
- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- Mail: Gary K. Van Meter, Deputy Director, Office of Regulatory Policy, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090.

You may review copies of all comments we receive at our office in McLean, Virginia, or from our Web site at *http://www.fca.gov*. Once you are in the Web site, select "Public Commenters," then "Public Comments," and follow the directions for "Reading Submitted Public Comments." We will show your comments as submitted but, for technical reasons, we may omit items such as logos and special characters. Identifying information you provide, such as phone numbers and addresses, will be publicly available. However, we will attempt to remove e-mail addresses to help reduce Internet spam.

FOR FURTHER INFORMATION CONTACT:

Mark L. Johansen, Senior Policy Analyst, Office of Regulatory Policy, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4498, TTY (703) 883–4434,

or

Mary Alice Donner, Senior Attorney, Office of General Counsel, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4033, TTY (703) 883–4020.

SUPPLEMENTARY INFORMATION: On May 18, 2010, FCA published a proposed rule in the **Federal Register** that would permit Farm Credit System institutions with direct lending authority to purchase from the Federal Deposit Insurance Corporation loans to farmers, ranchers, producers or harvesters of aquatic products and cooperatives that meet eligibility and scope of financing requirements. *See* 75 FR 27660. The comment period expired on July 19, 2010. In response to statements by the Independent Community Bankers of America, Minnesota Community Bankers, and other commercial bankers that due to the time needed to review the Dodd-Frank Wall Street Reform and Consumer Protection Act (H.R. 4173) they have not had adequate time to analyze this proposal, and their requests for additional time to comment, the FCA has determined to reopen the comment period to allow an additional 30 days to comment. The FCA supports public involvement and participation in its regulatory process and invites all interested parties to review and provide comments on our proposed rule.

Date: September 9, 2010.

Roland E. Smith,

Secretary, Farm Credit Administration Board.

[FR Doc. 2010–23068 Filed 9–15–10; 8:45 am]

BILLING CODE 6705–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0909; Directorate Identifier 2010–SW–026–AD]

RIN 2120–AA64

Airworthiness Directives; Erickson Air-Crane Incorporated Model S–64F Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes adopting a new airworthiness directive (AD) for Erickson Air-Crane Incorporated (Erickson Air-Crane) Model S–64F helicopters. The AD would require, at specified intervals, certain inspections of the rotating swashplate assembly (swashplate) for a crack. If a crack is found, this AD would also require, before further flight, replacing the swashplate with an airworthy swashplate. This proposal is prompted by a report from the manufacturer of a swashplate cracking during fatigue testing. The actions specified by the proposed AD are intended to prevent loss of a swashplate due to a fatigue crack, loss of control of the main rotor system, and subsequent loss of control of the helicopter.

DATES: Comments must be received on or before November 15, 2010.

ADDRESSES: Use one of the following addresses to submit comments on this proposed AD:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor,

Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

• *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

You may get the service information identified in this proposed AD from Erickson Air-Crane Incorporated, 3100 Willow Springs Road, P.O. Box 3247, Central Point, OR 97502, telephone (541) 664–5544, fax (541) 664–2312.

You may examine the comments to this proposed AD in the AD docket on the Internet at *http://regulations.gov.*

FOR FURTHER INFORMATION CONTACT: DOT/FAA Southwest Region, Michael Kohner, ASW–170, Aviation Safety Engineer, Rotorcraft Directorate, Rotorcraft Certification Office, Fort Worth, Texas 76137, telephone (817) 222–5170, fax (817) 222–5783.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to submit any written data, views, or arguments regarding this proposed AD. Send your comments to the address listed under the caption **ADDRESSES**. Include the docket number "FAA–2010–0909, Directorate Identifier 2010–SW–026–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

We will post all comments we receive, without change, to *http://regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed rulemaking. Using the search function of the docket Web site, you can find and read the comments to any of our dockets, including the name of the individual who sent or signed the comment. You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Examining the Docket

You may examine the docket that contains the proposed AD, any comments, and other information in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Operations office (telephone (800) 647–5527) is located in Room W12–140 on the ground floor of the West Building at the street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

Discussion

This document proposes adopting a new AD for Erickson Air-Crane Model S–64F helicopters. The AD would require, at specified intervals, certain visual inspections of the swashplate for a crack. Also, the AD would require, at specified intervals, a fluorescent-penetrant inspection (FPI) of the swashplate for a crack. If a crack is found, this AD would also require, before further flight, replacing the swashplate with an airworthy swashplate. This proposal is prompted by a report from the manufacturer of a swashplate cracking during fatigue testing. This condition, if not corrected, could result in loss of a swashplate due to a fatigue crack, loss of control of the main rotor system, and subsequent loss of control of the helicopter.

We have reviewed Erickson Air-Crane Service Bulletin (SB) 64B10–10, Revision 2, dated April 1, 2008 (SB 64B10–10) and SB 64F General-3, Revision C, dated December 12, 2007 (SB 64F General-3). SB 64F General-3 summarizes a listing of the Model S–64F helicopter components, their part number, and the corresponding service bulletins that the manufacturer suggests using when performing the structural inspections of the listed components to maintain the continued airworthiness of the helicopters. Adherence to some or all of these structural limitations may be subsequently required by an AD. SB 64B10–10 listed in SB 64F General-3 and the subject of this proposal describes certain repetitive inspections of the swashplate for a crack to maintain the continued airworthiness of the helicopters.

This unsafe condition is likely to exist or develop on other helicopters of the same type design. Therefore, the proposed AD would require the following:

• Within 15 hours time-in-service (TIS) and thereafter at intervals not to exceed 15 hours TIS, clean and visually inspect the swashplate for a crack.

• Within 150 hours TIS and thereafter at intervals not to exceed 150 hours TIS, clean the swashplate and, using a 10-power or higher magnifying glass, visually inspect the swashplate for a crack.

• Within 1,000 hours TIS since the last FPI and thereafter at intervals not to exceed 1,000 hours TIS, removing the swashplate from the helicopter and conducting an FPI of the swashplate for a crack.

• If a crack is found after any inspection, before further flight, replace the swashplate with an airworthy swashplate.

We estimate that this proposed AD would affect 7 helicopters of U.S. registry and would take about:

• .5 hour for the visual inspection;

• 1 hour for the 10-power or higher magnifying glass inspection;

• 35 hours for the 1,000-hour FPI; and

• 32 hours to replace a swashplate at an average labor rate of $85 per work hour. Required parts would cost about $25,000 per helicopter. Based on these figures, the total cost impact of the proposed AD on U.S. operators would be $229,145, assuming 40 15-hour visual inspections; 4 150-hour 10-power magnifying glass inspections; 1 1000-hour FPI and 1 swashplate replacement for each helicopter for the entire fleet of S–64F helicopters for each year.

Regulatory Findings

We have determined that this proposed AD would not have federalism implications under Executive Order 13132. Additionally, 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 that the 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 draft economic evaluation of the estimated costs to comply with this proposed AD. See the AD docket to examine the draft economic evaluation.

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.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (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. Section 39.13 is amended by adding a new airworthiness directive to read as follows:

Erickson Air-Crane Incorporated: Docket No. FAA–2010–0909; Directorate Identifier 2010–SW–026–AD.

Applicability

Model S–64F helicopters, with rotating swashplate assembly (swashplate), part number (P/N) 65104–11001–051, installed, certificated in any category.

Compliance

Required as indicated.

To prevent loss of a swashplate due to a fatigue crack, loss of control of the main rotor system, and subsequent loss of control of the helicopter, do the following:

(a) Within 15 hours time-in-service (TIS), unless accomplished previously, and thereafter at intervals not to exceed 15 hours TIS, clean and visually inspect the swashplate for a crack in areas A through F as depicted in Figure 1 of Erickson Air-Crane Incorporated Service Bulletin 64B10–10, Revision 2, dated April 1, 2008 (SB).

(b) Within 150 hours TIS, unless accomplished previously, and thereafter at intervals not to exceed 150 hours TIS, clean the swashplate and, using a 10-power or higher magnifying glass, visually inspect for a crack in areas A through F as depicted in Figure 1 of the SB.

(c) Within 1,000 hours TIS since the last fluorescent-penetrant inspection (FPI) and thereafter at intervals not to exceed 1,000 hours TIS, remove the swashplate from the rotor head, disassemble and remove the paint from the swashplate, and FPI the swashplate for a crack in accordance with ATSM E1417, Type I, Methods A or C.

(d) If a crack is found in the swashplate, before further flight, replace the swashplate with an airworthy swashplate.

(e) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Contact the Manager, Rotorcraft Certification Office, Rotorcraft Directorate, ATTN: DOT/FAA Southwest Region, Michael Kohner, ASW–170, Aviation Safety Engineer, Fort Worth, Texas 76137, telephone (817) 222–5170, fax (817) 222–5783, for information about previously approved alternative methods of compliance.

(f) The Joint Aircraft System/Component (JASC) Code is 6230: Main Rotor Mast/Swashplate.

Issued in Fort Worth, Texas, on September 3, 2010.

Kim Smith,

Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 2010–23097 Filed 9–15–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms, and Explosives

27 CFR Part 555

[Docket No. ATF 26A]

RIN 1140–AA27

Separation Distances of Ammonium Nitrate and Blasting Agents From Explosives or Blasting Agents (2002R–226P)

AGENCY: Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), Department of Justice.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Department of Justice (Department) intends to amend the regulations of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) to replace the regulations' reference to an outdated guidance document. Based upon a petition ATF received, the Department wishes to gather information and comments from the public and industry about possible replacements for this guidance document.

DATES: Written comments must be postmarked and electronic comments must be submitted on or before December 15, 2010. Commenters should be aware that the electronic Federal Docket Management System will not accept comments after Midnight Eastern Time on the last day of the comment period.

ADDRESSES: Send comments to any of the following addresses—

- Scott P. Armstrong-Cezar, Industry Operations Specialist, Room 6N–602, Bureau of Alcohol, Tobacco, Firearms, and Explosives, 99 New York Avenue, NE., Washington, DC 20226; ATTN: ATF 26A. Written comments must appear in a minimum 12 point size of type (.17 inches), include the commenter's mailing address, be signed, and may be of any length.
- 202–648–9741 (facsimile).
- *http://www.regulations.gov.* Federal eRulemaking portal; follow the instructions for submitting comments.

You may also view an electronic version of this advance notice at *http://www.regulations.gov.*

See the Public Participation section at the end of the **SUPPLEMENTARY INFORMATION** section for instructions and requirements for submitting comments.

FOR FURTHER INFORMATION CONTACT: Scott P. Armstrong-Cezar, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms, and Explosives, U.S. Department of Justice, 99 New York Avenue, NE., Washington, DC 20226; telephone: (202) 648–7119.

SUPPLEMENTARY INFORMATION:

I. Background

ATF is responsible for implementing title XI of the Organized Crime Control Act of 1970, 91 Public Law 452 ("Title XI"), which added chapter 40 ("Importation, Manufacture, Distribution and Storage of Explosive Materials") to title 18 of the United States Code. One of the stated purposes of title XI is to reduce the "hazard to persons and property arising from misuse and unsafe or insecure storage of explosive materials." Under section 847 of title 18, United States Code, the Attorney General "may prescribe such rules and regulations as he deems reasonably necessary to carry out the provisions of this chapter." Regulations that implement the provisions of chapter 40 are contained in title 27, Code of Federal Regulations (CFR), part 555 ("Commerce in Explosives").

The regulations at 27 CFR 555.220 set forth a table of separation distances of ammonium nitrate and blasting agents from explosives or blasting agents followed by six explanatory notes. Note three (3) states that the distances specified in the table "apply to ammonium nitrate that passes the insensitivity test prescribed in the definition of ammonium nitrate fertilizer issued by the Fertilizer Institute" in its "Definition and Test Procedures for Ammonium Nitrate Fertilizer." The Fertilizer Institute (TFI)

is a voluntary, non-profit trade association of the fertilizer industry that currently has more than 175 members. *See* Member Companies, The Fertilizer Institute, *http://tfi.org/about/company.cfm* (last visited June 17, 2010). Members include importers, wholesalers, retailers, and others involved in the fertilizer industry. Id. Many of TFI's members handle and store ammonium nitrate fertilizer and may be affected by the regulations at section 555.220.

The "Definition and Test Procedures for Ammonium Nitrate Fertilizer" guidance document was originally developed by the Agricultural Nitrogen Institute, a predecessor organization of TFI. See The Fertilizer Institute, Definition and Test Procedures for Ammonium Nitrate Fertilizer i (Aug. 1984), *available at http://www.atf.gov/publications/download/hist/definition-and-test-procedures-for-ammonium-nitrate.pdf.* As stated in the guidance document, in May of 1984 TFI assembled a task force of industry and government representatives and experts on the physical and chemical characteristics of ammonium nitrate fertilizer to review this publication and make any necessary changes. *Id.* Based on that review and the technical expertise and experience of the task force members, TFI published a revised edition of the guidance document, dated August 1984. *Id.* In the guidance document, ammonium nitrate fertilizer is defined as "solid ammonium nitrate containing a minimum of 33.0% nitrogen, having a minimum pH of 4.0 in a 10% aqueous solution, 0.20% maximum carbon, 0.010% maximum elemental sulfur, 0.150% maximum chloride as Cl, or particulated elemental metals sufficient to release 4.60 ml, maximum, of hydrogen from 50.0 gram sample and which will pass the detonation resistance test in Section 2.0 and the burning test in Section 4.0." *Id.* at 1.

II. The Fertilizer Institute Petition

On March 19, 2002, TFI filed a petition with ATF requesting that the Federal explosives regulations at section 555.220 be amended to remove the reference to the "Definition and Test Procedures for Ammonium Nitrate Fertilizer." TFI explained that the "Definition and Test Procedures for Ammonium Nitrate Fertilizer" is outdated because TFI last published the guidance document in 1984, TFI will not review or update it, and TFI cannot ensure that the procedures outlined in the guidance document are still valid. TFI recognizes that ATF may require an alternate method of determining the insensitivity of ammonium nitrate fertilizer and has suggested that ATF reference certain Department of Transportation (DOT) regulations.

The DOT regulations include several definitions and two hazardous classifications (Class 5.1 and Class 9) for ammonium nitrate based fertilizers based on the amount of combustible material included in the fertilizer. (*See* 49 CFR 172.101, 172.102, 173.127 and 173.140). Class 5.1 ammonium nitrate fertilizer is defined as a uniform mixture with ammonium nitrate as the main ingredient within the following composition limits: (1) Not less than 90 percent ammonium nitrate with not more than 0.2 percent combustible, organic material calculated as carbon, and with added matter, if any, that is inorganic and inert when in contact with ammonium nitrate, or (2) more than 70 percent but less than 90 percent ammonium nitrate with other inorganic materials, or more than 80 percent but less than 90 percent ammonium nitrate mixed with calcium carbonate and/or dolomite and/or mineral calcium sulphate, and not more than 0.4 percent total combustible, organic material calculated as carbon, or (3) ammonium nitrate-based fertilizers containing mixtures of ammonium nitrate and ammonium sulphate with more than 45 percent but less than 70 percent ammonium nitrate, and not more than 0.4 percent total combustible, organic material calculated as carbon such that the sum of the percentage of compositions of ammonium nitrate and ammonium sulphate exceeds 70 percent. Class 9 ammonium nitrate fertilizer is defined as a uniform, ammonium nitrate based fertilizer mixture containing nitrogen, phosphate, or potash with not more than 70 percent ammonium nitrate and not more than 0.4 percent total combustible, organic material calculated as carbon or with not more than 45 percent ammonium nitrate and unrestricted combustibles. See 49 CFR 172.101 and 172.102(c)(1) special provisions 150, 132 for more information. To determine whether a material falls within Class 5, Division 5.1, DOT requires regulated parties to conduct tests in accordance with the United Nations (UN) Manual of Tests and Criteria. See 49 CFR 173.127(a) for additional information.

III. Discussion

ATF is requesting information from explosives industry members, trade associations, consumers, and all other interested parties to determine whether a replacement reference for TFI's ammonium nitrate guidance document is necessary and, if so, whether there are alternate methods available to determine the insensitivity of ammonium nitrate fertilizer.

Although ATF is soliciting comments on the following specific questions, it is also requesting any relevant information on the subject.

1. Should ATF adopt the Department of Transportation (DOT) regulations for classifying ammonium nitrate fertilizer in accordance with the UN Manual of Tests and Criteria? If not, are there existing reduced-sensitivity tests that could be used to replace TFI's definition and reduced-sensitivity test procedures? If so, have these test procedures demonstrated consistent, reproducible, and accurate results?

2. What are manufacturers currently using to establish the sensitivity or reduced sensitivity of ammonium nitrate fertilizer or other oxidizing materials?

3. If no current test procedures are found suitable, should ATF convene an explosives study group to create a viable reduced-sensitivity test standard?

4. Assuming ATF initiates a study, which organizations or individuals should be included in the study group or consulted prior to implementing a new test procedure?

5. What criteria should be established to accurately characterize insensitive ammonium nitrate fertilizer or other oxidizing materials? Should testing results for each material be quantified in a specific unit of measure for evaluation against other materials?

6. What test procedures should be included in a possible reduced-sensitivity test of ammonium nitrate fertilizer and other oxidizing materials?

7. Should a new reduced-sensitivity test be applied to test previously evaluated ammonium nitrate products?

8. Who should be responsible for the reduced-sensitivity certification of ammonium nitrate fertilizer and other oxidizing materials? Should each company conduct self-certified testing or should the testing be overseen by government regulators or independent scientific laboratories applying mutually accepted standards and procedures under the guidance of government oversight and regulation?

9. What would be the cost burden imposed on manufacturers required to implement their own testing program? What would be the industry cost burden associated with a government testing program?

10. Should materials found to demonstrate reduced sensitivity have their own storage requirements? If so, what requirements would be sufficient to protect them?

How This Document Complies With the Federal Administrative Requirements for Rulemaking

This action is an Advance Notice of Proposed Rulemaking (ANPRM). Because it is not a "significant regulatory action" within the meaning of Executive Order 12866, the Executive Order's requirement of cost-benefit assessment does not apply. ATF is publishing this ANPRM to seek information from the public about a replacement document for the "Definition and Test Procedures for Ammonium Nitrate Fertilizer."

Similarly, the requirements of section 603 of the Regulatory Flexibility Act do not apply to this action because, at this stage, it is an ANPRM and not a "rule" as defined in section 601 of the Regulatory Flexibility Act. Following review of the comments received in response to this ANPRM, if ATF promulgates a notice or notices of proposed rulemaking regarding this matter, ATF will conduct all analyses required by the Regulatory Flexibility Act, Executive Order 12866, and any other statutes or Executive Orders relevant to those rules and in effect at the time of promulgation.

Public Participation

A. Comments Sought

ATF is requesting comments on this advance notice of proposed rulemaking from all interested persons. ATF is also specifically requesting comments on the clarity of this advance notice and how it may be made easier to understand.

All comments must reference this document docket number (ATF 26A), be legible, and include the commenter's name and mailing address. ATF will treat all comments as originals and it will not acknowledge receipt of comments.

Comments received on or before the closing date will be carefully considered. Comments received after that date will be given the same consideration if it is practical to do so, but assurance of consideration cannot be given except as to comments received on or before the closing date.

B. Confidentiality

Comments, whether submitted electronically or in paper format, will be made available for public viewing at ATF, and on the Internet as part of the eRulemaking initiative, and are subject to the Freedom of Information Act. Commenters who do not want their name or other personal identifying information posted on the Internet should submit their comment by mail or facsimile, along with a separate cover sheet that contains their personal identifying information. Both the cover sheet and comment must reference this docket number. Information contained in the cover sheet will not be posted on the Internet. Any personal identifying information that appears within the comment will be posted on the Internet and will not be redacted by ATF.

Any material that the commenter considers to be inappropriate for disclosure to the public should not be included in the comment. Any person submitting a comment shall specifically designate that portion (if any) of his comment that contains material that is confidential under law (*e.g.,* trade secrets, processes, *etc.*). Any portion of a comment that is confidential under law shall be set forth on pages separate from the balance of the comment and shall be prominently marked "confidential" at the top of each page. Confidential information will be included in the rulemaking record but will not be disclosed to the public. Any comments containing material that is not confidential under law may be disclosed to the public. In any event, the name of the person submitting a comment is not exempt from disclosure.

C. Submitting Comments

Comments may be submitted in any of three ways:

- *Mail:* Send written comments to the address listed in the **ADDRESSES** section of this document. Written comments must appear in a minimum 12 point size of type (.17 inches), include the commenter's mailing address, be signed, and may be of any length.
- *Facsimile:* Submit comments by facsimile transmission to (202) 648–9741. Faxed comments must:

(1) Be legible and appear in a minimum 12 point size of type (.17 inches);

(2) Be on 8½″ x 11″ paper;

(3) Contain a legible, written signature; and

(4) Be no more than five pages long. ATF will not accept faxed comments that exceed five pages.

- *Federal eRulemaking Portal:* Submit comments to ATF via the Federal eRulemaking portal by visiting *http://www.regulations.gov* and following the instructions for submitting comments.

Disclosure

Copies of the petition, this advance notice, and the comments received will be available for public inspection by appointment during normal business hours at: ATF Reading Room, Room 1E–063, 99 New York Avenue, NE., Washington, DC 20226; telephone (202) 648–7080.

Drafting Information

The author of this document is Scott P. Armstrong-Cezar; Enforcement Programs and Services; Bureau of Alcohol, Tobacco, Firearms, and Explosives.

List of Subjects in 27 CFR Part 555

Administrative practice and procedure, Authority delegations, Customs duties and inspection, Explosives, Hazardous materials, Imports, Penalties, Reporting and recordkeeping requirements, Safety, Security measures, Seizures and forfeitures, Transportation, and Warehouses.

Authority and Issuance

This notice is issued under the authority of 18 U.S.C. 847.

Approved: September 3, 2010.

Kenneth E. Melson,

Deputy Director.

[FR Doc. 2010–23042 Filed 9–15–10; 8:45 am]

BILLING CODE 4410–FY–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 1060

[EPA–HQ–OAR–2010–0270; FRL–9202–3]

RIN 2060–AQ18

Technical Amendments for Marine Spark-Ignition Engines and Vessels

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: In the final rulemaking for new exhaust and evaporative emissions standards for nonroad spark-ignition engines, vessels, and equipment (73 FR 59034, October 8, 2008), EPA established first-ever evaporative emissions standards for marine vessels. These requirements included portable marine fuel tanks commonly used in recreational boating. During their efforts to certify portable fuel tanks to these new requirements, manufacturers working together on systems integration identified several technical issues with the performance of the tanks/fuel systems in use that were not fully apparent to them before these standards were developed. Systems integration work conducted by the fuel tank, boat and engine manufacturers highlighted that under some circumstances there was the potential for fuel spillage to occur. Work conducted by these parties

indicated that this issue applies to existing systems and tanks as well as those built to comply with EPA's evaporative emission design standard. We have engaged the industry to identify a simple, safe, and emissions neutral solution to this concern. This proposed action represents the results of that work and is emissions neutral with respect to the diurnal emissions standard; however, to the extent that it helps reduce fuel spillage, incorporating safe recommended practices will result in a net benefit to the environment and lead to fuel savings. In the "Rules and Regulations" section of this **Federal Register**, we are making these technical amendments as a direct final rule without a prior proposed rule. If we receive no adverse comment, we will not take further action on this proposed rule.

DATES: Written comments must be received by October 18, 2010.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2010–0270, by mail to Environmental Protection Agency, Air Docket, Mail-code 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Comments may also be submitted electronically or through hand delivery/courier by following the detailed instructions in the **ADDRESSES** section of the direct final rule located in the rules section of this **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Michael Samulski, Environmental Protection Agency, Office of Transportation and Air Quality, Assessment and Standards Division, 2000 Traverwood Drive, Ann Arbor, Michigan 48105; telephone number: 734–214–4532; fax number: 734–214–4050; email address: *samulski.michael@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Why is EPA issuing this proposed rule?

This document proposes to take action on Technical Amendments for Marine Spark-Ignition Engines and Vessels. We have published a direct final rule to modify existing design-based certification requirements to incorporate safe recommended practices, developed through industry consensus, for portable marine fuel tanks in the "Rules and Regulations" section of this **Federal Register** because we view this as a noncontroversial action and anticipate no adverse comment. We have explained our reasons for this action in the preamble to the direct final rule.

If we receive no adverse comment, we will not take further action on this proposed rule. If we receive adverse comment, we will withdraw the direct final rule and it will not take effect. We would address all public comments in any subsequent final rule based on this proposed rule.

We do not intend to institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information, please see the information provided in the **ADDRESSES** section of this document.

II. Does this action apply to me?

This action will affect companies that manufacture and certify portable marine fuel tanks for sale in the United States. The following table gives some examples of entities that may have to follow the regulations; however, since these are only examples, you should carefully examine the proposed regulations. You may direct questions regarding the applicability of this action as noted in **FOR FURTHER INFORMATION CONTACT**.

Category	NAICS codes[a]	SIC codes[b]	Examples of potentially regulated entities
Industry	333618	3519	Manufacturers of new engines.
Industry	336612	3731, 3732	Manufacturers of marine vessels.

[a] North American Industry Classification System (NAICS).
[b] Standard Industrial Classification (SIC) system code.

III. Summary of Rule

In the final rulemaking for new exhaust and evaporative emissions standards for nonroad spark-ignition engines, vessels, and equipment (73 FR 59034, October 8, 2008), EPA established first-ever evaporative emissions standards for marine vessels. These requirements included portable marine fuel tanks specifically designed for and commonly used in recreational boating, which are normally used to power gasoline outboard engines. During their efforts to certify portable fuel tanks to these new requirements, manufacturers working together on systems integration identified several technical issues with the performance of the tanks/fuel systems in use that were not fully apparent to them before these standards were developed. Systems integration work conducted by the fuel tank, boat and engine manufacturers highlighted that under some circumstances there was the potential for fuel spillage to occur. Work conducted by these parties indicated that this issue applies to existing fuel systems and tanks as well as those built to comply with EPA's evaporative emission design standard. We have engaged the industry to identify a simple, safe, and emissions neutral solution to this concern. This action is emissions neutral with respect to the diurnal emissions standard; however, to the extent that it helps reduce fuel spillage, incorporating safe recommended practices will result in a net benefit to the environment and lead to fuel savings.

EPA is proposing to make technical amendments to the design standard for portable tanks that will allow for this solution. Specifically, we are proposing to revise the text in § 1060.105(c)(1) to allow for an integrated or external manually activated device to be included in the fuel tank design to temporarily relieve pressure prior to fuel filling or connection to the engine.

In addition, we are proposing to incorporate safe recommended practices, developed through industry consensus, for portable marine fuel tanks. Specifically, we are proposing to reference the ABYC H25 pressure relief method system testing and informational (e.g. labeling) provisions into our regulations.[1]

EPA does not expect that this action would have an adverse cost impact to the manufacturers beyond that envisioned in the original rule. This proposed rule would merely modify existing design-based certification requirements to incorporate safe recommended practices, developed through industry consensus, for portable marine fuel tanks. Adopting these amendments would lead to environmental, cost, and safety benefits through reduced fuel spillage.

[1] American Boat and Yacht Council (ABYC), "ABYC H–25: Portable Marine Gasoline Fuel Systems," July, 2010.

For additional discussion of the proposed rule changes, see the direct final rule EPA has published in the "Rules and Regulations" section of today's **Federal Register**. This proposal incorporates by reference all the reasoning, explanation, and regulatory text from the direct final rule.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

This proposed rule is not a "significant regulatory action" under the terms of Executive Order (EO) 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the EO. This proposed rule merely modifies existing design-based certification requirements to incorporate safe recommended practices, developed through industry consensus, for portable marine fuel tanks. There are no costs with this proposed rule beyond those envisioned in the original rule.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b). This proposed rule does not include any new collection requirements, as it would simply modify existing design-based certification requirements to incorporate safe recommended practices, developed through industry consensus, for portable marine fuel tanks. There are no new paperwork requirements associated with this proposed rule.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure 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 proposed rule on small entities, small entity is defined as: (1) A small as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) 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 (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed rule on small entities, EPA has concluded that this proposed rule would not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives "which minimize any significant economic impact of the rule on small entities." 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

This proposed rule would merely modify existing design-based certification requirements to incorporate safe recommended practices, developed through industry consensus, for portable marine fuel tanks. We have therefore concluded that today's final rule will not increase regulatory burden for affected small entities.

D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for State, local, or tribal governments or the private sector. The action imposes no enforceable duty on any State, local or tribal governments or the private sector. Therefore, this action is not subject to the requirements of sections 202 or 205 of the UMRA.

This action 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. This proposed rule would merely modify existing design-based certification requirements to incorporate safe recommended practices, developed through industry consensus, for portable marine fuel tanks.

E. Executive Order 13132: Federalism

This proposed rule does not have federalism implications. It would 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, as specified in Executive Order 13132. This proposed rule would merely modify existing design-based certification requirements to incorporate safe recommended practices, developed through industry consensus, for portable marine fuel tanks. Thus, Executive Order 13132 does not apply to this action.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This proposed rule would merely modify existing design-based certification requirements to incorporate safe recommended practices, developed through industry consensus, for portable marine fuel tanks. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children From Environmental Health 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 in EO 12866, and because the Agency does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. This proposed rule would merely modify existing design-based certification requirements to incorporate safe recommended practices, developed through industry consensus, for portable marine fuel tanks.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer 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 proposed rulemaking involves technical standards. This proposed rule would modify existing design-based certification requirements to incorporate safe recommended practices, developed through industry consensus, for portable marine fuel tanks. Specifically, it incorporates by reference ABYC H–25, "Portable Marine Gasoline Fuel Systems," July, 2010. Anyone may purchase copies of these materials from the American Boat and Yacht Council, 613 Third Street, Suite 10 Annapolis, MD 21403 or *http://www.abycinc.org/.*

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order (EO) 12898 (59 FR 7629 (Feb. 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 proposed rule would 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 without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. This proposed rule would merely modify existing design-based certification requirements to incorporate safe recommended practices, developed through industry consensus, for portable marine fuel tanks.

K. Statutory Authority

The statutory authority for this action comes from section 213 of the Clean Air Act as amended (42 U.S.C. 7547). This action is a rulemaking subject to the provisions of Clean Air Act section 307(d). See 42 U.S.C. 7607(d).

List of Subjects in 40 CFR Part 1060

Environmental protection, Air pollution control, Incorporation by reference, Marine spark-ignition engines and vessels.

Dated: September 9, 2010.

Lisa P. Jackson,

Administrator.

[FR Doc. 2010–23127 Filed 9–15–10; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 54

[WC Docket No. 05–337, CC Docket No. 96–45; FCC 10–155]

High-Cost Universal Service Support and Federal-State Joint Board on Universal Service

AGENCY: Federal Communications Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: In this document, the Federal Communications Commission (Commission) undertakes important steps for fiscally responsible universal service fund reform. The Commission seeks comment on permanently amending our rules to facilitate efficient use of reclaimed excess high-cost support. In addition, the Commission seeks comment on a proposal to modify our rules to reclaim legacy support surrendered by a competitive ETC when it relinquishes ETC status in a particular state.

DATES: Comments on the proposed rules are due on or before October 7, 2010 and reply comments are due on or before October 21, 2010. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: You may submit comments, identified by WC Docket No. 05–337 and CC Docket No. 96–45, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Federal Communications Commission's Web Site: http://fjallfoss.fcc.gov/ecfs2/.* Follow the instructions for submitting comments.
- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: *FCC504@fcc.gov* or phone: (202) 418–0530 or TTY: (202) 418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Ted Burmeister, Wireline Competition Bureau, Telecommunications Access Policy Division, (202) 418–7389 or TTY: (202) 418–0484.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rulemaking in WC Docket No. 05–337, CC Docket No. 96–45, FCC 10–155, adopted August 31, 2010, and released September 3, 2010. This NPRM was also released with a companion Final Rule document that is published elsewhere in this **Federal Register** issue. The complete text of this document is available for inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. The document may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone (800) 378–3160 or (202) 863–2893, facsimile (202) 863–2898, or via the Internet at *http://www.bcpiweb.com.* It is also available on the Commission's Web site at *http://www.fcc.gov.*

Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121, May 1, 1998.

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://www.fcc.gov/cgb/ecfs/* or the Federal eRulemaking Portal: *http://www.regulations.gov.* Filers should follow the instructions provided on the website for submitting comments.
- *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

• All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW., Room TW–A325, Washington, DC 20554. The filing hours are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of *before* entering the building.

• Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

• U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW., Washington, DC 20554.

In addition, one copy of each pleading must be sent to each of the following:

• The Commission's duplicating contractor, Best Copy and Printing, Inc, 445 12th Street, SW., Room CY–B402, Washington, DC 20554; Web site: *http://www.bcpiweb.com;* phone: 1–800–378–3160;

• Theordore Burmeister, Telecommunications, Telecommunications Access Policy Division, Wireline Competition Bureau, 445 12th Street, SW., Room 5–A5360, Washington, DC 20554; e-mail: *Theodore.Burmeister@fcc.gov;* and

• Charles Tyler, Telecommunications Access Policy Division, Wireline Competition Bureau, 445 12th Street, SW., Room 5–A452, Washington, DC 20554; e-mail: *Charles.Tyler@fcc.gov.*

People with Disabilities: To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice) or (202) 418–0432 (TTY). Contact the FCC to request reasonable accommodations for filing comments (accessible format documents, sign language interpreters, CART, etc.) by e-mail: *fcc504@fcc.gov;* phone: (202) 418–0530 or (202) 418–0432 (TTY).

Filings and comments are also available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. Copies may also be purchased from the Commission's duplicating contractor, BCPI, 445 12th Street, SW., Room CY–B402, Washington, DC. 20554. Customers may contact BCPI through its Web site: *http://www.bcpiweb.com,* by e-mail at *fcc@bcpiweb.com,* by telephone at (202) 488–5300 or (800) 378–3160 (voice), (202) 488–5562 (TTY), or by facsimile at (202) 488–5563.

1. In the Order and Notice of Proposed Rulemaking (NPRM), we undertake important steps for fiscally responsible universal service fund reform. Verizon Wireless and Sprint Nextel, in separate transactions in 2008, each committed to surrender their high-cost universal service support over five years, but those commitments have yet to be implemented. Corr Wireless Communications, LLC (Corr Wireless) has asked that any support reclaimed from Verizon Wireless and Sprint Nextel be redistributed to other competitive eligible telecommunications carriers (ETCs).

2. In the NPRM, we seek comment on permanently amending our rules to facilitate efficient use of reclaimed excess high-cost support. In addition, we seek comment on a proposal to modify our rules to reclaim legacy support surrendered by a competitive ETC when it relinquishes ETC status in a particular state.

Synopsis of Notice of Proposed Rulemaking

3. In the NPRM, we seek comment on modifying our rules to better enable the Commission to reclaim certain high-cost support, and to use that support to help fund broadband universal service programs, consistent with the recommendations of the National Broadband Plan. First, we seek comment on amending the interim cap rule so that a state's interim cap amount would be adjusted if a competitive ETC serving the state relinquishes its ETC status. In the *Interim Cap Order,* the Commission capped high-cost support for voice service provided to competitive ETCs serving each state at the level of support such carriers were eligible to receive in March 2008, on an annualized basis. This cap amount does not change even if the number of competitive ETCs serving the state changes. We propose amending the interim cap rule so that, if a competitive ETC relinquishes its ETC status in a state, the cap amount for that state is reduced by the amount of support that the competitive ETC was eligible to receive in its final month of eligibility, annualized.

4. The goal of the *Interim Cap Order* was to rein in high-cost universal service disbursements, and additional support would not necessarily result in future deployment of expanded service. Reducing the total amount of support available to competitive ETCs in a state when a competitive ETC relinquishes its ETC status in that state will not reduce support flowing to any individual competitive ETC. Reducing the pool of support in a state also would enable excess funds from the legacy high-cost program to be used more effectively to advance universal service broadband programs, as recommended by the National Broadband Plan. We invite comment on this proposal.

5. Second, we seek comment on amending § 54.709(b) to permit the Commission to provide the Universal Service Administrative Company (USAC) alternate instructions for implementing prior period adjustments. In the accompanying order, we adopt an interim waiver of § 54.709(b) to enable us to direct USAC to reserve reclaimed funds as we consider broadband universal service reform. Amending the rule as proposed would serve this same purpose, on a permanent basis. In addition, it would enable the Commission to provide USAC with alternate instructions regarding future excess funds in other situations without having to adopt a rule waiver.

6. We seek comment on how to develop a streamlined, administratively workable process for providing such instruction to USAC, if we amended § 54.709(b). We seek comment regarding the form that the instructions must take, including whether the instructions must be provided in an order, public notice, or other form. We also seek comment on a process by which the Wireline Competition Bureau or Office of the Managing Director would issue a public notice providing instruction to USAC that would become effective absent action by the Commission within fourteen days. We note that, for the purpose of calculating the contribution factor, the Commission already has the authority to set demand and administrative expenses at levels other than those shown in USAC's quarterly demand projections. The modification we propose here would permit the Commission, or the Wireline Competition Bureau or Office of the Managing Director on delegated authority, to instruct USAC to modify the prior period adjustments in the quarterly demand projections. We request comment on this proposal.

Procedural Matters

Paperwork Reduction Act

7. This notice of proposed rulemaking does not contain new, modified, or proposed information collections subject to the Paperwork Reduction Act of 1995. In addition, therefore, it does not contain any new, modified, or proposed "information collection burden for small business concerns with fewer than 25 employees" pursuant to

the Small Business Paperwork Relief Act of 2002.

Initial Regulatory Flexibility Analysis

8. As required by the Regulatory Flexibility Act of 1980, as amended, *see* 5 U.S.C. 603, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) for this NPRM, of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this NPRM. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the SBA. In addition, the NPRM and IRFA (or summaries thereof) will be published in the **Federal Register.**

Need for, and Objectives of, the Notice

9. In the NPRM, the Commission seeks comment on a proposal to modify its interim cap on support for competitive eligible telecommunications carriers (ETCs) so that if a competitive ETC relinquishes its ETC status, the amount of support it receives would be removed from the cap amount. The Commission is considering this action so that support removed from the cap may be reserved as a potential down payment on proposed broadband universal service reforms as recommended by the National Broadband Plan, including to index the E-rate funding cap to inflation to enhance broadband opportunities for children, teachers, schools, and libraries; support a Mobility Fund to provide wireless broadband service in areas that lack coverage; improve utilization of the Rural Health Care program to advance telemedicine in rural areas across the country, including Tribal lands; and, in the long term, directly support broadband Internet services for all Americans.

10. The Commission also seeks comment on a proposal to modify its rules governing the calculation of the universal service fund contribution factor. Specifically, we seek comment on amending § 54.709(b) to enable the Commission to provide USAC with alternate direction regarding the application of excess contributions from prior quarters. The current rule requires that excess contributions be applied in the next quarter, effectively reducing the contribution factor in that quarter. In the associated Order, the Commission waives the rule on an interim basis and directs USAC to reserve reclaimed funds as a potential down payment on proposed broadband universal service reforms. In the NPRM, the Commission seeks comment on amending the rule to permit it to do so permanently. In addition, amending the rule as proposed would enable the Commission to provide USAC with alternate instructions regarding future excess funds in other situations without having to adopt a rule waiver.

Legal Basis

11. This legal basis for any action that may be taken pursuant to the NPRM is contained in sections 1, 2, 4(i), 4(j), 201–205, 214, 220, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i), 154(j), 201–205, 214, 220, and 254 and 1.411 of the Commission's rules, 47 CFR 1.411.

Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

12. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules and policies, if adopted. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. A "small business concern" is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

13. *Small Businesses.* Nationwide, there are a total of approximately 29.6 million small businesses, according to the SBA.

14. *Small Organizations.* Nationwide, as of 2002, there are approximately 1.6 million small organizations. A "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."

15. *Small Governmental Jurisdictions.* The term "small governmental jurisdiction" is defined generally as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand." Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States. We estimate that, of this total, 84,377 entities were "small governmental jurisdictions." Thus, we estimate that most governmental jurisdictions are small.

16. We have included small incumbent local exchange carriers in this present RFA analysis. As noted above, a "small business" under the RFA is one that, inter alia, meets the pertinent small business size standard (*e.g.,* a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation." The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope. We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

17. *Competitive Local Exchange Carriers ("CLECs"), Competitive Access Providers ("CAPs"), "Shared-Tenant Service Providers," and "Other Local Service Providers."* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 1005 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 1005 carriers, an estimated 918 have 1,500 or fewer employees and 87 have more than 1,500 employees. In addition, 16 carriers have reported that they are "Shared-Tenant Service Providers," and all 16 are estimated to have 1,500 or fewer employees. In addition, 89 carriers have reported that they are "Other Local Service Providers." Of the 89, all have 1,500 or fewer employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities that may be affected by our action.

18. *Wireless Telecommunications Carriers (except Satellite).* Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category. Prior to that time, such firms were within the now-superseded categories of "Paging" and "Cellular and Other Wireless Telecommunications."

Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees. Because Census Bureau data are not yet available for the new category, we will estimate small business prevalence using the prior categories and associated data. For the category of Paging, data for 2002 show that there were 807 firms that operated for the entire year. Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more. For the category of Cellular and Other Wireless Telecommunications, data for 2002 show that there were 1,397 firms that operated for the entire year. Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more. Thus, we estimate that the majority of wireless firms are small.

19. *2.3 GHz Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined "small business" for the wireless communications services ("WCS") auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a "very small business" as an entity with average gross revenues of $15 million for each of the three preceding years. The SBA has approved these definitions. The Commission auctioned geographic area licenses in the WCS service. In the auction, which was conducted in 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity.

20. *1670–1675 MHz Services.* An auction for one license in the 1670–1675 MHz band was conducted in 2003. One license was awarded. The winning bidder was not a small entity.

21. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. As noted, the SBA has developed a small business size standard for Wireless Telecommunications Carriers (except Satellite). Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees. According to *Trends in Telephone Service* data, 434 carriers reported that they were engaged in wireless telephony. Of these, an estimated 222 have 1,500 or fewer employees and 212 have more than 1,500 employees. We have estimated that 222 of these are small under the SBA small business size standard.

22. *Broadband Personal Communications Service.* The broadband personal communications services ("PCS") spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years. For Block F, an additional small business size standard for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA. No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 "small" and "very small" business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F. In 1999, the Commission reauctioned 155 C, D, E, and F Block licenses; there were 113 small business winning bidders.

23. In 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction 35. Of the 35 winning bidders in this auction, 29 qualified as "small" or "very small" businesses. Subsequent events, concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. In 2005, the Commission completed an auction of 188 C block licenses and 21 F block licenses in Auction 58. There were 24 winning bidders for 217 licenses. Of the 24 winning bidders, 16 claimed small business status and won 156 licenses. In 2007, the Commission completed an auction of 33 licenses in the A, C, and F Blocks in Auction 71. Of the 14 winning bidders, six were designated entities. In 2008, the Commission completed an auction of 20 Broadband PCS licenses in the C, D, E and F block licenses in Auction 78.

24. *Advanced Wireless Services.* In 2008, the Commission conducted the auction of Advanced Wireless Services ("AWS") licenses. This auction, which as designated as Auction 78, offered 35 licenses in the AWS 1710–1755 MHz and 2110–2155 MHz bands ("AWS–1"). The AWS–1 licenses were licenses for which there were no winning bids in Auction 66. That same year, the Commission completed Auction 78. A bidder with attributed average annual gross revenues that exceeded $15 million and did not exceed $40 million for the preceding three years ("small business") received a 15 percent discount on its winning bid. A bidder with attributed average annual gross revenues that did not exceed $15 million for the preceding three years ("very small business") received a 25 percent discount on its winning bid. A bidder that had combined total assets of less than $500 million and combined gross revenues of less than $125 million in each of the last two years qualified for entrepreneur status. Four winning bidders that identified themselves as very small businesses won 17 licenses. Three of the winning bidders that identified themselves as a small business won five licenses. Additionally, one other winning bidder that qualified for entrepreneur status won 2 licenses.

25. *700 MHz Band Licenses.* The Commission previously adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. The Commission defined a "small business" as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years. A "very small business" is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. Additionally, the lower 700 MHz Service had a third category of small business status for Metropolitan/Rural Service Area ("MSA/RSA") licenses. The third category is "entrepreneur," which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. The SBA approved these small size standards. The Commission conducted an auction in 2002 of 740 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)). Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses. The Commission conducted a second auction in 2003 that included 256 licenses: 5 EAG licenses and 476 Cellular Market Area licenses. Seventeen winning bidders claimed

small or very small business status and won 60 licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses. In 2005, the Commission completed an auction of 5 licenses in the lower 700 MHz band (Auction 60). There were three winning bidders for five licenses. All three winning bidders claimed small business status.

26. In 2007, the Commission adopted the *700 MHz Second Report and Order.* The *Order* revised the band plan for the commercial (including Guard Band) and public safety spectrum, adopted services rules, including stringent build-out requirements, an open platform requirement on the C Block, and a requirement on the D Block licensee to construct and operate a nationwide, interoperable wireless broadband network for public safety users. In 2008, the Commission commenced Auction 73 which offered all available, commercial 700 MHz Band licenses (1,099 licenses) for bidding using the Commission's standard simultaneous multiple-round ("SMR") auction format for the A, B, D, and E block licenses and an SMR auction design with hierarchical package bidding ("HPB") for the C Block licenses. Later in 2008, the Commission concluded Auction 73. A bidder with attributed average annual gross revenues that did not exceed $15 million for the preceding three years (very small business) qualified for a 25 percent discount on its winning bids. A bidder with attributed average annual gross revenues that exceeded $15 million, but did not exceed $40 million for the preceding three years, qualified for a 15 percent discount on its winning bids. There were 36 winning bidders (who won 330 of the 1,090 licenses won) that identified themselves as very small businesses. There were 20 winning bidders that identified themselves as a small business that won 49 of the 1,090 licenses won. The provisionally winning bids for the A, B, C, and E Block licenses exceeded the aggregate reserve prices for those blocks. However, the provisionally winning bid for the D Block license did not meet the applicable reserve price and thus did not become a winning bid.

27. *700 MHz Guard Band Licenses.* In the 700 MHz Guard Band Order, the Commission adopted size standards for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years. Additionally, a very small business is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. SBA approval of these definitions is not required. In 2000, the Commission conducted an auction of 52 Major Economic Area ("MEA") licenses. Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced and closed in 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.

28. *Specialized Mobile Radio.* The Commission awards "small entity" bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than $15 million in each of the three previous calendar years. The Commission awards "very small entity" bidding credits to firms that had revenues of no more than $3 million in each of the three previous calendar years. The SBA has approved these small business size standards for the 900 MHz Service. The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction was completed in 1996. Sixty bidders claiming that they qualified as small businesses under the $15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels was conducted in 1997. Ten bidders claiming that they qualified as small businesses under the $15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band. A second auction for the 800 MHz band was conducted in 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses. The auction of the 1,053 800 MHz SMR geographic area licenses for the General Category channels was conducted in 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the $15 million size standard. In an auction completed in 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were awarded. Of the 22 winning bidders, 19 claimed small business status and won 129 licenses. Thus, combining all three auctions, 40 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small business.

29. In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. In addition, we do not know how many of these firms have 1500 or fewer employees. We assume, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is approved by the SBA.

30. *Cellular Radiotelephone Service.* Auction 77 was held to resolve one group of mutually exclusive applications for Cellular Radiotelephone Service licenses for unserved areas in New Mexico. Bidding credits for designated entities were not available in Auction 77. In 2008, the Commission completed the closed auction of one unserved service area in the Cellular Radiotelephone Service, designated as Auction 77. Auction 77 concluded with one provisionally winning bid for the unserved area totaling $25,002.

31. *Private Land Mobile Radio ("PLMR").* PLMR systems serve an essential role in a range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories, and are often used in support of the licensee's primary (non-telecommunications) business operations. For the purpose of determining whether a licensee of a PLMR system is a small business as defined by the SBA, we use the broad census category, Wireless Telecommunications Carriers (except Satellite). This definition provides that a small entity is any such entity employing no more than 1,500 persons. The Commission does not require PLMR licensees to disclose information about number of employees, so the Commission does not have information that could be used to determine how many PLMR licensees constitute small entities under this definition. We note that PLMR licensees generally use the licensed facilities in support of other business activities, and therefore, it would also be helpful to assess PLMR licensees under the standards applied to the particular industry subsector to which the licensee belongs.

32. As of March 2010, there were 424,162 PLMR licensees operating 921,909 transmitters in the PLMR bands below 512 MHz. We note that any entity engaged in a commercial activity is eligible to hold a PLMR license, and that any revised rules in this context could therefore potentially impact small entities covering a great variety of industries.

33. *Rural Radiotelephone Service.* The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service. A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System ("BETRS"). In the present context, we will use the SBA's small business size standard applicable to Wireless Telecommunications Carriers (except Satellite), *i.e.,* an entity employing no more than 1,500 persons. There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies proposed herein.

34. *1.4 GHz Band Licensees.* The Commission conducted an auction of 64 1.4 GHz band licenses in 2007. In that auction, the Commission defined "small business" as an entity that, together with its affiliates and controlling interests, had average gross revenues that exceed $15 million but do not exceed $40 million for the preceding three years, and a "very small business" as an entity that, together with its affiliates and controlling interests, has had average annual gross revenues not exceeding $15 million for the preceding three years. Neither of the two winning bidders sought such designated entity status.

Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

35. The NPRM does not propose any reporting, recordkeeping, or other compliance requirements.

Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

36. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its approach, which may include the following four alternatives, among others: (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

37. The NPRM proposes reducing the size of the interim cap on competitive ETC support when any competitive ETC relinquishes its ETC designation. Under certain circumstances, this may have a significant economic impact on other competitive ETCs that are small entities. For example, as described in footnote 31 of the Order, the reduction in size of a state interim cap amount could negatively affect a competitive ETC that is a small entity if another competitive ETC is later designated and receives a share of the smaller interim cap amount. While the designation of another competitive ETC would have an impact on the support received by the small entity even without the adoption of the proposed rule, the proposed rule could magnify that impact. The Commission is seeking comment on this rule, in part to consider its necessity and any alternatives. Because, however, the purpose of the proposed rule is to reduce the amount of high-cost universal service support received by competitive ETCs, it is not likely that a significant alternative could be chosen that would minimize the effect of the proposed rule if it is, in fact, adopted.

38. The NPRM also seeks comment on a proposed rule that would give the Commission the ability to provide the universal service administrator alternate instructions with regard to the use of extra or unused funds. The current rules require that the administrator use such funds to reduce the need for universal service contributions in the next quarter. The proposed rule would permit the Commission to instruct the administrator to reserve the funds for later use. Because the later use of the funds would also require universal service contributions, the overall effect of this proposed rule would be to shift the time of the contributions' collection, not to change the long-term amount contributed. Accordingly, we do not believe there is a significant economic impact, on small entities or otherwise, associated with this proposed rule.

Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

39. None.

Ex Parte Presentations

40. This proceeding shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. Other requirements pertaining to oral and written presentations are set forth in § 1.1206(b) of the Commission's rules.

Comment Filing Procedures

41. Pursuant to §§ 1.415 and 1.419 of the Commission's rules, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS); (2) the Federal Government's eRulemaking Portal; or (3) by filing paper copies.

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://www.fcc.gov/cgb/ecfs/* or the Federal eRulemaking Portal: *http://www.regulations.gov.* Filers should follow the instructions provided on the Web site for submitting comments.
- For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to *ecfs@fcc.gov,* and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.
- *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.
- Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

• All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW., Room TW–A325, Washington, DC 20554. The filing hours are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of *before* entering the building.

• Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

• U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW., Washington, DC 20554.

42. In addition, one copy of each pleading must be sent to the Commission's duplicating contractor, Best Copy and Printing, Inc, 445 12th Street, SW., Room CY–B402, Washington, DC 20554; website: www.bcpiweb.com; phone: 1–800–378–3160. Furthermore, three copies of each pleading must be sent to Charles Tyler, Telecommunications Access Policy Division, Wireline Competition Bureau, 445 12th Street, SW., Room 5–A452, Washington, DC 20554; e-mail: *Charles.Tyler@fcc.gov.*

43. Filings and comments are also available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC, 20554. Copies may also be purchased from the Commission's duplicating contractor, BCPI, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. Customers may contact BCPI through its website: www.bcpiweb.com, by e-mail at *fcc@bcpiweb.com,* by telephone at (202) 488–5300 or (800) 378–3160 (voice), (202) 488–5562 (tty), or by facsimile at (202) 488–5563.

44. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice) or (202) 418–0432 (TTY). Contact the FCC to request reasonable accommodations for filing comments (accessible format documents, sign language interpreters, CART, etc.) by e-mail: FCC504@fcc.gov; phone: (202) 418–0530 or TTY: (202) 418–0432.

45. For further information regarding this proceeding, contact Ted Burmeister, Attorney Advisor, Telecommunications Access Policy Division, Wireline Competition Bureau at (202) 418–7389, or *Theodore.Burmeister@fcc.gov.*

List of Subjects in 47 CFR Part 54

Communications common carriers, Health facilities, Infants and children, Libraries, Reporting and recordkeeping requirements, Schools, Telecommunications, Telephone.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 54 as follows:

PART 54—UNIVERSAL SERVICE

1. The authority citation for part 54 continues to read as follows:

Authority: 47 U.S.C. 151, 154(i), 201, 205, 214, and 254 unless otherwise noted.

2. Section 54.709 is amended by revising paragraph (b) to read as follows:

§ 54.709 Computations of required contributions to universal service support mechanisms.

* * * * *

(b) If the contributions received by the Administrator in a quarter exceed the amount of universal service support program contributions and administrative costs for that quarter, the excess payments will be carried forward to the following quarter, unless otherwise instructed by the Commission. The contribution factors for the following quarter will take into consideration the projected costs of the support mechanisms for that quarter and the excess contributions carried over from the previous quarter.

* * * * *

[FR Doc. 2010–23162 Filed 9–15–10; 8:45 am]

BILLING CODE 6712–01–P

Notices

Federal Register

Vol. 75, No. 179

Thursday, September 16, 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

Forest Service

Information Collection; Land Management Agency Volunteer Surveys

AGENCY: Forest Service, USDA.

ACTION: Notice; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Forest Service is seeking comments from all interested individuals and organizations on the new information collection, the Land Management Agency Volunteer Surveys.

DATES: Comments must be received in writing on or before November 15, 2010 to be assured of consideration. Comments received after that date will be considered to the extent practicable.

ADDRESSES: Comments concerning this notice should be addressed to James Absher, Forest Service, U.S. Department of Agriculture, 4955 Canyon Crest Drive, Riverside, CA 92507. Comments also may be submitted via e-mail to: *jabsher@fs.fed.us.*

The public may inspect comments received at Forest Service Reception, 4955 Canyon Crest Drive, Riverside, CA during normal business hours. Visitors are encouraged to call ahead to 951–680–1500 to facilitate entry to the building.

FOR FURTHER INFORMATION CONTACT: James Absher, Pacific Southwest Research Station at 951–680–1500. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339, between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Title: Land Management Agency Volunteer Surveys.

OMB Number: 0596–New.

Type of Request: New.

Abstract: The Forest Service, U.S. Department of Agriculture, and contracted researchers will contact individuals who currently volunteer, or have recently volunteered, for selected natural resource (land) management agencies (LMA). Through a short Web-based survey, respondents will provide information regarding how often and why they volunteer, the positive and negative aspects of that experience, and basic socio-demographics. The results of this information collection will help researchers and managers improve their ability to provide land management services to the public, as well as strengthen volunteers' experiences at their respective agencies.

Participation in the survey will be strictly voluntary. If necessary, respondents will be allowed to answer via postal mail at their convenience. A Forest Service researcher, agency technician, or a contracted researcher will collect and analyze the data.

Additionally, in order to ensure anonymity, personal information will not be stored with contact information at any time, and contact information will be purged from researcher files once data collection is complete.

Responses will be used to assess volunteers' experience with agencies that have a land management function such as parks, forests, recreation areas, or wildlife refuges. Although an abundance of research exists regarding volunteering in general, there is very little rigorous, academic research on volunteering as it applies to LMAs, largely because there is no reliable, uniform, and comprehensive data available. Further, it is unknown whether the findings emerging from other studies of volunteerism are applicable in the context of LMAs. Because of the enormous role that volunteers play in the operations of LMAs, clarity and insight into volunteer characteristics and experiences is imperative. Ultimately, findings will help researchers and resource managers determine the best ways to involve, retain, and manage volunteers.

The primary beneficiaries of results from these surveys will be LMAs, such as the Forest Service, and other agencies at all levels of government that are concerned with enjoyment, preservation, and advancement of our natural resources. These results will be particularly important to LMAs because recently these agencies have become heavily dependent on volunteer support.

Without the proposed information collection, managers of volunteers in LMAs will continue to rely upon anecdotal or unreliable information, which may perpetuate poor volunteer recruitment, retention, and satisfaction. The information collected will help researchers develop and test models of volunteer management; supply information to LMA program managers and other voluntary action managers who are focusing their own work on natural resource management values and objectives; and will facilitate further application of findings. The exact number of respondents will be dependent upon the number of agencies that choose to participate. Volunteers from up to ten different agencies, or sub-units of those agencies, per year will be selected to participate. Each will be allocated 200–600 surveys, for a maximum of 4,000 completed surveys per year for the project as a whole.

Estimate of Annual Burden: 20 minutes.

Type of Respondents: Individuals who currently volunteer, or who have recently volunteered, for a natural resources (land) management agency, age 18 or older.

Estimated Annual Number of Respondents: 4,000.

Estimated Annual Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 1,333 hours.

Comment is Invited:

Comment is invited on: (1) Whether this collection of information is necessary for the stated purposes and the proper performance of the functions of the Agency, including whether the information will have practical or scientific utility; (2) the accuracy of the Agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All comments received in response to this notice, including names and

addresses when provided, will be a matter of public record. Comments will be summarized and included in the submission request toward Office of Management and Budget approval.

Dated: September 10, 2010.

Carlos Rodriguez-Franco,

Acting Deputy Chief, Research and Development.

[FR Doc. 2010–23122 Filed 9–15–10; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. FSIS–2010–0030]

National Advisory Committee on Meat and Poultry Inspection

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice of public meeting.

SUMMARY: The Food Safety and Inspection Service (FSIS) is announcing, pursuant to the Federal Advisory Committee Act, 5 U.S.C. App. 2, that the National Advisory Committee on Meat and Poultry Inspection (NACMPI) will hold a public meeting on September 29–30, 2010, to review and discuss issues relating to data analysis, collection, and transparency, and pre-harvest controls.

All issues will be presented to the full Committee. The Committee will then divide into subcommittees to discuss the issues. The subcommittees will provide a report of their comments and recommendations to the full Committee before the meeting concludes on September 30, 2010.

DATES: The Committee will hold a public meeting on Wednesday, September 29, 2010, from 12:30 p.m. to 5 p.m., and Thursday, September 30, 2010, from 9 a.m. to 3:30 p.m. The subcommittees will hold open meetings during their deliberations and report preparation.

ADDRESSES: The meeting will take place at the South Building Cafeteria, U.S. Department of Agriculture (USDA), 14th & Independence Avenue, SW., Washington, DC 20250. Non-USDA employees must enter through wing 2, located on 12th and C Street, SW. More information is available on the Internet at the NACMPI Web site, *http://www.fsis.usda.gov/about_fsis/nacmpi/index.asp.*

FSIS welcomes comments by October 18, 2010 on the topics discussed at the NACMPI public meeting. Comments may be submitted by any of the following methods:

- Electronic mail: *NACMPI@fsis.usda.gov.*
- Mail, including floppy disks or CD–ROMs: Send to National Advisory Committee on Meat and Poultry Inspection, USDA, FSIS, 14th & Independence Avenue, SW., Room 1180, South Building, Washington, DC 20250.
- Hand- or courier-delivered items: Deliver to Tiffanie Newman at 14th & Independence Avenue, SW., Room 1180, South Building, Washington, DC. To deliver these items, the building security guard must first call (202) 720–9113.
- Facsimile: Send to Tiffanie Newman, (202) 720–5704. All submissions received must include the Agency name and docket number FSIS–2010–0030.

FOR FURTHER INFORMATION CONTACT: Contact Josh Stull for information on the content of the meeting at (202) 720–9113, or e-mail *josh.stull@fsis.usda.gov,* and Tiffanie Newman for general meeting and logistical information at (202) 720–9113 or e-mail *tiffanie.newman@fsis.usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

The NACMPI provides advice and recommendations to the Secretary of Agriculture pertaining to the Federal and State meat and poultry inspection programs, pursuant to sections 7(c), 24, 205, 301(a)(3), 301(a)(4), and 301(c) of the Federal Meat Inspection Act (21 U.S.C. 607(c), 624, 645, 661(a)(3), 661(a)(4), and 661(c)) and sections 5(a)(3), 5(a)(4), 5(c), 8(b), and 11(e) of the Poultry Products Inspection Act (21 U.S.C. 454(a)(3), 454(a)(4), 454(c), 457(b), and 460(e)).

The Administrator of FSIS is the chairperson of the Committee. Membership of the Committee is drawn from representatives of consumer groups; producers, processors, and marketers from the meat, poultry and egg product industries; State and local government officials; and academia. The current members of the NACMPI are: Patricia K. Buck, Center for Foodborne Illness Research and Prevention; Dr. Fur-Chi Chen, Tennessee State University; Brian R. Covington, Keystone Foods LLC; Dr. Catherine N. Cutter, Pennsylvania State University; Nancy J. Donley, Safe Tables Our Priority; Veneranda Gapud, private individual; Dr. Craig Henry, Deloitte & Touche LLP; Dr. Cheryl D. Jones, Morehouse School of Medicine; Dr. Heidi Kassenborg, Minnesota Department of Agriculture; Sarah A. Klein, Center for Science in the Public Interest; Dr. Shelton E. Murinda, California State Polytechnic University; Dr. Edna Negrón, University of Puerto Rico; Robert G. Reinhard, Sara Lee Corporation; Dr. Craig E. Shultz, Pennsylvania Department of Agriculture; Dr. Stanley A. Stromberg, Oklahoma Department of Agriculture, Food, and Forestry; Dr. John D. Tilden, Michigan Department of Agriculture; Carol L. Tucker-Foreman, Consumer Federation of America; Steve E. Warshawer, Mesa Top Farm; Dr. J. Byron Williams, Mississippi State University; and Leonard W. Winchester, Public Health—Seattle & King County.

All interested parties are welcome to attend the meeting and to submit written comments and suggestions concerning issues the Committee will review and discuss. The meeting agenda and topics to be discussed will be posted on FSIS's NACMPI Web site, *http://www.fsis.usda.gov/about_fsis/nacmpi/index.asp.*

The comments and the official transcript of the meeting, when they become available, will be kept in the FSIS Docket Room, USDA, FSIS, Room 2–2175, George Washington Carver Center, 5601 Sunnyside Avenue, Beltsville, MD 20705, Mailstop 5272, and posted on the Agency's NACMPI Web site.

Members of the public are encouraged to pre-register for the meeting by visiting the FSIS Web site: *http://www.fsis.usda.gov.*

USDA Nondiscrimination Statement

USDA prohibits discrimination in all its programs and activities on the basis of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, and marital or family status. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, *etc.*) should contact USDA's Target Center at 202–720–2600 (voice and TTY).

To file a written complaint of discrimination, write USDA, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue, SW., Washington, DC 20250–9410 or call 202–720–5964 (voice and TTY). USDA is an equal opportunity provider and employer.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, in an effort to ensure that the public and in particular minorities, women, and persons with disabilities, are aware of this notice, FSIS will announce it on-line through

the FSIS Web page located at *http://www.fsis.usda.gov/regulations/2010_Notices_Index/*.

FSIS also will make copies of this **Federal Register** publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to our constituents and stakeholders. The Update is communicated via Listserv, a free e-mail subscription service consisting of industry, trade, and farm groups, consumer interest groups, allied health professionals, scientific professionals, and other individuals who have requested to be included. The Update also is available on the FSIS Web page. Through Listserv and the Web page, FSIS is able to provide information to a much broader, more diverse audience. In addition, FSIS offers an e-mail subscription service which provides automatic and customized access to selected food safety news and information. This service is available at *http://www.fsis.usda.gov/News_&_Events/Email_Subscription/*.

Options range from recalls, export information, regulations, directives, and notices. Customers can add or delete subscriptions themselves, and have the option to password protect their accounts.

Done at Washington, DC, on September 14, 2010.

Alfred V. Almanza,

Administrator.

[FR Doc. 2010–23255 Filed 9–14–10; 4:15 pm]

BILLING CODE 3410–DM–P

COMMISSION ON CIVIL RIGHTS

Corrected Notice of Public Meeting of the New Hampshire Advisory Committee

SUMMARY: On September 7, 2010 (75 FR 54299), the Commission on Civil Rights announced September 21, 2010 as the meeting date for a planning and briefing meeting of the New Hampshire State Advisory Committee.

The date and starting times for these meetings are changed to Monday, September 20, 2010. The meetings will convene at 9 a.m. at the Manchester City Library, 405 Pine Street, Manchester, NH 03104.

The meetings are open to the public.

Peter Minarik,

Acting Chief, Regional Programs Coordination Unit.

[FR Doc. 2010–23121 Filed 9–15–10; 8:45 am]

BILLING CODE 6335–01–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: Socio-Economic Assessment of Gulf of Mexico Fisheries under the Limited Access Privilege Program.

OMB Control Number: None.

Form Number(s): NA.

Type of Request: Regular submission (new information collection).

Number of Respondents: 400.

Average Hours per Response: 1 hour.

Burden Hours: 400.

Needs and Uses: The National Marine Fisheries Service (NMFS) proposes to collect demographic, cultural, economic and social information about Gulf of Mexico fisheries managed under the limited access privilege program (LAPP). The collection also intends to inquire about the industry's perceptions, attitudes and beliefs about the performance of the LAPP. The data gathered will be used to describe the social and economic changes brought about by the LAPP, assess the economic performance of the industry under the LAPP, and evaluate the socio-economic impacts of future federal regulatory actions. In addition, the information will be used to strengthen and improve fishery management decision-making, satisfy legal mandates under Executive Order 12866, the Magnuson-Stevens Fishery Conservation and Management Act (U.S.C. 1801 *et seq.*), the Regulatory Flexibility Act, the Endangered Species Act, the National Environmental Policy Act, and other pertinent statues.

Affected Public: Business or other for-profit organizations.

Frequency: One time.

Respondent's Obligation: Voluntary.

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: September 10, 2010.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2010–23043 Filed 9–15–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Membership of the Departmental Performance Review Board

AGENCY: Department of Commerce.

ACTION: Notice of Membership on the Departmental Performance Review Board.

SUMMARY: In accordance with 5 U.S.C., 4314 (c)(4), Department of Commerce (DOC) announces the appointment of persons to serve as members of the Departmental Performance Review Board (DPRB). The DPRB provides an objective peer review of the initial performance ratings, performance-based pay adjustments and bonus recommendations, higher-level review requests and other performance-related actions submitted by appointing authorities for Senior Executive Service (SES) members whom they directly supervise, and makes recommendations based upon its review. The term of the new members of the DPRB will expire December 31, 2012.

DATES: *Effective Date:* The effective date of service of appointees to the Departmental Performance Review Board is based upon publication of this notice.

FOR FURTHER INFORMATION CONTACT: Denise A. Yang, Director, Office of Executive Resources, Office of Human Resources Management, Office of the Director, 14th and Constitution Avenue, NW., Washington, DC 20230, (202) 482–3600.

SUPPLEMENTARY INFORMATION: The names and position titles of the members of the DPRB are set forth below by organization:

Department of Commerce

Departmental Performance Review Board Membership

2010–2012

Office of the Secretary:

John C. Connor, Director, Office of White House Liaison
Tene A. Dolphin, Director, Executive Secretariat
Frederick C. Siger, Chief of Staff to the Deputy Secretary
Travis J. Sullivan, Director, Office of Policy and Strategic Planning

Office of General Counsel:

Michael A. Levitt, Assistant General Counsel for Legislation and Regulation
Barbara S. Fredericks, Assistant General Counsel for Administration
Geovette E. Washington, Deputy General Counsel

Chief Financial Officer and Assistant Secretary for Administration:

William J. Fleming, Deputy Director for Human Resources Management
Office of the Chief Information Officer
Earl B. Neal, Director of Information Technology, Security, Infrastructure and Technology

Bureau of Industry and Security:

Gay G. Shrum, Director of Administration

Bureau of the Census:

Arnold A. Jackson, Associate Director for Decennial Census

Economics and Statistics Administration:

Nancy Potok, Deputy Under Secretary for Economic Affairs
James K. White, Associate Under Secretary for Management

Economics and Development Administration:

Brian P. McGowan, Deputy Assistant Secretary for Economic Development
Sandra Walters, Chief Financial Officer and Director of Administration

International Trade Administration:

Michelle O'Neill, Deputy Under Secretary for International Trade
Stephen P. Jacobs, Deputy Assistant Secretary for Market Access and Compliance
Theodore C.Z. Johnston, Chief of Staff for ITA

Minority Business Development Agency:

Alejandra Y. Castillo, Deputy Director
Edith J. McCloud, Associate Director for Management

National Oceanic and Atmospheric Administration:

Robert J. Byrd, Chief Financial Officer/Chief Administrative Officer, NWS
Joseph F. Klimavicz, Chief Information Officer and Director of High Performance Computing and Communications
Maureen Wylie, Chief Financial Officer, NOAA
Kathleen A. Kelly, Director, Office of Satellite Operations, NESDIS

National Technical Information Service:

Bruce E. Borzino, Director, National Technical Information Service

National Telecommunications and Information Administration:

Anna M. Gomez, Deputy Assistant Secretary for Communications and Information
Daniel C. Hurley, Director, Communications and Information Infrastructure Assurance Program

National Institute of Standards and Technology:

Richard F. Kayser, Jr., Special Assistant for Environment, Safety and Health

Dated: September 8, 2010.

Denise A. Yaag,

Director, Office of Executive Resources.

[FR Doc. 2010–22874 Filed 9–15–10; 8:45 am]

BILLING CODE 3510–BS–M

DEPARTMENT OF COMMERCE

Membership of the Office of the Secretary Performance Review Board

AGENCY: Department of Commerce.

ACTION: Notice of Membership on the Office of the Secretary Performance Review Board.

SUMMARY: In accordance with 5 U.S.C., 4314(c)(4), Department of Commerce (DOC) announces the appointment of persons to serve as members of the Office of the Secretary (OS) Performance Review Board (PRB). The OS PRB is responsible for reviewing performance ratings, pay adjustments and bonuses of Senior Executive Service (SES) members. The term of the new members of the OS PRB will expire December 31, 2012.

DATES: *Effective Date:* The effective date of service of appointees to the Office of the Secretary Performance Review Board is upon publication of this notice.

FOR FURTHER INFORMATION CONTACT: Denise A. Yaag, Director, Office of Executive Resources, Office of Human Resources Management, Office of the Director, 14th and Constitution Avenue, NW., Washington, DC 20230, (202) 482–3600.

SUPPLEMENTARY INFORMATION: The names, position titles, and type of appointment of the members of the OS/PRE are set forth below by organization:

Department of Commerce, Office of the Secretary, 2010–2012, Performance Review Board Membership.

Office of the Secretary

Tene A. Dolphin, Director, Executive Secretariat;
Earl B. Neal, Director, Office of Information Technology, Security, Infrastructure, and Technology;
Travis J. Sullivan, Director, Office of Policy and Strategic Planning.

Office of Assistant Secretary for Administration

Suzan J. Aramaki, Director, Office of Civil Rights;
Alfred J. Broadbent, Director, Office of Security.

National Institute of Standards and Technology

Michael V. Culpepper, Chief Human Capitol Officer for NIST.

National Oceanic and Atmospheric Administration

Jane H. Chalmers, Deputy General Counsel for NOAA.

Office of the General Counsel

Michael A. Levitt, Assistant General Counsel for Legislation and Regulation;
Barbara S. Fredericks, Assistant General Counsel for Administration (Alternate).

Dated: September 8, 2010.

Denise A. Yaag,

Director, Office of Executive Resources.

[FR Doc. 2010–22873 Filed 9–15–10; 8:45 am]

BILLING CODE 3510–BS–M

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Action Affecting Export Privileges; Rigel Optics, Inc. and Donald Wayne Hatch; Order Denying Export Privileges

In the Matter of: Rigel Optics, Inc., 477 South 28th Street, Suite #3, Washougal, WA 98607, Respondent; Donald Wayne Hatch, 2602 NW 35th Circle, Camas, WA 98607, Related Person.

A. Denial of Export Privileges of Rigel Optics, Inc.

On May 12, 2009, in the U.S. District Court for the Southern District of Iowa, Rigel Optics, Inc. ("Rigel Optics") pled guilty to, and was convicted of, violating Section 38 of the Arms Export Control Act (22 U.S.C. 2778 (2000)) ("AECA"). Specifically, Rigel Optics pled guilty to knowingly and willfully exporting and causing to be exported from the United States to Italy Rigel 3502 Gen 2+ Night Vision Goggles, which were designated as a defense

article on the United States Munitions List, without having first obtained from the Department of State a license for such export or written authorization for such export. Rigel Optics was ordered to pay a $90,000 criminal fine and a $400.00 special assessment. Rigel Optics is also listed on the Department of State's Debarred List.

Section 766.25 of the Export Administration Regulations ("EAR" or "Regulations")[1] provides, in pertinent part, that "[t]he Director of the Office of Exporter Services, in consultation with the Director of the Office of Export Enforcement, may deny the export privileges of any person who has been convicted of a violation of the [Export Administration Act ("EAA")], the EAR, of any order, license or authorization issued thereunder; any regulation, license, or order issued under the International Emergency Economic Powers Act (50 U.S.C. 1701–1706); 18 U.S.C. 793, 794 or 798; section 4(b) of the Internal Security Act of 1950 (50 U.S.C. 783(b)), or section 38 of the Arms Export Control Act (22 U.S.C. 2778)." 15 CFR 766.25(a); see also Section 11(h) of the EAA, 50 U.S.C. app. section 2410(h). The denial of export privileges under this provision may be for a period of up to 10 years from the date of the conviction. 15 CFR 766.25(d); see also 50 U.S.C. app. section 2410(h). In addition, Section 750.8 of the Regulations states that the Bureau of Industry and Security's Office of Exporter Services may revoke any Bureau of Industry and Security ("BIS") licenses previously issued in which the person had an interest in at the time of his conviction.

I have received notice of Rigel Optics's conviction for violating the AECA, and have provided notice and an opportunity for Rigel Optics to make a written submission to BIS, as provided in Section 766.25 of the Regulations. I have not received a submission from Rigel Optics. Based upon my review and consultations with BIS's Office of Export Enforcement, including its Director, and the facts available to BIS, I have decided to deny Rigel Optics's export privileges under the Regulations for a period of 10 years from the date of Rigel Optics's conviction. I have also decided to revoke all licenses issued pursuant to the Act or Regulations in which Rigel Optics had an interest at the time of its conviction.

B. Denial of Export Privileges of Related Person

Pursuant to Sections 766.25(h) and 766.23 of the Regulations, the Director of BIS's Office of Exporter Services, in consultation with the Director of BIS's Office of Export Enforcement, may take action to name persons related to a Respondent by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business in order to prevent evasion of a denial order. Donald Wayne Hatch ("Hatch") is the President and co-owner of Rigel Optics and primarily controlled the activities of the business from his residence in the State of Washington. Hatch pleaded guilty to, and was convicted of, making false statements on a Shipper's Export Declaration (18 U.S.C. 1001 (2000). He was ordered to serve a term of two years probation and pay a criminal fine of $5,000.00 with a special assessment of $100.00. Hatch is related to Rigel Optics by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business. BIS believes that naming Hatch as a related person to Rigel Optics is necessary to avoid evasion of the denial order against Rigel Optics.

As provided in Section 766.23 of the Regulations, I gave notice to Hatch that his export privileges under the Regulations could be denied for up to 10 years due to his relationship with Rigel Optics and that BIS believes naming him as a person related to Rigel Optics would be necessary to prevent evasion of a denial order imposed against Rigel Optics. In providing such notice, I gave Hatch an opportunity to oppose his addition to the Rigel Optics Denial Order as a related party. Having received no submission, I have decided, following consultations with BIS's Office of Export Enforcement, including its Director, to name Hatch as a Related Person to the Rigel Optics Denial Order, thereby denying his export privileges for 10 years from the date of Rigel Optics's conviction.

I have also decided to revoke all licenses issued pursuant to the Act or Regulations in which the Related Person had an interest at the time of Rigel Optics's conviction. The 10-year denial period will end on May 12, 2019.

Accordingly, *It is hereby ordered*

I. Until May 12, 2019, Rigel Optics, Inc., with a last known address at: 477 South 28th Street, Suite #3, Washougal, WA 98607, and when acting for or on behalf of Rigel Optics, its successors or assigns, agents, or employees, ("the Denied Person") and the following person related to the Denied Person as defined by Section 766.23 of the Regulations: Donald Wayne Hatch, with a last known address at: 2602 NW 35th Circle, Camas, WA 98607, and when acting for or on his behalf, employees, agents or representatives, ("the Related Person") (together, the Denied Person and the Related Person are "Persons Subject To This Order") may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as "item") exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations, including but not limited to:

A. Applying for, obtaining, or using any license, License Exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations.

II. No person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of the Persons Subject to this Order any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Persons Subject to this Order of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Persons Subject to this Order acquire or attempt to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Persons Subject to this Order of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the Persons Subject to this Order in the United States any item subject to the Regulations with

[1] The Regulations are currently codified in the Code of Federal Regulations at 15 CFR Parts 730–774 (2010). The Regulations issued pursuant to the EAA (50 U.S.C. app. sections 2401–2420 (2000)). Since August 21, 2001, the EAA has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 CFR part 2001 Comp. 783 (2002)), which has been extended by successive Presidential Notices, the most recent being that of August 12, 2010 (75 FR 50681, August 16, 2010), has continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.* (2000)).

knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Persons Subject to this Order, or service any item, of whatever origin, that is owned, possessed or controlled by the Persons Subject to this Order if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

III. In addition to the Related Person named above, after notice and opportunity for comment as provided in section 766.23 of the Regulations, any other person, firm, corporation, or business organization related to the Denied Person by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may also be made subject to the provisions of this Order if necessary to prevent evasion of the Order.

IV. This Order does not prohibit any export, reexport, or other transaction subject to the Regulations where the only items involved that are subject to the Regulations are the foreign-produced direct product of U.S.-origin technology.

V. This Order is effective immediately and shall remain in effect until May 12, 2019.

VI. In accordance with Part 756 of the Regulations, Rigel Optics may file an appeal of this Order with the Under Secretary of Commerce for Industry and Security. The appeal must be filed within 45 days from the date of this Order and must comply with the provisions of Part 756 of the Regulations.

VII. In accordance with Part 756 of the Regulations, the Related Person may also file an appeal of this Order with the Under Secretary of Commerce for Industry and Security. The appeal must be filed within 45 days from the date of this Order and must comply with the provisions of Part 756 of the Regulations.

VIII. A copy of this Order shall be delivered to the Denied Person and the Related Person. This Order shall be published in the **Federal Register**.

Issued this 7th day of September, 2010.

Bernard Kritzer,

Director, Office of Exporter Services.

[FR Doc. 2010–23029 Filed 9–15–10; 8:45 am]

BILLING CODE 3510–DT–P

DEPARTMENT OF COMMERCE

International Trade Administration

Beauty and Cosmetics Trade Mission to India; Application Deadline Extended and Acceptance To Participate Changed to First-Come First-Serve Basis

AGENCY: International Trade Administration, Department of Commerce.

ACTION: Notice.

Timeframe for Recruitment and Applications

Mission recruitment will be conducted in an open and public manner, including publication in the **Federal Register**, posting on the Commerce Department trade mission calendar (*http://www.ita.doc.gov/doctm/tmcal.html*) and other Internet Web sites, press releases to general and trade media, direct mail, notices by industry trade associations and other multiplier groups, and publicity at industry meetings, symposia, conferences, and trade shows.

The application deadline has been extended to October 1, 2010. The U.S. Department of Commerce will review all applications on a first-come, first-serve basis. We will inform applicants of selection decisions as soon as possible after receiving their applications. Applications received after the deadline will be considered only if space and scheduling constraints permit.

Contacts

U.S. Commercial Service Domestic Contact:

Lisa Huot, 202–482–2796, *Lisa.Huot@trade.gov.*

Leticia Arias, (310) 235–7204, *Leticia.Arias@trade.gov.*

U.S. Commercial Service in India:

Aliasgar.Motiwala, Commercial Specialist, Mumbai, Tel: (91–22) 2265 2511, E-mail: *Aliasgar.Motiwala@mail.doc.gov.*

Manjushree Phookan, Commercial Specialist, Bangalore, Tel: (91–80) 2220 6404, E–mail: *Manjushree.Phookan@mail.doc.gov.*

Srimoti Mukherji, Commercial Specialist, New Delhi, Tel: (91–11) 2347 2226, E–mail: *Srimoti.Mukherji@mail.doc.gov.*

Lisa Huot,

Global Trade Programs, Commercial Service Trade Missions Program.

[FR Doc. 2010–23030 Filed 9–15–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

Energy and Infrastructure Mission to Saudi Arabia; Application Deadline Extended

AGENCY: International Trade Administration, Department of Commerce.

ACTION: Notice.

Timeframe for Recruitment and Applications

Mission recruitment will be conducted in an open and public manner, including publication in the **Federal Register**, posting on the Commerce Department trade mission calendar (*http://www.ita.doc.gov/doctm/tmcal.html)* and other Internet web sites, press releases to general and trade media, direct mail, notices by industry trade associations and other multiplier groups, and publicity at industry meetings, symposia, conferences, and trade shows.

The application deadline has been extended to September 30, 2010. The U.S. Department of Commerce will review all applications immediately after the deadline. We will inform applicants of selection decisions as soon as possible after September 30, 2010. Applications received after that date will be considered only if space and scheduling constraints permit.

Contacts

U.S. Commercial Service Domestic Contact:

Sean Timmins, 202–482–1841, *Sean.Timmins@trade.gov.*

Natalia Susak, 202–482–4423, *Natalia.Susak@trade.gov.*

U.S. Commercial Service Saudi Arabia Contacts:

Mr. Habeeb Saeed, U.S. Commercial Service Riyadh, Tel: 966–1–488–3800, *Habeeb.Saeed@mail.doc.gov.*

Mr. Ishtiaq Hussain, U.S. Commercial Service Dhahran, Tel: 966–3–330–3200, *Ishtiaq.Hussain@mail.doc.gov.*

Sean Timmins,

Global Trade Programs, Commercial Service Trade Missions Program.

[FR Doc. 2010–23037 Filed 9–15–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No. 100910446–0446–01]

RIN 0648–ZC21

Extension of Award Period for FY 2007 Coastal and Estuarine Land Conservation Program Grants

AGENCY: National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce.

ACTION: Notice.

SUMMARY: The National Oceanic and Atmospheric Administration, National Ocean Service publishes this notice to announce that for those grants issued in fiscal year 2007 that are due to expire on September 30, 2010, NOAA may extend the financial assistance award period for up to six additional months, providing for a potential maximum award duration of three years and six months.

DATES: The provisions in this notice are implemented as of September 15, 2010. Award recipients who wish to avail themselves of the extension to the award period should contact their Program Officer by September 30, 2010 to inform them of their intent to seek an extension.

FOR FURTHER INFORMATION CONTACT: For further information, contact: Elaine Vaudreuil, 301–713–3155 ext. 103, *Elaine.Vaudreuil@noaa.gov.*

SUPPLEMENTARY INFORMATION: The Coastal and Estuarine Land Conservation Program was established pursuant to Public Law 107–77 for the purpose of protecting important coastal and estuarine areas that have significant conservation, recreation, ecological, historical, or aesthetic values, or that are threatened by conversion from their natural or recreational state to other uses. In accordance with Public Law 107–77, CELCP published in the **Federal Register** on June 17, 2003 (68 FR 35860) program guidelines delineating the criteria for grant awards. The Final Guidelines for the Coastal and Estuarine Land Conservation Program (CELCP) outline a planning process for states to identify the conservation needs and priorities within each state; provide the information necessary for eligible coastal states to develop land conservation plans and nominate projects to a national competitive selection process; and delineate the criteria for grant awards. Consistent with the criteria for grants awards in the Final Guidelines, the standard financial assistance award period for these awards is 18 months, which can be extended an additional 18 months if circumstances warrant, but may not exceed three years.

Several FY 2007 awards, whose award period is set to expire on September 30, 2010, have experienced circumstances late in the process that precluded their completion within the three-year timeframe provided in the CELCP Guidelines. Although the Final Guidelines indicate that the financial assistance award period may not exceed three years, NOAA is extending the maximum potential award duration for those FY 2007 grants in an open status on September 29, 2010, from three years to three years and six months, ending no later than March 31, 2011, in order to enable projects to be completed and funds expended for their intended purpose.

Award recipients who wish to avail themselves of the extension to the award period should contact their Program Officer by September 30, 2010 to inform them of their intent to seek an extension.

This extension applies to only FY 2007 CELCP awards in an open status on September 29, 2010. This notice does not modify any provision in the Final Guidelines for the Coastal and Estuarine Land Conservation Program published on June 17, 2003.

Classification

Executive Order 12866

This notice has been determined to be not significant for purposes of Executive Order 12866.

Executive Order 13132 (Federalism)

It has been determined that this notice does not contain policies with Federalism implications as that term is defined in Executive Order 13132.

Administrative Procedure Act/ Regulatory Flexibility Act

Prior notice and an opportunity for public comment are not required by the Administrative Procedure Act or any other law for rules concerning public property, loans, grants, benefits, and contracts (5 U.S.C. 553(a)(2)). Because notice and opportunity for comment are not required pursuant to 5 U.S.C. 553 or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are inapplicable. Therefore, a regulatory flexibility analysis has not been prepared.

Dated: September 10, 2010.

Christopher C. Cartwright,

Associate Assistant Administrator for Management and CFO/CAO, Ocean Services and Coastal Zone Management.

[FR Doc. 2010–23080 Filed 9–15–10; 8:45 am]

BILLING CODE 3510–08–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XZ03

Western Pacific Fishery Management Council; Public Meetings

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

ACTION: Notice of public meetings and hearings.

SUMMARY: The Western Pacific Fishery Management Council (Council) will hold its 105th Scientific and Statistical Committee (SSC) and 149th Council meetings to take recommendations and action on fishery management issues in the Western Pacific Region.

DATES: The 105th SSC Meeting will be held on October 6–8 2010 in Honolulu, and the 149th Council meeting will be held on October 11–14, 2010, in Honolulu. For specific times and agendas, see **SUPPLEMENTARY INFORMATION**.

ADDRESSES: The 105th SSC will be held at the Council Office, 1164 Bishop Street, Suite 1400, Honolulu, HI 96813.

The 149th Council Standing Committee meeting will be held at Council office on October 11, 2010, and the full Council meeting between October 12–14, 2010, at the Laniakea YWCA-Fuller Hall, 1040 Richards Street, Honolulu, HI 96813.

FOR FURTHER INFORMATION CONTACT: Kitty M. Simonds, Executive Director; telephone: (808) 522–8220.

SUPPLEMENTARY INFORMATION: In addition to the agenda items listed here, the SSC and Council will hear recommendations from Council advisory groups. Public comment periods will be provided throughout the agendas. The order in which agenda items are addressed may change. The meetings will run as late as necessary to complete scheduled business.

Schedule and Agenda for 105th SSC Meeting:

Wednesday, October 6, 2010, 8:30 a.m.

1. Introductions

2. Approval of Draft Agenda and Assignment of Rapporteurs
3. Status of the 104th SSC Meeting Recommendations
4. Report from the Pacific Islands Fisheries Science Center Director
5. Program Planning
A. Annual Catch Limits (ACLs) Process
1. Reef Fishery Data Analysis
B. Third National SSC Workshop
C. Public Comment
D. SSC Discussion and Recommendations
6. Insular Fisheries
A. Mariana Islands
1. Bottomfish Scoping Meetings
2. Community Fishery Monitoring
3. Biosampling in the Mariana Islands
B. Hawaii
1. Bottomfish Stock Assessment
2. Bottomfish Essential Fish Habitat
3. Mesophotic Coral Ecosystem Assessments
4. Puwalu Recommendations
C. American Samoa
D. Changes in socio-economic factors related to social resilience during post-tsunami rehabilitation in coastal Thailand
E. Public Comment
F. SSC Discussion and Recommendations

Thursday, October 7, 2010, 8:30 a.m.

7. Pelagic Fisheries
A. Hawaii Longline Bigeye Tuna Management Under a Catch Limit (Action)
B. Proposed Changes to American Samoa Large Pelagic Fishing Vessel (≤50 ft) Area Closure (Action)
C. Hawaii Longline Bigeye Tuna Catch Shares Update
D. Mitigation to reduce catches of North Pacific striped marlin in the Hawaii-based tuna fishery
E. American Samoa and Hawaii Longline Quarterly Reports
F. International Fisheries Meetings
1. Western & Central Pacific Fisheries Commission (WCPFC) (Science Committee, Northern Committee, Technical & Compliance Committee)
2. Inter-American Tropical Tuna Commission (IATTC) (Sharks, Bluefin, Science Committee, IATTC Plenary)
3. Fifth International Fishers Forum
G. Public Comment
H. SSC Discussion and Recommendations
8. Protected Species
A. False Killer Whale Issues
1. Longline Mitigation
2. Take Reduction Plan Proposed Rule
3. Stock Assessment Cruise
4. Insular False Killer Whale Status Review and 12-month Finding
B. Biological Opinion: American Samoa Longline Fishery
C. U.S. National Research Council's Review of Sea Turtle Population Assessment Methods
D. Public Comment
E. SSC Discussion and Recommendations

Friday, October 8, 2010, 8:30 a.m.

9. Other Business
A. 106th SSC Meeting
10. Summary of SSC Recommendations to the Council

149th Council Meeting, Monday, October 11, 2010, Council Office

Executive and Budget Standing Committee, 2 p.m. - 5 p.m.

149th Council Meeting, Tuesday, October 12, 2010, Laniakea YWCA-Fuller Hall, 8:30 a.m. - 5 p.m.

1. Introductions
2. Guest Speaker
3. Approval of Agenda
4. Approval of the 148th Meeting Minutes
5. Executive Director's Report
6. Agency Reports
A. National Marine Fisheries Service
1. Pacific Islands Regional Office
2. Pacific Islands Fisheries Science Center
B. NOAA Regional Counsel
C. State Department
D. U.S. Fish and Wildlife Service
E. Enforcement
1. U.S. Coast Guard
2. NMFS Office for Law Enforcement
3. NOAA General Counsel for Enforcement and Litigation
4. NOAA National and Regional Enforcement Priorities
F. National Marine Sanctuaries Program
G. Public Comment
7. Marianas Archipelago
A. Arongo flaeey
B. Isla Informe
C. Legislative Report
D. Enforcement Issues
E. Monument Activities
F. Report on Bottomfish Scoping Meetings
G. Update on Military Activities
1. Mariana Islands Range Complex
2. Guam Buildup
H. Community Activities and Issues
1. Cumulative Impacts to Guam fisheries and Fishermen
2. Community Monitoring Workshop Report
3. MPA impacts on fishermen drowning
4. Economic Development
a. Fisheries and Aquaculture
I. Education and Outreach Initiatives
J. SSC Recommendations
K. Public Comment
L. Council Discussion and Action
8. American Samoa Archipelago
A. Motu Lipoti
B. Fono Report
C. Enforcement Issues
D. Community Activities and Issues
E. Education and Outreach Initiatives
F. SSC Recommendations
G. Public Comment
H. Council Discussion and Action
9. Public Comment on Non-Agenda Items

Fishers Forum, 6 p.m. - 9 p.m.

Aloha Tower Market Place
Marine Spatial Planning: Fishermen and Ocean User Perspectives

Wednesday, October 13, 2010, 8:30 a.m. - 5 p.m.

10. Hawaii Archipelago
A. Moku Pepa
B. Commercial Marine License Compliance
C. Hawaii Shark Fin Law
D. Action Items
1. Bottomfish Stock Assessment
2. Community Development Program Application
E. Permitting Issues
1. MHI Research Permits
2. NWHI Monument Permits
F. Sustenance Fishing in the Monument Policy
G. Community Activities and Issues
1. Hawaii Bottomfish Restricted Fishing Areas
a. Monitoring
b. State and Federal Enforcement
2. Hawaii Community Fishery Workshop Report
3. Puwalu and Moku Meeting Report
H. SSC Recommendations
I. Public Hearing
J. Council Discussion and Action
11. Program Planning and Research
A. Annual Catch Limits
1. Recommendations on a Process for Establishing Annual Catch Limits (Final Action)
2. Reef Fisheries Data Analysis
B. Fisheries Monitoring and Compliance
1. Vessel Monitoring System Policy
C. Marine Spatial Planning
D. Hawaii, Regional, National & International Education and Outreach
E. SSC Recommendations
F. Public Hearing
G. Council Discussion and Action
12. Protected Species
A. False Killer Whale Issues
1. Take Reduction Plan Proposed Rule
2. Stock Assessment Cruise
3. Insular False Killer Whale Status Review and 12-month Finding
B. Biological Opinion: American Samoa Longline Fishery
C. U.S. National Research Council's Review of Sea Turtle Population Assessment Models

D. SSC Recommendations

E. Public Comment

F. Council Discussion and Action

Thursday, October 14, 2010 8:30 a.m. - 1 p.m.

13. Pelagic & International Fisheries

A. Action Items

1. Hawaii Longline Bigeye Tuna Catch Limit Management (Final)

2. Hawaii Longline Catch Shares (Ongoing)

3. American Samoa Longline Large-Vessel Closed Area Options (Initial)

4. American Samoa Longline Limited Entry Modification (Ongoing)

B. Pacific Tuna Stock Assessments

C. International Fisheries

1. 5th International Fishers Forum (IFF5)

2. Western Central Pacific Fisheries Commission

a. Science Committee

b. Northern Committee

c. Technical & Compliance Committee

3. Inter-American Tropical Tuna Commission

D. SSC Recommendations

E. Public Hearing

F. Council Discussion and Action

14. Administrative Matters

A. Financial Reports

B. Administrative Reports

C. Standard Operating Practices and Procedures (SOPP) Review and Changes

D. Council Family Changes

1. Advisory Panels

E. Meetings and Workshops

F. Other Business

G. Executive and Budget Standing Committee Recommendations

H. Public Comment

I. Council Discussion and Action

15. Other Business

A. Election of Council Officers

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kitty M. Simonds, (808) 522–8220 (voice) or (808) 522–8226 (fax), at least 5 days prior to the meeting date.

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

Dated: September 13, 2010.

Tracey L. Thompson,

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

[FR Doc. 2010–23091 Filed 9–15–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XZ09

Mid-Atlantic Fishery Management Council (MAFMC); Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council's (MAFMC) Squid, Mackerel, and Butterfish Committee will hold a public meeting.

DATES: Wednesday, October 6, 2010, from 9 a.m. to 5 p.m.

ADDRESSES: The meeting will be held at the Embassy Suites Philadelphia Airport, 9000 Bartram Avenue, Philadelphia, PA 19153; (telephone: 215–365–4500).

Council Address: Mid-Atlantic Fishery Management Council, 800 N. State Street, Suite 201, Dover, DE 19901; telephone: (302) 674–2331.

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore Ph.D., Executive Director, Mid-Atlantic Fishery Management Council, 800 N. State Street, Suite 201, Dover, DE 19901; telephone: (302) 526–5255.

SUPPLEMENTARY INFORMATION: The purpose of this Squid, Mackerel, and Butterfish Committee meeting is to begin the development of Amendment 14 to the Atlantic Mackerel, Squid, and Butterfish Fishery Management Plan. Amendment 14 will be focused on monitoring, bycatch, and management integration issues, especially as related to alewife, blueback herring, American shad, and hickory shad in terms of their interactions with the directed Atlantic mackerel and *Loligo* fisheries. The meeting will generally be non-decisional and informational in nature, with the Committee receiving a variety of presentations on topics relevant to Amendment 14. An agenda, list of speakers, and any briefing documents will be posted to the Mackerel, Squid, and Butterfish section of the Mid-Atlantic Council's website, *http://www.mafmc.org/fmp/msb.htm*, by September 29, 2010.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to M. Jan Saunders at the Mid-Atlantic Council Office (302) 526–5251 at least five days prior to the meeting date.

Dated: September 13, 2010

Tracey L. Thompson,

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

[FR Doc. 2010–23133 Filed 9–15–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

International Trade Administration

Multi-Sector Trade Mission to Nigeria

AGENCY: International Trade Administration, Department of Commerce.

ACTION: Notice.

Mission Statement: Multi-Sector Trade Mission to Nigeria, March 8–10, 2011

I. Mission Description

The United States Department of Commerce, International Trade Administration, U.S. Commercial Service is organizing a Trade Mission to Nigeria March 8–10, 2011, to help U.S. firms find business partners and sell equipment and services in Lagos and Abuja, Nigeria. Targeted sectors include, but are not limited to, energy and power generation, health care, information technology, transportation and construction. This mission will be led by a senior official and will include business-to-business matchmaking with local companies, market briefings, and meetings with key government officials.

II. Commercial Setting

In 2009, the Nigerian economy was among the top 20 fastest growing in the world at 6+%, and is one of the two largest economies in Africa. The International Monetary Fund projects Nigeria's economy to continue to grow at 6+% for the next 4 years. With a population of 150 million people, the largest in Africa and 8th largest in the world, Nigeria has a thriving consumer market. Total U.S.-Nigeria trade did fall from $3.4 trillion to $2.6 trillion in 2008 and 2009 but is expected to surge in conjunction with Nigeria's growing economy. U.S. exports to Nigeria in 2009 consisted mostly of cereals, vehicles, machinery, fuel and aircraft.

There is significant business potential for U.S. businesses willing to conduct due diligence and draw on Commercial Service assistance in screening prospective partners and customers in Nigeria.

Nigerians prefer U.S. products due to quality, name brand recognition and seek competitive pricing. The business culture relies heavily on the strength of personal contacts to consummate deals. This trade mission offers U.S. company

representatives an excellent introduction to a broad range of credible Nigerian business partners and Nigerian officials.

Best Prospects

Energy: At 20% of GDP, the oil and gas industry continues to dominate the Nigerian economy. With an estimated 36.24 billion barrels of oil, Nigeria has the 10th largest proven oil reserves in the world. It also has the 8th largest proven gas reserves with an estimated 187 trillion standard cubic feet. In addition, Nigeria is the 12th largest market for U.S. oil and gas equipment sales. A recent Government of Nigeria (GON) directive will require the end of gas flaring on December 31, 2010. Compliance with this GON directive potentially could create a lucrative market for U.S. industry. The estimated life expectancy of Nigeria's proven crude oil reserve is 35 years, while that of gas is over 100, ensuring that the oil and gas industry will continue to offer lucrative opportunities in oil and natural gas equipment and services. The President and Minister for Power have unveiled a roadmap for reform of the power sector (*http://www.nigeriapowerreform.org*) which will provide concrete opportunities for U.S. suppliers over the next two-three years in the power generation and distribution sectors. Note: Companies interested in this sector of the Nigerian economy should take into account ongoing security issues in and around the oil fields in the Niger delta for pricing and delivery purposes.

Healthcare: In 2006, the GON spent $1.2 billion per year on health care and plans to increase spending as it reforms Nigeria's healthcare policies and rebuilds health care infrastructure. Industry watchers and analysts indicate potential opportunities for U.S. suppliers and manufacturers of cutting-edge medical equipment used especially for medical examination, on-line training and telemedicine, particularly for complex and difficult operations where international expertise is needed.

Information Technology: The success of Nigeria's telecommunications industry subsector is fueling demand for computers, software, peripherals and professional services such as electronic banking, internet services, e-learning, e-government, e-health and digital security services. Current bandwidth in Nigeria is provided through the SAT–3 cable of 350 gigabits. Two additional broadband cables are expected to increase the broadband capacity by 2.6 terabits for a total of almost 3.0 terabits for the entire country in the coming year. With over 1,800 licenses managed by the Nigerian Communications Commission (NCC), the market generated about $10 billion in telecommunications services revenue in 2009 and recorded an average annual growth rate of about 30 percent.

Transportation: The United States currently accounts for more than 70% of all categories of automobiles supplied to Nigeria, most of which are used cars and trucks. The government of Nigeria continues to fund efficiency efforts for the aeronautics and aviation industries. The transport ministry (aviation division) is planning to fix, purchase and install additional navigation and landing aids for the airports across the country within a short period of time, as there has been an increase in air transportation in the country with more aviation companies joining the sector. In addition, the Federal Airport Authority of Nigeria (FAAN) stated recently that five new terminals are to be built in Lagos, Abuja, Kano, Port Harcourt and Enugu. The United States Federal Aviation Administration granted Nigeria Category 1 status under the international aviation safety assessment program, which means a country has the laws and regulations necessary to oversee air carriers in accordance with minimum international standards, and that its civil aviation authority—equivalent to the FAA for aviation safety matters—meets international standards for technical expertise, trained personnel, recordkeeping and inspection procedures.

Construction: There are also plans to construct or reconstruct existing expressways as well as over 40 separate dredging and related projects scattered in the Niger-Delta region. State governments have also awarded major contracts to provide infrastructure, including railroad and housing in major cities as well as creating new settlements in urban areas. It is also expected that the GON will upgrade the major seaports in Nigeria as well as set up Free Trade Zones where importation of equipment and heavy machinery can easily be undertaken.

III. Mission Goals

The goal of the Nigeria Trade Mission is to provide U.S. participants with first-hand market information, access to government decision makers, and one-on-one meetings with business contacts, including potential agents, distributors and partners, so they can position themselves to enter or expand their presence in the Nigerian market. A presence in Nigeria can be used to enter other West African markets, allowing for better market penetration/saturation.

IV. Mission Scenario

The Nigeria Trade Mission will visit both the commercial center and political capital of Nigeria: Lagos and Abuja, to give participants access to decision makers in Nigeria. In each city, participants will meet with new business contacts.

Proposed Timetable

Day of week	Date	Activity
Monday	March 7, Lagos	Arrive in Lagos, Nigeria.
Tuesday	March 8, Lagos	**Mission Meetings Officially Start.** Breakfast briefing from Lagos Consulate staff. One-on-one business appointments. Evening business reception.
Wednesday	March 9, Lagos/Abuja	One-on-one business appointments continue. Afternoon departure for Abuja.
Thursday	March 10, Abuja	Briefing by Abuja Embassy Staff. One-on-one business and government meetings. **Trade Mission Officially Ends.**

***Note:** The final schedule and potential site visits will depend on the availability of local government and business officials, specific goals of mission participants, and air travel schedules.

V. Participation Requirements

All applicants will be evaluated on their ability to meet certain conditions and best satisfy the selection criteria as outlined below. The mission is designed for a minimum of 12 and a maximum of 18 to participate in the mission from the applicant pool. U.S. companies

already doing business in the target markets as well as U.S. companies seeking to enter these markets for the first time are encouraged to apply.

Fees and Expenses

After a company has been selected to participate on the mission, a participation fee to the U.S. Department of Commerce is required. The participation fee for one representative is $2,975 for a small or medium-sized enterprise (SME) [1] and $3,515 for large firms. The fee for each additional firm representative (SME or large) is $450. Expenses for travel, lodging, some meals, and incidentals will be the responsibility of each mission participant.

Conditions for Participation

- An applicant must submit a completed and signed mission application and supplemental application materials, including adequate information on the company's products and/or services, primary market objectives, and goals for participation. If the U.S. Department of Commerce receives an incomplete application, the Department may reject the application, request additional information, or take the lack of information into account when evaluating the applications.
- Each applicant must also certify that the products and services it seeks to export through the mission are either produced in the United States, or, if not, marketed under the name of a U.S. firm and have at least 51 percent U.S. content of the value of the finished product or service.

Selection Criteria for Participation

- Suitability of the company's products or services to the mission goals.
- Applicant's potential for business in Nigeria, including likelihood of exports resulting from the mission.
- Consistency of the applicant's goals and objectives with the stated scope of the mission.

Diversity of company size, sector or subsector, and location may also be considered during the review process.

Referrals from political organizations and any documents containing references to partisan political activities (including political contributions) will be removed from an applicant's submission and not considered during the selection process.

VI. Selection Timeline

Mission recruitment will be conducted in an open and public manner, including publication in the **Federal Register**, posting on the Commerce Department trade mission calendar—*http://www.ita.doc.gov/doctm/tmcal.html*—and other Internet Web sites, press releases to general and trade media, direct mail, broadcast fax, notices by industry trade associations and other multiplier groups, and publicity at industry meetings, symposia, conferences, and trade shows.

Recruitment for the mission will begin immediately, and conclude January 18, 2011. Applications received after January 18, 2011, will be considered only if space and scheduling constraints permit.

Contacts:

Ryan Kane, International Trade Specialist, U.S. Commercial Service, Washington, DC 20230, Tel: 202–482–5740, Fax: 202–482–9000, E-mail: *ryan.kane@trade.gov.*

Rebecca Armand, Senior Commercial Officer, U.S. Consulate, Lagos, Nigeria, Tel: 234–1–460–358, E-mail: *Rebecca.Armand@trade.gov.*

Ryan Kane,

Global Trade Programs, Commercial Service Trade Missions Program.

[FR Doc. 2010–23028 Filed 9–15–10; 8:45 am]

BILLING CODE P

[1] An SME is defined as a firm with 500 or fewer employees or that otherwise qualifies as a small business under SBA regulations. *See http://www.sba.gov/contractingopportunities/owners/basics/whatismallbusiness/index.html.* Parent companies, affiliates, and subsidiaries will be considered when determining business size. The dual pricing reflects the Commercial Service's user fee schedule that became effective May 1, 2008. *See http://www.export.gov/newsletter/march2008/initiatives.html.*

COMMODITY FUTURES TRADING COMMISSION

Agency Information Collection Activities: Proposed Collection; Comment Request: Part 41, Relating to Security Futures Products

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that the CFTC is planning to submit the following proposed Information Collection Request (ICR) to the Office of Management and Budget (OMB): Part 41, Relating to Security Futures Products; OMB Control Number 3038–0059. Before submitting the ICR to OMB for review and approval, the CFTC is soliciting comments on specific aspects of the proposed information collection as described below.

DATES: Comments must be submitted on or before November 15, 2010.

ADDRESSES: Comments may be mailed to David Steinberg, Special Counsel, Division of Market Oversight, U.S. Commodity Futures Trading Commission, 1155 21st Street, NW., Washington, DC 20581.

FOR FURTHER INFORMATION CONTACT: David Steinberg (202) 418–5102; FAX: (202) 418–5527; email: *dsteinberg@cftc.gov.*

SUPPLEMENTARY INFORMATION:

Affected Entities: Entities potentially affected by this action are businesses and other for-profit institutions.

Title: Part 41, Relating to Security Futures Products.

Abstract: Section 4d(c) of the Commodity Exchange Act (CEA), 7 U.S.C. 6d(c), requires the CFTC to consult with the SEC and issue such rules, regulations, or orders as are necessary to avoid duplicative or conflicting regulations applicable to firms that are fully registered with the SEC as brokers or dealers (broker-dealers) and the CFTC as futures commission merchants (FCMs) involving provisions of the CEA that pertain to the treatment of customer funds. The CFTC, jointly with the SEC, issued regulations requiring such dually registered firms to make choices as to how its customers' transactions in security futures products (SFP) will be treated, either as securities transactions held in a securities account or as futures transactions held in a futures account. How an account is treated is important in the unlikely event of the insolvency of the firm. Securities accounts receive insurance protection under provisions of the Securities Investor Protection Act. By contrast, futures accounts are subject to the protections provided by the segregation requirements of the CEA.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the CFTC's regulations were published on December 30, 1981. See 46 FR 63035 (Dec. 30, 1981).

The Commission would like to solicit comments to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have a practical use;
- Evaluate the accuracy of the Commission's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

• Enhance the quality, usefulness, and clarity of the information to be collected; and

• Minimize the burden of collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology; *e.g.,* permitting electronic submission of responses.

Burden Statement: The respondent burden for this collection is estimated to average .59 hours per response. These estimates include 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; train personnel to be able to respond to a collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: 147.

Estimated Number of Responses: 2,739.90

Estimated Total Annual Burden on Respondents: 1,624.08. hours

Frequency of Collection: On occasion.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, 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; train personnel to be able to respond to a collection of information; and transmit or otherwise disclose the information.

Dated: September 10, 2010.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 2010–23140 Filed 9–15–10; 8:45 am]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Notice Regarding the Treatment of Petitions Seeking Grandfather Relief for Trading Activity Done in Reliance Upon Section 2(h)(1)–(2) of the Commodity Exchange Act

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice.

SUMMARY: Section 723 of the Dodd-Frank Wall Street Reform and Consumer Protection Act permits persons transacting business in exempt commodities in reliance upon Section 2(h) of the Commodity Exchange Act to petition the Commission for grandfather relief enabling them to continue to rely on Section 2(h) after the effective date of the Dodd-Frank Wall Street Reform and Consumer Protection Act. While persons may submit such grandfather relief petitions in accordance with the procedures provided herein, at this time the Commission has determined that it will not be issuing such relief to persons seeking to continue to rely on Section 2(h)(1)–(2). The Commission is prepared to revisit its decision in the future should it be necessary in order to ensure a smooth transition to the new regulatory regime mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act. Any relief that the Commission determines to grant in the future will not be limited to persons that may file a petition.

DATES: *Effective date:* September 10, 2010 Petitions for relief will be accepted until September 20, 2010. Comments on this notice will be accepted until October 18, 2010.

ADDRESSES: You may submit comments or petitions for relief, identified with "Section 2(h)(1)–(2) Grandfather Relief" in the subject line, by any of the following methods:

• *E-mail for comments: pgfrcomment@cftc.gov.* E-mail for petitions: *pgfrpetition@cftc.gov.*

• *Mail:* David A. Stawick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

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

All comments must be submitted in English, or if not, accompanied by an English translation. Comments and petitions will be posted as received to *http://www.cftc.gov.*

FOR FURTHER INFORMATION CONTACT: David P. Van Wagner, Chief Counsel, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Telephone: (202) 418–5481. E-mail: *dvanwagner@cftc.gov;* or Beverly E. Loew, Assistant General Counsel, Office of the General Counsel, same address. Telephone: (202) 418–5648. E-mail: *bloew@cftc.gov.*

SUPPLEMENTARY INFORMATION:

I. Treatment of Petitions for Grandfather Relief Received From Persons Relying Upon Section 2(h)(1)–(2) of the Commodity Exchange Act

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").[1] Title VII of the Dodd-Frank Act[2] will amend the Commodity Exchange Act ("CEA")[3] to establish a comprehensive new regulatory framework for swaps and security-based swaps. As part of the revisions to the CEA, the Dodd-Frank Act will delete various provisions from the CEA that were first established by the Commodity Futures Modernization Act of 2000 ("CFMA")[4] to permit the trading of derivative instruments off of regulated markets. Among other such provisions, the Dodd-Frank Act will strike Section 2(h)(1)–(2) (the "Exempt Commodity Exemption") from the CEA, effective July 15, 2011.[5] CEA Section 2(h)(1)–(2) generally provides that bilateral "exempt commodity"[6] transactions entered into between eligible contract participants, as that term is defined by CEA Section 1a(12), are exempt from all of the provisions of the CEA, except for the anti-fraud and anti-manipulation provisions.

Section 723(c)(1) of the Dodd-Frank Act provides that a person who is subject to the Exempt Commodity Exemption may petition the Commission to continue to operate pursuant to Section 2(h)(1)–(2) by submitting a petition to the Commission within 60 days of the enactment of the Dodd-Frank Act (*i.e.,* by September 20, 2010). Section 723(c)(1) further states that the Commission must consider all such petitions in a "prompt manner" and may grant grandfather relief for up to one year. The Dodd-Frank Act does not suggest any standard for the Commission to evaluate grandfather relief petitions from parties seeking to continue their reliance on the Exempt Commodity Exemption.

Ordinarily, a grandfather clause in a regulatory statute relieves or exempts

[1] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at *http://www.cftc.gov./LawRegulation/OTCDERIVATIVES/index.htm.*

[2] Pursuant to Section 701 of the Dodd-Frank Act, Title VII may be cited as the "Wall Street Transparency and Accountability Act of 2010."

[3] 7 U.S.C. 1 *et seq.*

[4] *See* Commodity Futures Modernization Act of 2000, Pub. L. 106–554, 114 Stat. 2763 (2000).

[5] *See* Section 723(a)(1)(A) of the Dodd-Frank Act.

[6] Under CEA Section 1a(14), an exempt commodity is defined as a commodity that is neither an excluded nor an agricultural commodity. Generally, the term encompasses energy and metals commodities.

those already involved in an activity or business from the new regulations to be established by the statute because it is anticipated that it may be difficult for the parties to transition the activity or business to the new regulatory scheme.

The Commission is aware of the transformational nature of the Dodd-Frank Act and its potential impact on the swaps industry. The Commission also recognizes that bilateral swaps trading activity currently conducted in reliance upon the CEA's Exempt Commodity Exemption will likely become subject to any number of regulatory provisions implementing the requirements of the Dodd-Frank Act, including business conduct standards, recordkeeping and reporting requirements, and capital and margin requirements.[7] Until the contents and timing of the Commission's regulations affecting bilateral swaps are better known, however, the Commission has determined not to grant grandfather relief as it is impossible to know at this time whether such relief will be necessary.[8]

In implementing the important requirements of the Dodd-Frank Act, the Commission will strive to ensure that current practices will not be unduly disrupted during the transition to the new regulatory regime. Persons relying upon the Exempt Commodity Exemption will have an opportunity to comment on each of the rulemakings that may affect them, which will permit the Commission to consider and adopt appropriate regulatory provisions to address transitioning from the Exempt Commodity Exemption to the Dodd-Frank regulations as they become effective. Additionally, while the Commission has chosen at this time not to grant grandfather relief to parties that rely on the Exempt Commodity Exemption, if it later determines that Dodd-Frank Act-required regulations might pose particular difficulties for such parties that cannot be addressed in final regulations, the Commission is committed to use its available exemptive authorities to address such a situation. Any relief that the Commission determines to grant will not be limited to persons who may wish to file a petition.[9]

II. Related Matters

a. Paperwork Reduction Act

This notice does not impose any recordkeeping or information collection requirements, or other collections of information that require approval of the Office of Management and Budget ("OMB") under the Paperwork Reduction Act ("PRA").[10] Requests for comment that are published in the **Federal Register** in which collections of information are not embedded are excluded from PRA compliance by OMB regulations.[11] Collections of information that may be required as a condition for the grant of grandfather relief for persons relying on the Exempt Commodity Exemption will be addressed at the time such conditions may be imposed.

b. Cost-Benefit Analysis

Section 15(a) of the CEA [12] requires the Commission to consider the costs and benefits of its actions before taking certain actions under the Act. This notice is neither a regulation nor an order to which Section 15(a) applies.

c. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA") requires that agencies consider the impact of their rules on small businesses. This notice is not a "rule for which the agency publishes a general notice of proposed rulemaking." [13] Therefore, the Commission is not required to conduct a regulatory flexibility analysis.[14]

Issued in Washington, DC, on September 10, 2010, by the Commission.

David A. Stawick,

Secretary of the Commission.

Concurring Statement of Commissioner Scott D. O'Malia

Regarding the Treatment of Petitions Seeking Grandfather Relief Pursuant to Section 723 of the Dodd-Frank Act for Trading Activity Done in Reliance Upon Section 2(h)(1)–(2)

I concur in the Commission's decision to presently decline to grant relief under Section 723 of the Dodd-Frank Act to persons transacting business in exempt commodities in reliance upon Sections 2(h)(1)–(2) of the Commodity Exchange Act (the "Act"). While the Commission has chosen to decline to grant relief at this time, it is not restricted from using its authority to address and provide relief to such persons in the future. In an effort to proactively ensure the smoothest possible transition of these bilateral markets for transactions in exempt commodities into the new regulatory landscape, it is my hope that the Commission will revisit the issue at least ninety days prior to the Dodd-Frank Act effective date. The Commission remains committed to the efficient functioning of the markets in exempt commodities, and the path that we take in each rulemaking under the Dodd-Frank Act will only be enhanced by the comments we receive. Therefore, I urge all market participants who currently rely on Sections 2(h)(1)–(2) of the Act to help shape the new regulatory frontier by submitting their comments to the Commission.

[FR Doc. 2010–23141 Filed 9–15–10; 8:45 am]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Orders Regarding the Treatment of Petitions Seeking Grandfather Relief for Exempt Commercial Markets and Exempt Boards of Trade

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice; final orders.

SUMMARY: The Commission is issuing orders whereby entities currently operating as exempt commercial markets, pursuant to Section 2(h)(3)–(7) of the Commodity Exchange Act, or exempt boards of trade, pursuant to Section 5d of the Commodity Exchange Act, may receive grandfather relief to continue to operate in accordance with those provisions notwithstanding their deletion from the Commodity Exchange Act, effective July 15, 2011, by the Dodd-Frank Wall Street Reform and Consumer Protection Act. The Commission's orders set forth various conditions for such grandfather relief, including the filing of a relief petition

[7] *See* Sections 731 and 747 of the Dodd-Frank Act.

[8] In a separate action, the Commission has issued orders providing grandfather relief to parties affected by the Dodd-Frank Act's elimination of the CEA Section 2(h)(3)–(7) exempt commercial market ("ECM") provision and the CEA Section 5d exempt board of trade ("EBOT") provision. In that matter, the Commission foresaw that many entities that currently operate as ECMs or EBOTs will seek to become either swap execution facilities ("SEFs") or designated contract markets ("DCMs") when the Commission adopts regulations implementing Dodd-Frank's requirements for those facilities. Because the new SEF and DCM regulatory provisions are not likely to be completed until close to the same time that the ECM and EBOT provisions are deleted from the CEA, the Commission anticipated that there would be a large number of new SEF and DCM applications at that time. In order to ease this congestion of applications, and to facilitate the transition of current ECM and EBOT businesses to the new regulatory regime mandated by the Dodd-Frank Act, the Commission provided limited grandfather relief to EBOTs and ECMs.

[9] In addition to deleting the CEA Section 2(h)(1)–(2) Exempt Commodity Exemption from the CEA, the Dodd-Frank Act also will delete two other provisions that provide for the exclusion of bilateral swaps from the CEA—Section 2(d)(2) for excluded commodities (mostly financial products) and Section 2(g) for non-agricultural commodities. The Commission notes that the Dodd-Frank Act does not provide for the possibility of any grandfather relief for parties relying on those exclusions, which partially overlap with the Section 2(h)(1)–(2). The Commission also pledges to be attentive to the transition needs of parties that rely on those provisions, as well as Section 2(h)(1)–(2) users, as it considers Dodd-Frank Act-required regulations.

[10] 44 U.S.C. 3501 *et seq.*

[11] 5 CFR 1320.3(h)(4).

[12] 7 U.S.C. 19(a).

[13] 5 U.S.C. 601(2).

[14] *See* 5 U.S.C 603.

and a swap execution facility or designated contract market application with the Commission.

DATES: *Effective Date:* September 10, 2010. Comments on this notice will be accepted until October 18, 2010.

ADDRESSES: You may submit comments or petitions for relief, identified with "ECM/EBOT Grandfather Relief" in the subject line, whichever is appropriate, by any of the following methods:

- *E-mail for Comments: ecmebotcomments@cftc.gov. E-mail for petitions: ecmebotpetitionscftc.gov.*
- *Mail:* David A. Stawick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.
- *Hand Delivery/Courier:* Same as mail above.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments and petitions will be posted as received to *http://www.cftc.gov.*

FOR FURTHER INFORMATION CONTACT: David P. Van Wagner, Chief Counsel, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Telephone: (202) 418–5481. E-mail: *dvanwagner@cftc.gov;* or Beverly E. Loew, Assistant General Counsel, Office of the General Counsel, same address. Telephone: (202) 418–5648. E-mail: *bloew@cftc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").[1] Title VII of the Dodd-Frank Act[2] amended the Commodity Exchange Act ("CEA")[3] to establish a comprehensive new regulatory framework for swaps and security-based swaps. Among other changes to the CEA, the Dodd-Frank Act eliminated certain exempt market categories—exempt commercial markets ("ECMs") and exempt boards of trade ("EBOTs")—from the CEA; established a new regulated market category—swap execution facilities ("SEFs"); revised certain requirements for an extant regulated market category—designated contract markets ("DCMs"); and authorized the Commission to grant grandfather relief for entities in the eliminated exempt market categories in order to assist those entities to transition their business models to a different market category.[4]

II. Background and Discussion

a. Exempt Commercial Markets and Exempt Boards of Trade

Sections 723 and 734 of the Dodd-Frank Act will strike from the CEA enabling provisions for two categories of exempt markets established by the Commodity Futures Modernization Act of 2000 ("CFMA").[5] Specifically, Section 723 of the Dodd-Frank Act will strike CEA Section 2(h)(3)–(7) and, thus, eliminate the ECM category.[6] Similarly, Section 734 of the Dodd-Frank Act will strike CEA Section 5d and, thus, eliminate the EBOT category.[7]

The Commission notes that ECMs and EBOTs are both required to operate their execution platforms as trading facilities, as that term is defined by CEA Section 1a(34), and must limit access to a narrow group of market participants—eligible commercial entities in the case of ECMs and eligible contract participants in the case of EBOTs. These requirements are not inconsistent with the execution platform and market participant requirements for DCMs or SEFs as they are set forth in the CEA and the Dodd-Frank Act. Accordingly, while the ECM and EBOT provisions will be eliminated from the CEA effective July 15, 2011, the basic structural requirements for both of those market categories should facilitate the ability of ECMs and EBOTs to transition to either the SEF or DCM market category; provided, of course, that they comply with the enhanced regulatory requirements for those two categories.

Sections 723 and 734 of the Dodd-Frank Act contain similar grandfather provisions for ECMs and EBOTs, respectively, whereby they may petition the Commission to continue to operate as ECMs and EBOTs. With some variation, both sections establish three basic requirements regarding the processing of grandfather petitions.

First, entities seeking grandfather treatment must submit their petitions to the Commission by a set deadline: ECMs must submit their petitions within sixty days of the enactment of the Dodd-Frank Act (*i.e.,* by September 20, 2010) and EBOTs must submit their petitions by the Dodd-Frank Act's effective date (*i.e.,* by July 15, 2011). Second, the Commission must consider all petitions in a "prompt manner." Third, the Commission may grant grandfather treatment for up to one year. In the case of EBOT petitions, the Dodd-Frank Act makes clear that the one-year period would commence with the Dodd-Frank Act's effective date of July 15, 2011. By contrast, the Dodd-Frank Act does not specify what the reference date should be for the running of any grandfather period for ECMs.

The Commission expects that many entities that currently operate as ECMs or EBOTs will seek to become either SEFs or DCMs when the Commission adopts regulations implementing Dodd-Frank's requirements for those facilities. While the Commission expects to adopt SEF and DCM regulations prior to the July 15, 2011, effective date for deleting the ECM and EBOT provisions from the CEA, the Commission also anticipates that concurrent with the implementation of those new provisions it will have to process a large number of SEF and DCM applications from ECMs, EBOTs and interdealer brokers.[8] In order to ease this congestion of applications, and to facilitate the transition of current ECM and EBOT businesses to the new regulatory regime mandated by the Dodd-Frank Act, the Commission believes that it would be appropriate to provide grandfather relief allowing EBOTs and ECMs to continue to operate as EBOTs and ECMs after the July 15, 2011, effective date of the Dodd-Frank Act.

Accordingly, the Commission is issuing orders that would establish procedures whereby ECMs and EBOTs may petition for and receive grandfather relief from the otherwise applicable provisions of the Dodd-Frank Act, so long as they submit both timely and acceptable grandfather relief requests and either DCM or SEF applications. To be acceptable, the grandfather relief request shall contain a commitment to provide the Commission and its staff with access to the books and records of the ECM or EBOT relating to its business as an ECM or EBOT in

[1] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at *http://www.cftc.gov./LawRegulation/OTCDERIVATIVES/index.htm.*

[2] Pursuant to Section 701 of the Dodd-Frank Act, Title VII may be cited as the "Wall Street Transparency and Accountability Act of 2010."

[3] 7 U.S.C. 1 *et seq.*

[4] The same provision of the Dodd-Frank Act that eliminated EBOTs also deleted CEA Section 5a—a provision that established a category of regulated markets known as derivatives transaction execution facilities ("DTEFs"). *See* Section 734 of the Dodd-Frank Act. The Dodd-Frank Act does not, however, authorize the Commission to grant grandfather relief to the DTEFs. Accordingly, DTEFs are not addressed in the Commission's subject order. Notably, the Commission has never registered a DTEF.

[5] *See* Commodity Futures Modernization Act of 2000, Public Law 106–554, 114 Stat. 2763 (2000).

[6] *See* Section 723(a)(1)(A) of the Dodd-Frank Act.

[7] *See* Section 734(a) of the Dodd-Frank Act.

[8] Currently, there are 16 ECMs and 6 EBOTs with active Notifications of Operation or Annual Certifications on file with the Commission.

accordance with the requirements in Commission Regulation 1.31, 17 CFR 1.31, effective July 15, 2011. Failure to comply with any request for books and records in accordance with the requirements of Commission Regulation 1.31 shall constitute a basis for revocation of the grandfather relief. The grandfather relief will extend for as long as the ECM or EBOT has a legitimate DCM or SEF application pending before the Commission and, accordingly, the relief will expire upon the Commission's approval or disapproval of the application.

b. Eligible Contract Participants Operating Pursuant to Section 2(h)(1)

Section 723 of the Dodd-Frank Act, which eliminated the ECM category from the CEA, also deleted CEA Section 2(h)(1)–(2)—a provision that provides an exemption for certain types of bilateral trading conducted off of regulated markets. Although the Dodd-Frank Act authorizes the Commission to grant grandfather relief to trading activity that relies upon CEA Section 2(h)(1)–(2), the nature of that trading activity is qualitatively different from trading activity on EBOTs and ECMs, both of which must operate as trading facilities, as that term is defined in CEA Section 1a(34). Accordingly, the issue of grandfather treatment for Section 2(h)(1)–(2) bilateral trading will be addressed by the Commission in a separate action.

III. Related Matters

a. Paperwork Reduction Act

The Commission has determined that these proposed orders will not impose any new recordkeeping or information collection requirements, or other collections of information that require approval of the Office of Management and Budget under the Paperwork Reduction Act ("PRA").[9] Collections of information that may be associated with a SEF or DCM application required as a condition for receiving relief will be addressed within the SEF and DCM-related rulemakings implementing the Dodd-Frank Act.

b. Cost-Benefit Analysis

Section 15(a) of the CEA [10] requires the Commission to consider the costs and benefits of its actions before issuing an order under the Act. By its terms, Section 15(a) does not require the Commission to quantify the costs and benefits of an order or to determine whether the benefits of the order outweigh its costs; rather, it requires that the Commission "consider" the costs and benefits of its actions. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular order is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the Act. The Commission has determined that providing grandfather relief to ECMs and EBOTs, as provided in these orders, will mitigate market disruptions by permitting ECMs and EBOTs to continue to operate while they transition into new market categories once the Dodd-Frank Act becomes effective.[11]

c. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA") [12] requires that agencies consider the impact of their rules on small businesses. The Commission previously has determined that neither ECMs nor EBOTs are small entities for purposes of the RFA.[13] Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that these Orders, taken in connection with Sections 2(h)(3)–(7) and 5d of the Act and with the Part 36 rules, will not have a significant impact on a substantial number of small entities.

IV. Orders

a. ECM Grandfather Order

After considering the complete record in this matter, the Commission has determined to issue the following Order pursuant to its authority under Section 723(c) of the Dodd-Frank Act:

It is hereby ordered that any ECM that meets all of the following applicable conditions may continue to operate pursuant to the provisions of CEA Section 2(h)(3)–(7) until July 15, 2012 (one year after the general effective date of the Dodd-Frank Act's amendments to the CEA): [14]

(1) The ECM must have filed with the Commission by September 20, 2010, a grandfather relief petition that:

(a) Is labeled "Exempt Commercial Market Grandfather Relief Petition Filed Pursuant to Section 723(c)(2)(A) of the Dodd-Frank Act,"

(b) Identifies the requesting ECM,

(c) Identifies a contact person at the ECM, including that person's contact information at the ECM, and

(d) Grants the Commission and its representatives access to the books and records of the ECM relating to its business as an ECM in accordance with the requirements of Commission Regulation 1.31, starting July 15, 2011 and throughout the pendency of the grandfather relief.

(2) The ECM must have filed a formal SEF or DCM application with the Commission within sixty days after the effective date of final regulations implementing the provisions of either Section 733 or 735 of the Dodd-Frank Act, whichever is appropriate.

(3) The ECM's SEF or DCM application is currently pending before the Commission.

b. EBOT Grandfather Order

After considering the complete record in this matter, the Commission has determined to issue the following Order pursuant to its authority under Section 734(c)(1) of the Dodd-Frank Act:

It is hereby ordered that any EBOT that meets all of the following applicable conditions may continue to operate pursuant to the provisions of CEA Section 5d up until July 15, 2012 (one year after the general effective date of the Dodd-Frank Act's amendments to the CEA): [15]

(1) The EBOT must have filed with the Commission by July 15, 2011, a grandfather relief petition that:

(a) Is labeled "Exempt Board of Trade Grandfather Relief Petition Filed Pursuant to Section 734(c)(1) of the Dodd-Frank Act,"

(b) Identifies the requesting EBOT,

(c) Identifies a contact person at the EBOT, including that person's contact information at the EBOT, and

(d) Grants the Commission and its representatives access to the books and records of the EBOT relating to its business as an EBOT in accordance with the requirements of Commission

[9] 44 U.S.C. 3501 *et seq.*

[10] 7 U.S.C. 19(a).

[11] The Commission is aware of certain ECMs that have block trade mechanisms whereby large-sized block transactions are executed away from the ECM's central marketplace, but in accordance with the ECM's rules, and subsequently reported to the ECM and treated as fungible with positions established through the central marketplace. Those block trades and resultant positions should be considered within the scope of the ECM grandfather relief being granted by this release.

[12] 5 U.S.C. 601 *et seq.*

[13] 66 FR 42256, 42268 (Aug. 10, 2001).

[14] *See* Section 754 of the Dodd-Frank Act.

[15] *See* Section 754 of the Dodd-Frank Act.

Regulation 1.31, starting July 15, 2011 and throughout the pendency of the grandfather relief.

(2) The EBOT must have filed a formal SEF or DCM application with the Commission within sixty days after the effective date of final regulations implementing the provisions of either Section 733 or 735 of the Dodd-Frank Act, whichever is appropriate.

(3) The EBOT's SEF or DCM application is currently pending before the Commission.

Issued in Washington, DC, on September 10, 2010, by the Commission.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 2010–23142 Filed 9–15–10; 8:45 am]

BILLING CODE 6351–01–P

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meetings

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: Vol. 75, No. 175, Friday, September 10, 2010, page 55312.

PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING: 10 a.m.–11 a.m., Wednesday September 15, 2010.

CHANGES IN MEETING: Meeting postponed to September 22, 2010, 10 a.m.–11 a.m. For a recorded message containing the latest agenda information, call (301) 504–7948.

CONTACT PERSON FOR ADDITIONAL INFORMATION: Todd A. Stevenson, Office of the Secretary, 4330 East West Highway, Bethesda, MD 20814 (301) 504–7923.

Dated: September 14, 2010.

Todd A. Stevenson,

Secretary.

[FR Doc. 2010–23276 Filed 9–14–10; 4:15 pm]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket No. DoD–2010–OS–0086]

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by October 18, 2010.

Title and OMB Number: Defense Acquisition University, Student Information System (SIS); OMB Control Number 0704–TBD.

Type of Request: New.

Number of Respondents: 90,000.

Responses per Respondent: 1.

Annual Responses: 90,000.

Average Burden per Response: 5 minutes.

Annual Burden Hours: 7,500 hours.

Needs and Uses: The information collection requirement is necessary to permit an individual to register for a DAU training course. The information is used to evaluate the individual's eligibility for a course and to notify the individual of approval or disapproval of the request. It is also used to notify the training facility of assignments to classes, and for cost analysis, budget estimates and financial planning.

Affected Public: Individuals or household.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: Ms. Jasmeet Seehra.

Written comments and recommendations on the proposed information collection should be sent to Ms. Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD/Information Management Division, 1777 North Kent Street, RPN, Suite 11000, Arlington, VA 22209–2133.

Dated: September 3, 2010.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2010–23090 Filed 9–15–10; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Federal Advisory Committee; Military Leadership Diversity Commission (MLDC)

AGENCY: Office of the Under Secretary of Defense for Personnel and Readiness.

ACTION: Meeting notice.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150, the Department of Defense announces that the Military Leadership Diversity Commission (MLDC) will meet September 27–29, 2010, in Baltimore, MD.

DATES: The meeting will be held on September 27 (from 7 p.m. to 9:30 p.m.), September 28 (from 8 a.m. to 8 p.m.), and September 29, 2010 (from 8 a.m. to 5:30 p.m.).

An Administrative Working Meeting that is scheduled for September 27 from 7 to 8 p.m. is closed to the public.

ADDRESSES: The meeting will be held at the Mt. Washington Conference Center, 5801 Smith Ave, Suite 1100, Baltimore, MD 21209.

FOR FURTHER INFORMATION CONTACT: Master Chief Steven A. Hady, Designated Federal Officer, MLDC, at (703) 602–0838 or (571) 882–0140, 1851 South Bell Street, Suite 532, Arlington, VA. E-mail: *steven.Hady@wso.whs.mil.*

SUPPLEMENTARY INFORMATION: Due to internal DoD difficulties, beyond the control of the Military Leadership Diversity Commission or its Designated Federal Officer, the Government was unable to process the **Federal Register** notice for the September 27–29, 2010, meeting of the Military Leadership Diversity Commission as required by 41 CFR 102–3.150(a). Accordingly, the Advisory Committee Management Officer for the Department of Defense, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement.

Purpose of the Meeting

The purpose of the meeting is for the commissioners of the Military Leadership Diversity Commission to continue their efforts to address congressional concerns as outlined in the commission charter.

Agenda

September 27, 2010

7 p.m.–8 p.m.

Administrative Working Meeting

(closed to the public)

8 p.m.–9:30 p.m.

Designated Federal Officer (DFO) opens meeting.
Commission Chairman opening remarks.
National Guard and Reserve Decision Brief
Commission Chairman closing remarks.
DFO adjourns the meeting.

September 28, 2010

8 a.m.–9 a.m.

DFO opens the meeting.
Commission Chairman opening remarks.
Deliberation of Outreach and Recruiting.
Deliberation of Retention.

9 a.m.–10 a.m.

Dr. Clifford Stanley, OSD P&R addresses MLDC

10 a.m.–10:30 a.m.

Presentation of Definition of Diversity.
DFO recesses the meeting.

11 a.m.–12 p.m.

DFO opens the meeting.
Deliberation of Definition of Diversity.
DFO recesses the meeting.

1 p.m.–1:30 p.m.

DFO opens the meeting.
Presentation of recommendations for Implementation and Accountability.
DFO recesses the meeting.

2 p.m.–4 p.m.

DFO opens the meeting.
Deliberation of recommendations for Implementation and Accountability.

4 p.m.–4:30 p.m.

DFO opens the meeting.
Presentation of recommendations for National Guard and Reserve.
DFO recesses the meeting.

6 p.m.–7:45 p.m.

DFO opens the meeting.
Deliberation of recommendations for National Guard and Reserve.

7:45 p.m.–8 p.m.

Public Comments.
Commission Chairman closing remarks.
DFO adjourns the meeting.

September 29, 2010

8 a.m.–8:15 a.m.

DFO opens the meeting.
Commission Chairman opening remarks.

8:15 a.m.–9:45 a.m.

Panel discussion regarding DoD/Service combat exclusion policies.

9:45 a.m.–10:15 a.m.

Presentation of recommendations for branching and assignments.
DFO recesses the meeting.

11 a.m.–12:30 p.m.

DFO opens the meeting.
Deliberation of recommendations for branching and assignments.

1:30 p.m.–5 p.m.

Revise and finalize recommendations.

5 p.m.–5:30 p.m.

Public Comments.
Commission Chairman closing remarks.
DFO adjourns the meeting.

Public's Accessibility to the Meeting

Pursuant to 5 U.S.C. 552b and 41 CFR 102–3.140 through 102–3.165, and the availability of space, the meetings on September 27 through 29, 2010, will be open to the public. However, pursuant to 41 CFR 3.160(b), the Administrative Working Meeting on September 27, 2010, from 7 p.m. to 8 p.m. shall be closed to the public.

Please note that the availability of seating is on a first-come basis.

Written Statements

Pursuant to 41 CFR 102–3.105(j) and 102–3.140, and section 10(a)(3) of the Federal Advisory Committee Act of 1972, the public or interested organizations may submit written statements to the Military Leadership Diversity Commission about its mission and functions. Written statements may be submitted at any time or in response to the stated agenda of a planned meeting of the Military Leadership Diversity Commission.

All written statements shall be submitted to the Designated Federal Officer for the Military Leadership Diversity Commission, and this individual will ensure that the written statements are provided to the membership for its consideration. Contact information for the Designated Federal Officer can be obtained from the GSA's FACA Database-—*https://www.fido.gov/facadatabase/public.asp*.

Statements being submitted in response to the agenda mentioned in this notice must be received by the Designated Federal Officer at the address listed above at least five calendar days prior to the meeting that is the subject of this notice. Written statements received after this date may not be provided to or considered by the Military Leadership Diversity Commission until its next meeting.

The Designated Federal Officer will review all timely submissions with the Military Leadership Diversity Commission Chairperson and ensure they are provided to all members of the Military Leadership Diversity Commission before the meeting that is the subject of this notice.

Dated: September 10, 2010.

Mitchell S. Bryman,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2010–23056 Filed 9–15–10; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2010–OS–0121]

Privacy Act of 1974; System of Records

AGENCY: Defense Threat Reduction Agency, DoD.

ACTION: Notice to amend a system of records.

SUMMARY: Defense Threat Reduction Agency proposes to amend a system of records notice in its existing inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective without further notice on October 18, 2010, unless comments are received which result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

* *Federal Rulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.

* *Mail:* Federal Docket Management System Office, Room 3C843 Pentagon, 1160 Defense Pentagon, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Brenda Carter at (703) 767–1771.

SUPPLEMENTARY INFORMATION: The Defense Threat Reduction Agency notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the Freedom of Information and Privacy Office, Defense Threat Reduction Agency, 8725 John J. Kingman Road, Fort Belvoir, VA 22060–6201.

The specific changes to the record system being amended are set forth below followed by the notice, as amended, published in its entirety. The proposed amendments are not within the purview of subsection (r) of the Privacy Act of 1974 (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: September 13, 2010.

Mitchell S. Bryman,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

HDTRA 26

SYSTEM NAME:

DTRA Telework Program Records (March 10, 2008; 73 FR 12712).

CHANGES:

* * * * *

SYSTEM LOCATION:

Delete entry and replace with "Special Programs Management Division (BE–BHS), Human Capital Office, Defense Threat Reduction Agency, 8725 John J. Kingman Road, Fort Belvoir, VA 22060–6201."

* * * * *

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with "5 U.S.C. 6120, Flexible and Compressed Work Schedules, Purposes; DoD Directive 1035.1, Telework Policy for Department of Defense; DoD Instruction 1035.1, Telework Policy; and Defense Threat Reduction Agency Instruction 1100.2, Defense Threat Reduction Agency Telework Program."

* * * * *

RETENTION AND DISPOSAL:

Delete entry and replace with "Records are destroyed in burn bags one year after supersession, cancellation, or termination of agreement."

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with "DTRA Telework Coordinator, Special Programs Management Division (BE–BHS), Human Capital Office, Defense Threat Reduction Agency, 8725 John J. Kingman Road, Fort Belvoir, VA 22060–6201."

NOTIFICATION PROCEDURE:

Delete entry and replace with "Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquires to the DTRA Telework Coordinator, Special Programs Management Division, Human Capital Office, Defense Threat Reduction Agency, 8725 John J. Kingman Road, Fort Belvoir, VA 22060–6201.

Individuals must provide their full name, address, and a telephone number and the enterprise/staff office where employed at the time they are approved to participate in the DTRA Telework Program."

RECORDS ACCESS PROCEDURES:

Delete entry and replace with "Individuals seeking access to information about themselves contained in this system of records should address written inquiries to DTRA Telework Coordinator, Special Programs Management Division Human Capital Office, Defense Threat Reduction Agency, 8725 John J. Kingman Road, Fort Belvoir, VA 22060–6201.

Individuals must provide their full name, address, and a telephone number and the enterprise/staff office where employed at the time they are approved to participate in the DTRA Telework Program."

* * * * *

HDTRA 026

SYSTEM NAME:

DTRA Telework Program Records

SYSTEM LOCATION:

Special Programs Management Division (BE–BHS), Human Capital Office, Defense Threat Reduction Agency, 8725 John J. Kingman Road, Fort Belvoir, VA 22060–6201.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who have been granted approval to telework on a regular/recurring, or situational (ad hoc) basis in accordance with Defense Threat Reduction Agency (DTRA) Telework Program.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records include individual's name; office symbol; office telephone number; official duty station; alternative worksite address (GSA Telecenter, home, other alternative worksite); mileage savings; time savings; work schedule and tour of duty at the alternative worksite; regular work schedule (8 hours a day, flexitour or compressed); telework schedule.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 6120, Flexible and Compressed Work Schedules, Purposes; DoD Directive 1035.1, Telework Policy for Department of Defense; DoD Instruction 1035.1, Telework Policy; and Defense Threat Reduction Agency Instruction 1100.2, Defense Threat Reduction Agency Telework Program.

PURPOSE(S):

Records are used by supervisors and more frequently used by the telework program coordinators for managing, evaluating, and reporting DTRA Telework Program activity and participation. Data on participation in the DTRA Telework Program, minus personal identifiers, may also be provided to the Department of Defense (DoD) for a consolidated DoD response to the Office of Personnel Management (OPM) Telework Survey.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, these records contained therein may specifically be disclosed outside the DOD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To the Home and Alternative Worksites, excluding GSA Telecenters, Telework Safety Checklist may be disclosed to the Department of Labor when an employee is injured while working at home while in the performance of normal duties.

To the Office of Personnel Management (OPM) Telework Survey to provide a consolidated data on participation in the DTRA Telework Program, minus personal identifiers, may also be provided.

The DoD 'Blanket Routine Uses' published at the beginning of DTRA's compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are maintained in paper and electronic media.

RETRIEVABILITY:

By name and/or office/official duty station/work schedule.

SAFEGUARDS:

Access is limited to the Employee Relations and Work Life Division, Human Capital Office. Case records are maintained in locked security containers. Automated records are controlled by limiting physical access to

terminals and by the use of passwords. Work areas are sight controlled during normal duty hours. Security guards and an intrusion alarm system protect buildings. A risk assessment has been performed and will be made available upon request. The electronic database is further restricted by the use of Common Access Cards in order to access the excel spreadsheet.

RETENTION AND DISPOSAL:

Records are destroyed in burn bags one year after supersession, cancellation, or termination of agreement.

SYSTEM MANAGER(S) AND ADDRESS:

DTRA Telework Coordinator, Special Programs Management Division (BE–BHS), Human Capital Office, Defense Threat Reduction Agency, 8725 John J. Kingman Road, Fort Belvoir, VA 22060–6201.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquires to the DTRA Telework Coordinator, Special Programs Management Division, Human Capital Office, Defense Threat Reduction Agency, 8725 John J. Kingman Road, Fort Belvoir, VA 22060–6201.

Individuals must provide their full name, address, and a telephone number and the enterprise/staff office where employed at the time they are approved to participate in the DTRA Telework Program.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system of records should address written inquiries to DTRA Telework Coordinator, Special Programs Management Division Human Capital Office, Defense Threat Reduction Agency, 8725 John J. Kingman Road, Fort Belvoir, VA 22060–6201.

Individuals must provide their full name, address, and a telephone number and the enterprise/staff office where employed at the time they are approved to participate in the DTRA Telework Program.

CONTESTING RECORD PROCEDURES:

The DTRA rules for accessing records, for contesting contents, and appealing initial agency determinations are contained in 32 CFR part 318, or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Data is supplied by telework participants and their supervisors.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2010–23094 Filed 9–15–10; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Navy

[Docket No. USN–2010–0004]

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by October 18, 2010.

Title and OMB Number: JAGC Applicant Survey; OMB Control Number 0703–TBD.

Type of Request: New.

Number of Respondents: 800.

Responses per Respondent: 1.

Annual Responses: 800.

Average Burden Per Response: 15 minutes.

Annual Burden Hours: 200 hours.

Needs and Uses: The U.S. Navy Judge Advocate General requires a method to improve recruiting and accession board processes in order to recruit and select the best individuals as judge advocates. A survey will allow the JAG Corps to assess whether certain traits and/or behaviors are indicators of future success in the JAG Corps. If the survey is found to be predictive, it will be a reliable, valid, and fair tool to be used in recruiting and selection decisions.

Affected Public: Individuals or household.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

Written comments and recommendations on the proposed information collection should be sent to Ms. Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD/Information Management Division, 1777 North Kent Street, RPN, Suite 11000, Arlington, VA 22209–2133.

Dated: September 3, 2010.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2010–23087 Filed 9–15–10; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Navy

[Docket No. USN–2010–0005]

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by October 18, 2010.

Title and OMB Number: Naval Special Warfare Recruiting Directorate Sponsor Application; OMB Control Number 0703–TBD.

Type of Request: New.

Number of Respondents: 2,000.

Responses per Respondent: 1.

Annual Responses: 2,000.

Average Burden per Response: 1 hour.

Annual Burden Hours: 2,000 hours.

Needs and Uses: This collection of information is necessary to: (1) Help determine the eligibility and overall compatibility between individuals interested in potentially pursuing a career as a Navy Sea Air Land (SEAL), or Navy Special Warfare (NSW) Combatant Craft Crewman (SWCC) operator; (2) enable the NSW Recruiting Directorate to provide appropriate career and training preparation information to prospective Navy SEAL recruits; and (3) enable the NSW Recruiting Directorate to better allocate limited resources in establishing relationships with the Naval Special

Warfare community and prospective candidates based on the alignment of the prospective candidate profile with individuals who have been historically successful in completing Navy SEAL accession training.

Affected Public: Individuals or household.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: Ms. Jasmeet Seehra.

Written comments and recommendations on the proposed information collection should be sent to Ms. Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD/Information Management Division, 1777 North Kent Street, RPN, Suite 11000, Arlington, VA 22209–2133.

Dated: September 3, 2010.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2010–23088 Filed 9–15–10; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Navy

[Docket No. USN–2010–0012]

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by October 18, 2010.

Title and OMB Number: U.S. Navy Chief of Information Sponsor Application; OMB Control Number 0703–TBD.

Type of Request: New.

Number of Respondents: 3,000.

Responses per Respondent: 1.

Annual Responses: 3,000.

Average Burden per Response: 15 minutes.

Annual Burden Hours: 750 hours.

Needs and Uses: The Navy's Chief of Information proposes the establishment of a centralized system and database for those individuals who are embarking U.S. Navy ships as part of the Navy's Leaders to Sea program.

Affected Public: Individuals or household.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: Ms. Jasmeet Seehra.

Written comments and recommendations on the proposed information collection should be sent to Ms. Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD/Information Management Division, 1777 North Kent Street, RPN, Suite 11000, Arlington, VA 22209–2133.

Dated: September 3, 2010.

Patricia L. Toppings,

OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. 2010–23089 Filed 9–15–10; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Navy

Information on Surplus Land at a Military Installation Designated for Disposal: NASJRB Willow Grove, PA

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

SUMMARY: This notice provides information on the surplus property at Naval Air Station Joint Reserve Base (NASJRB) Willow Grove located in Horsham Township, Montgomery County, PA.

FOR FURTHER INFORMATION CONTACT: Ms. Kimberly Kesler, Director, Base Realignment and Closure Program Management Office, 1455 Frazee Road, San Diego, CA 92108–4310, telephone: 619–532–0993 or Mr. David Drozd, Director, Base Realignment and Closure Program Management Office, Northeast, 4911 South Broad Street, Philadelphia, PA 19112–1303, telephone: 215–897–4909.

SUPPLEMENTARY INFORMATION: In 2005, NASJRB Willow Grove, PA was designated for closure under the authority of the Defense Base Closure and Realignment Act of 1990, Public Law 101–510, as amended (the Act). Pursuant to this designation, on January 23, 2006, land and facilities at this installation were declared excess to the Department of Navy (DoN) and made available to other Department of Defense (DoD) components and other Federal agencies. In 2007, that declaration was superseded by Public Law 110–28, Section 3703, of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, as amended, which directed the DoN to transfer NASJRB Willow Grove land to the Department of the Air Force for subsequent conveyance to the Commonwealth of Pennsylvania for establishment of the Horsham Joint Interagency Installation (HJII). In November 2009, the Commonwealth of Pennsylvania informed the Secretary of Defense that the Commonwealth will not use NASJRB Willow Grove for the proposed HJII. On January 8, 2010, land and facilities at this installation were once again declared excess to the DoN and made available to other DoD components and other Federal agencies. The DoN has evaluated all timely Federal requests and has made a decision on property required by the Federal Government.

Notice of Surplus Property. Pursuant to paragraph (7)(B) of Section 2905(b) of the Act, as amended by the Base Closure

Community Redevelopment and Homeless Assistance Act of 1994, the following information regarding the redevelopment authority for surplus property at NASJRB Willow Grove, PA is published in the **Federal Register**.

Redevelopment Authority. The local redevelopment authority for NASJRB Willow Grove, PA is the Horsham Township Authority for NASJRB. The point of contact is Mr. Michael J. McGee, Executive Director, 1025 Horsham Road, Horsham, PA 19044, telephone 215–643–3131.

Surplus Property Description. The following is a list of the land and facilities at NASJRB Willow Grove that are surplus to the needs of the Federal Government.

A: Land. NASJRB Willow Grove, PA consists of approximately 892 acres of improved and unimproved fee simple land located within Montgomery County and the Township of Horsham.

This surplus notice does not include two parcels of land designated for federal transfer. These parcels are being retained to provide for the needs of the Federal Aviation Administration (FAA), and the Department of the Air Force. The FAA parcel consists of approximately 3 acres and includes the Airport Surveillance Radar-11. The parcel being made available to the Air Force totals approximately 26 acres, and is located in the northeastern portion of the base and lies contiguous to the Willow Grove Air Reserve Station, and includes Building Numbers 6 (Boiler House), 7 (Welding Shop), 8 (Sewage Plant Bldg.), 30 (Chlorinating House), 31 (Well House No. 1), 31A (Well No. 1), 32 (Well House No. 2), 32A (Well No. 2), 39 (Gate House—Main Gate), 65 (Training Building), 78 (Public Works Bldg.), 106 (Reservoir Water No. 1), 127 (Dispatcher Bldg.), 128 (Automotive Main Bldg./USAF), 171 (Supply Warehouse), 190 (Electrical Distribution Shed), 346 (PAANG Weapons and Release), 348 (PAANG Aircraft Maintenance Composite), 604 (Public Works Shed), 606 (Marine General Warehouse), 633 (Hazardous Waste Bldg.), 642 (Hazardous Waste Bldg.), 643 (Public Works Storage), 644 (Transportation Storage), 654 (Public Works Carpenter Shop), 658 (Equipment Maintenance Bldg.), 661 (Guard House), 662 (Guard House), and 686 (Guard Shack). These areas will be transferred on or before operational closure.

B: Buildings. The following is a summary of the buildings and other improvements located on the above-described land that will also be available when the installation closes. Property numbers are available on request.

(1) Aviation buildings (12 structures). *Comments:* Approximately 314,662 square feet. Includes hangars, passenger terminal, storage, etc. Approximately 781,447 square yards of aviation facilities (23 structures). Includes runway, taxiways, parking aprons, line vehicle parking, etc.

(2) Administrative/training facilities (16 structures). *Comments:* Approximately 208,691 square feet. Includes reserve training buildings, personnel support activity, etc.

(3) Bachelor Officers Quarters (3 structures). *Comments:* Approximately 100,689 square feet.

(4) Housing Quarters (6 structures). *Comments:* Approximately 18,623 square feet. Approximately 1,530 square feet of detached garages (4 structures).

(5) Maintenance & Production Facilities (20 structures). *Comments:* Approximately 190,830 square feet. Includes vehicle maintenance, fire and rescue station, operations buildings, support buildings/facilities, etc.

(6) Storage/Warehouse Facilities (35 structures). *Comments:* Approximately 120,633 square feet. Approximately 7,000 square yards of open storage area.

(7) Community Support Facilities (25 structures). *Comments:* Approximately 142,507 square feet. Includes recreation building, child care facility, swimming pool, chapel, Navy Exchange retail store, picnic shelters, pavilions, outdoor basketball court, softball diamond, auto hobby shop, Navy Lodge, etc.

(8) Miscellaneous facilities (36 structures). *Comments:* Approximately 29,740 square feet. Includes dispensary, enlisted dining club, dog kennels, etc.

(9) Paved areas (roads). *Comments:* Approximately 145,632 square yards consisting of roads and other similar pavements. Approximately 103,447 square yards consisting of other paved surface areas, including parking areas, sidewalks, etc.

(10) Utility facilities (approximately 50 structures). *Comments:* measuring systems vary. Includes boiler houses, pump house, storm sewer, sanitary sewer lines, electric and water lines, and substation.

Redevelopment Planning. Pursuant to section 2905(b)(7)(F) of the Act, the Horsham Township Authority for NASJRB, the Local Redevelopment Authority (LRA), will conduct a community outreach effort with respect to the surplus property and will publish, within 30 days of the date of this notice, in a newspaper of general circulation in the communities within the vicinity of NASJRB Willow Grove, PA the time period during which the LRA will receive notices of interest from State and local governments, representatives of the homeless, and other interested parties. This publication shall include the name, address and telephone number of the point of contact for the LRA who can provide information on the prescribed form and contents of the notices of interest.

Dated: September 9, 2010.

D. J. Werner,

Lieutenant Commander, Office of the Judge Advocate General, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2010–23095 Filed 9–15–10; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF EDUCATION

Notice of Submission for OMB Review

AGENCY: Department of Education.

ACTION: Comment request.

SUMMARY: The Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

DATES: Interested persons are invited to submit comments on or before October 18, 2010.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, New Executive Office Building, Washington, DC 20503, be faxed to (202) 395–5806 or e-mailed to *oira_submission@omb.eop.gov* with a cc: to *ICDocketMgr@ed.gov.* Please note that written comments received in response to this notice will be considered public records.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. The OMB is particularly interested in comments which: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Dated: September 9, 2010.

James Hyler,

Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.

Office of Innovation and Improvement

Type of Review: Revision.

Title of Collection: Application for Grants under the Credit Enhancement for Charter School Facilities Program.

OMB Control Number: 1855–0007.

Agency Form Number(s): N/A.

Frequency of Responses: Annually.

Affected Public: Not-for-profit institutions, State, Local, or Tribal Government, State Educational Agencies, Local Educational Agencies.

Total Estimated Number of Annual Responses: 20.

Total Estimated Annual Burden Hours: 1,600.

Abstract: The Department of Education will use the application to award grants under the Credit Enhancement for Charter School Facilities Program (formerly known as the Charter School Facilities Financing Demonstration Program) grants. These grants will be made to private, non-profits; public entities; governmental entities; and consortia of these organizations. The funds are to be deposited into a reserve account that will be used to leverage private funds on behalf of charter schools to acquire, construct, and renovate school facilities.

This information collection is being submitted under the Streamlined Clearance Process for Discretionary Grant Information Collections (1894–0001). Therefore, the 30-day public comment period notice will be the only public comment notice published for this information collection.

Requests for copies of the information collection submission for OMB review may be accessed from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or from the Department's Web site at *http://edicsweb.ed.gov,* by selecting the "Browse Pending Collections" link and by clicking on link number 4365. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to the Internet address *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 2010–23013 Filed 9–15–10; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Comment request.

SUMMARY: The Department of Education (the Department), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the reporting burden on the public and helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before November 15, 2010.

ADDRESSES: Comments may be submitted electronically to *FAFSA.Comments@ed.gov.* We also ask that you copy them to *ICDocketMgr@ed.gov* or mail to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Please note that written comments received in response to this notice will be considered public records.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35) requires that Federal agencies provide interested parties an early opportunity to comment on information collection requests. The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, publishes this notice containing proposed information collection requests at the beginning of the Departmental review of the information collection. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: September 13, 2010.

Darrin A. King,

Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.

Federal Student Aid

Type of Review: Revision.

Title of Collection: 2011–2012 Federal Student Aid Application.

OMB Control Number: 1845–0001.

Agency Form Number(s): N/A.

Frequency of Responses: Annually.

Affected Public: Individuals or households.

Total Estimated Number of Annual Responses: 35,818,915.

Total Estimated Number of Annual Burden Hours: 32,239,328.

Abstract: Public Law 89–329, Sections 401–495, the Higher Education Act of 1965, as amended (HEA), mandates that the Secretary of Education "* * * shall produce, distribute, and process free of charge common financial reporting forms as described in this subsection to be used for application and reapplication to determine the need and eligibility of a student for financial assistance."

The determination of need and eligibility are for the following Title IV, HEA, federal student financial assistance programs: The Federal Pell Grant Program; the Campus-Based programs (Federal Supplemental Educational Opportunity Grant (FSEOG), Federal Work-Study (FWS), and the Federal Perkins Loan Program); the William D. Ford Federal Direct Loan Program; the Teacher Education Assistance for College and Higher Education (TEACH) Grant; and the Iraq and Afghanistan Service Grant.

Federal Student Aid, an office of the U.S. Department of Education (hereafter "the Department"), subsequently

developed an application process to collect and process the data necessary to determine a student's eligibility to receive Title IV, HEA program assistance. The application process involves an applicant's submission of the *Free Application for Federal Student Aid* (FAFSA). After submission of the FAFSA, an applicant receives a *Student Aid Report* (SAR) which is a summary of the data they submitted on the FAFSA. The applicant reviews the SAR, and, if necessary, will make corrections or updates to their submitted FAFSA.

The Department seeks OMB approval of all application components as a single "collection of information." The aggregate burden will be accounted for under OMB Control Number 1845–0001, currently assigned to the FAFSA form. The specific application components, descriptions and submission methods for each are listed in Table 1.

TABLE 1—FEDERAL STUDENT AID APPLICATION COMPONENTS

Component	Description	Submission method
Initial Submission of FAFSA		
FAFSA on the Web (FOTW)	Online FAFSA that offers applicants a customized experience	Submitted by the applicant via *http://www.fafsa.gov.*
FOTW—Renewal	Online FAFSA for applicants who have previously completed the FAFSA.	
FOTW—EZ	Online FAFSA for applicants who qualify for the Simplified Needs Test (SNT) or Automatic Zero (Auto Zero) needs analysis formulas.	
FOTW—EZ Renewal	Online FAFSA for applicants who have previously completed the FAFSA and who qualify for the SNT or Auto Zero needs analysis formulas.	
FAFSA on the Phone (FOTP)	The Federal Student Aid Information Center (FSAIC) representatives assist applicants by filing the FAFSA on their behalf through FOTW.	Submitted through *http://www.fafsa.gov* for applicants who call 1–800–4–FED–AID.
FOTP—EZ	FSAIC representatives assist applicants who qualify for the SNT or Auto Zero needs analysis formulas by filing the FAFSA on their behalf through FOTW.	
FAA Access	Online tool that a financial aid administrator (FAA) utilizes to submit a FAFSA.	Submitted through *http://www.faaacess.ed.gov* by a FAA on behalf of an applicant.
FAA Access—Renewal	Online tool that a FAA can utilize to submit a Renewal FAFSA.	
FAA Access—EZ	Online tool that a FAA can utilize to submit a FAFSA for applicants who qualify for the SNT or Auto Zero needs analysis formulas.	
FAA Access—EZ Renewal	Online tool that a FAA can utilize to submit a FAFSA for applicants who have previously completed the FAFSA and who qualify for the SNT or Auto Zero needs analysis formulas.	
Electronic Other	This is a submission done by a FAA, on behalf of the applicant, using the Electronic Data Exchange (EDE).	The FAA may be using their mainframe computer or software to facilitate the EDE process.
PDF FAFSA or Paper FAFSA	The paper version of the FAFSA printed by the Department for applicants who are unable to access the Internet or the online PDF FAFSA for applicants who can access the Internet but are unable to complete the form using FOTW.	Mailed by the applicant.
Correcting Submitted FAFSA Information and Reviewing FAFSA Information		
FOTW—Corrections	Any applicant who has a Federal Student Aid PIN (FSA PIN)—regardless of how they originally applied—may correct using FOTW Corrections.	Submitted by the applicant via *http://www.fafsa.gov.*
Electronic Other—Corrections	With the applicant's permission, corrections can be made by a FAA using the EDE.	The FAA may be using their mainframe computer or software to facilitate the EDE process.
Paper SAR—This is a SAR and an option for corrections..	The full paper summary that is mailed to paper applicants who did not provide an e-mail address, to applicants who did not sign their application and to applicants whose records were rejected during processing because the Social Security Number did not match with the SSA. Applicants can write corrections directly on the paper SAR and mail for processing.	Mailed by the applicant.
FAA Access—Corrections	An institution can use FAA Access to correct the FAFSA	Submitted through *http://www.faaacess.ed.gov* by a FAA on behalf of an applicant.
Internal Department Corrections	The Department will submit an applicant's record for system generated corrections.	There is no burden to the applicants under this correction type as these are system based corrections.
FSAIC Corrections	Any applicant, with their Data Release Number (DRN), can change the postsecondary institutions listed on their FAFSA or change their address by calling FSAIC.	These changes are made directly in the CPS system by a FSAIC representative.
SAR Electronic (eSAR)	This is the PDF version of the SAR for applicants who applied electronically or by paper and provided an e-mail address.	Cannot be submitted for processing.

TABLE 1—FEDERAL STUDENT AID APPLICATION COMPONENTS—Continued

Component	Description	Submission method
SAR Acknowledgment	This is the condensed paper SAR that is mailed to applicants who applied electronically but did not provide an e-mail address.	

This information collection also documents an estimate of the annual public burden. The updated estimates are the result of the Department's efforts to more accurately determine the public's burden as it relates to the application process for Federal student aid. The findings have led to the development of the Applicant Burden Model (ABM), which measures applicant burden through an assessment of the activities each applicant conducts in conjunction with other characteristics of the applicant. The ABM has been designed to more accurately describe, in terms of burden, the average applicant's experience. Key determinants of the ABM include:

- The total number of applicants that will potentially apply for Federal student aid;
- How the applicant chooses to complete and submit the FAFSA, *e.g.,* by paper or electronically via FOTW;
- How the applicant chooses to submit any corrections and/or updates (*e.g.,* the paper SAR or electronically via FOTW Corrections);
- The type of SAR document the applicant receives (paper SAR, SAR acknowledgment, or the eSAR);
- The formula applied to determine the applicant's EFC (full need analysis formula, Simplified Needs Test or Automatic Zero); and
- The average amount of time involved in preparing to complete the application.

The ABM is largely driven by the number of potential applicants for the application cycle. The total application projection for 2011–2012 is based upon two factors—estimates of the total enrollment in all degree-granting institutions and the percentage change in FAFSA submissions for the last completed application cycle. This results in an estimate of 23,611,500 total applicants that will submit a FAFSA for 2011–2012.

The ABM is also largely based on the application options available to students and parents. In assessing the application options available, the Department recognized a need to restructure the current breakdown of the application components and revise the burden estimates for each application component based on a recently implemented web trending tool, FOTW survey information, and other Department data sources. The ABM changes the classification of the application components and combines the two previously separate collections for the FAFSA and the SAR. The final application components were listed in Table 1. These changes create a one-time re-alignment of the methodology, but do not reflect any change in the actual burden experienced by applicants. The changes have allowed the Department to utilize more controlled and accurate data for its burden calculations.

Another critical element included in the ABM is the anticipated impacts of the Department's enhancements to the application process and application products. In an ongoing effort for process improvement, the Department routinely conducts a review of the application data elements to identify questions that could be revised or removed. As a result, for 2011–2012, two questions have been deleted from the application.

Also for 2011–2012, FOTW will be further improved by the implementation of significant enhancements facilitated by a web technology upgrade. The upgraded application will include new features including a redesigned homepage and more dynamic and personalized navigation. In addition, there will be improved and simplified functionality for users that need to correct or update their FAFSA data using FAFSA Corrections.

FOTW will also expand the offering of the IRS Data Retrieval tool to more users in 2011–2012 by offering the tool earlier in the application cycle and offering the tool in FAFSA Corrections. Beginning in January of 2010, the Department began offering FOTW applicants the IRS Data Retrieval tool which significantly simplifies the completion of the FAFSA for many applicants. The IRS Data Retrieval tool is an optional service that provides the applicant and their parents, if parental information is required, access to view the IRS tax information required to complete the FAFSA. The applicant can also securely transfer the IRS information into the FAFSA. The tool saves time and increases the accuracy of the data submitted.

The Department has assessed that these simplification efforts over the last year, in addition to planned enhancements that will be deployed on January 1, 2011 for 2011–2012 cycle, will produce an overall reduction in burden. To understand the decrease in burden we should state that the decrease is even more notable because it is offset by the overall increase in the number of applicants choosing to attend college and apply for federal student aid.

For 2010–2011, the Department estimated that 21,696,675 applicants would complete the application. This led to a total burden estimate of 33,774,347 hours. The 2010–2011 FAFSA information collection (OMB Control # 1845–0001) was approved for 26,781,074 hours and the 2010–2011 SAR information collection (OMB Control # 1845–0008) was approved for 6,993,273 hours. Table 2 demonstrates what the burden would have been for the FAFSA and SAR collection in 2011–2012 if only the increase in applicants was taken into account.

TABLE 2—BURDEN BASELINE FOR 2011–2012—ACCOUNTING ONLY FOR INCREASE IN APPLICANTS

	2010–2011	*Baseline—2011–2012*	*Change*	*Percentage Change*
Total Number of Applicants (Respondents)	21,696,675	23,611,500	1,914,825	8.83
FAFSA Annual Burden (Hours)	26,781,074	30,034,682	3,253,608	12.15
SAR Annual Burden (Hours)	6,993,273	7,610,459	617,186	8.83
Annual Burden	33,774,347	37,645,141	3,870,794	11.46

As shown in Table 2, if no other changes had been made to the application process and the burden was calculated taking into account only the 8.83% increase in applicants; the burden would have increased by 11.46%. This translates into a burden adjustment of 3,870,794 hours.

Now that we have accounted for the burden change based solely on the increase in applicants, we can compare that figure to the actual burden calculated for 2011–2012. The Department's final total estimated burden for 2011–2012, which is 32,239,328, hours reflects all of the distinct application components combined into one information collection. The burden baseline for 2011–2012 based solely on the increase in applicants was 37,645,141 hours. Table 3 shows the difference in the two calculations.

TABLE 3—BURDEN BASELINE COMPARED TO FINAL BURDEN

	Baseline—2011–2012	*Final—2011–2012*	*Change*	*Percentage Change*
Total Number of Applicants (Respondents)	23,611,500	23,611,500	0	0
Annual Burden	37,645,141	32,239,328	5,405,813	−14.36

Table 3 also demonstrates the reduction in the public burden as a result of the simplification initiatives developed and implemented by the Department. The burden decrease is 14.36%, the largest in several years, and translates into a program change decrease of more than 5.4 million hours.

Lastly, Table 4, depicts the overall burden change in total burden hours from 2010–2011 to 2011–2012.

TABLE 4—COMPARISON OF 2010–2011 OVERALL BURDEN TO 2011–2012 OVERALL BURDEN

	2010–2011	*Final—2011–2012*	*Change*	*Percentage Change*
Total Number of Applicants (Respondents)	21,696,675	23,611,500	1,914,825	8.83
Annual Burden	33,774,347	32,239,328	−1,535,019	−4.54

This results in an overall program change reduction of 1,535,019 hours when compared to 2010–2011. As stated previously, this reduction is attributed to the simplification enhancements which include the redesign of FAFSA on the Web application submission, the availability of the IRS Data Retrieval Tool, a simplified FOTW homepage, more personalized navigation, and lastly, improved and simplified functionality for users that need to correct or update their FAFSA data through FOTW Corrections.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the "Browse Pending Collections" link and by clicking on link number 4391. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 2010–23175 Filed 9–15–10; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Biomass Research and Development Technical Advisory Committee

AGENCY: Department of Energy, Office of Energy Efficiency and Renewable Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces an open meeting of the Biomass Research and Development Technical Advisory Committee under Section 9008(d) of the Food, Conservation, and Energy Act of 2008. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that agencies publish these notices in the **Federal Register** to allow for public participation. This notice announces the meeting of the Biomass Research and Development Technical Advisory Committee.

DATES: September 29, 2010 and September 30, 2010.

ADDRESSES: Embassy Suites Denver—Aurora, 4444 North Havana Street, Denver, Colorado 80239, (303) 375–0400.

FOR FURTHER INFORMATION CONTACT: Laura McCann, Designated Federal Officer for the Committee, Office of Energy Efficiency and Renewable Energy, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585; (202) 586–7766; E-mail: *laura.mccann@ee.doe.gov* or Chrissy Fagerholm at (202) 586–2933; E-mail: *christina.fagerholm@ee.doe.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of Meeting: To provide advice and guidance that promotes research and development leading to the production of biobased fuels and biobased products.

Tentative Agenda: Agenda will include the following:

- Update on USDA Biomass R&D Activities.
- Update on DOE Biomass R&D Activities.
- Presentation on USDA and Department of Navy Joint Efforts.
- Presentation on IBR Projects Panel—Cellulosic Ethanol.
- Presentation on "Drop-In Fuels" Projects Panel.

Public Participation: In keeping with procedures, members of the public are welcome to observe the business of the Biomass Research and Development Technical Advisory Committee. To attend the meeting and/or to make oral statements regarding any of the items on the agenda, you should contact Laura McCann at 202–586–7766; E-mail: *laura.mccann@ee.doe.gov* or Chrissy Fagerholm at (202) 586–2933; E-mail: *christina.fagerholm@ee.doe.gov.* You

must make your request for an oral statement at least 5 business days before the meeting. Members of the public will be heard in the order in which they sign up at the beginning of the meeting. Reasonable provision will be made to include the scheduled oral statements on the agenda. The Chair of the Committee will make every effort to hear the views of all interested parties. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. The Chair will conduct the meeting to facilitate the orderly conduct of business.

Minutes: The minutes of the meeting will be available for public review and copying at *http://www.brdisolutions.com/publications/default.aspx#meetings.*

Issued at Washington, DC, on September 10, 2010.

Carol A. Matthews,

Committee Management Officer.

[FR Doc. 2010–23116 Filed 9–15–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Portsmouth

AGENCY: Department of Energy (DOE).

ACTION: Notice of open meeting.

SUMMARY: This notice announces an Energy Parks Initiative Workshop of the Environmental Management Site-Specific Advisory Board (EM SSAB), Portsmouth. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Thursday, September 23, 2010, 6 p.m.–8 p.m.

ADDRESSES: Ohio State University, Endeavor Center, 1862 Shyville Road, Piketon, Ohio 45661.

FOR FURTHER INFORMATION CONTACT: Joel Bradburne, Deputy Designated Federal Officer, Department of Energy Portsmouth/Paducah Project Office, Post Office Box 700, Piketon, Ohio 45661, (740) 897–3822, *Joel.Bradburne@lex.doe.gov.*

SUPPLEMENTARY INFORMATION: *Purpose of the Board:* The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management and related activities.

Tentative Agenda

- Portsmouth SSAB Involvement with Energy Parks—Val Francis, Co-Chair.
- Energy Parks Initiative Presentation—Mark Gilbertson, DOE–Headquarters.
- Break.
- Questions and Answers from Comment Cards.
- Adjourn.

Public Participation: The meeting is open to the public. The EM SSAB, Portsmouth, 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 Joel Bradburne in advance of the meeting at the phone number listed above. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. This notice is being published less than 15 days prior to the meeting date due to programmatic issues that had to be resolved prior to the meeting date.

Issued at Washington, DC, on September 10, 2010.

Carol A. Matthews,

Committee Management Officer.

[FR Doc. 2010–23117 Filed 9–15–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling

AGENCY: Department of Energy, Office of Fossil Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces an open meeting of the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling (the Commission). The Commission was organized pursuant to the Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) (the Act). The Act requires that agencies publish these notices in the **Federal Register**. The Charter of the Commission can be found at: *http://www.OilSpillCommission.gov.*

DATES: Monday, September 27, 2010, 9 a.m.–4:30 p.m., and Tuesday, September 28, 2010, 9 a.m.–4:30 p.m.

ADDRESSES: Washington Marriott Wardman Park, 2660 Woodley Park Road, NW., Washington, DC 20008; telephone number: 1–202–328–2000.

FOR FURTHER INFORMATION CONTACT: Christopher A. Smith, Designated Federal Officer, Mail Stop: FE–30, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington DC 20585; telephone (202) 586–0716 or facsimile (202) 586–6221; e-mail: *BPDeepwater HorizonCommission@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

Background: The President directed that the Commission be established to examine the relevant facts and circumstances concerning the root cause of the BP Deepwater Horizon explosion, fire, and oil spill and to develop options to guard against, and mitigate the impact of, any oil spills associated with offshore drilling in the future.

The Commission is composed of seven members appointed by the President to serve as special Government employees. The members were selected because of their extensive scientific, legal, engineering, and environmental expertise, and their knowledge of issues pertaining to the oil and gas industry. Information on the Commission can be found at its Web site: *http://www.OilSpillCommission.gov.*

Purpose of the Meeting: Inform the Commission members about the relevant facts and circumstances concerning (1) spill response following the BP Deepwater Horizon oil disaster, and (2) impacts of the spill on the Gulf of Mexico and approaches to long-term restoration. The meeting will provide the Commission with the opportunity to hear presentations and statements from various experts and provide additional information for the Commission's consideration.

Tentative Agenda: The meeting is expected to start on September 27 at 9 a.m. Presentations to the Commission are expected to begin shortly thereafter and will conclude at approximately 4 p.m. The meeting will continue on September 28 at 9 a.m. with presentations to the Commission. Public comments can be made on Monday, September 27 and Tuesday, September 28 from 4 p.m. to 4:30 p.m., respectively. The final agenda will be available at the Commission's Web site: *http://www.OilSpillCommission.gov.*

Public Participation: The meeting is open to the public, with capacity and seats available on a first-come, first-serve basis. The Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business.

Approximately one-half hour will be reserved for public comments each day for a total of one hour. Time allotted per

speaker will be three minutes. Opportunity for public comment will be available on September 27 and September 28, *tentatively* from 4 p.m. to 4:30 p.m. each day. Registration for those wishing to request an opportunity to speak opens onsite each day at 8 a.m. Speakers will register to speak on a first-come, first-serve basis each day. Members of the public wishing to provide oral comments are encouraged to provide a written copy of their comments for collection at the time of onsite registration.

Those not able to attend the meeting may view the meeting live on the Commission's Web site: *http://www.OilSpillCommission.gov.* Those individuals who are not able to attend the meeting, or who are not able to provide oral comments during the meeting, are invited to send a written statement to Christopher A. Smith, Mail Stop FE–30, U.S. Department of Energy, 1000 Independence Ave., SW., Washington DC 20585, or e-mail: *BPDeepwaterHorizionCommission@hq.doe.gov.*

Minutes: The minutes of the meeting will be available at the Commission's Web site: *http://www.OilSpillCommission.gov* or by contacting Mr. Smith. He may be reached at the postal or e-mail addresses above.

Accommodation for the hearing impaired: A sign language interpreter will be onsite for the duration of the meeting.

Issued in Washington, DC, on September 10, 2010.

Carol A. Matthews,

Committee Management Officer.

[FR Doc. 2010–23118 Filed 9–15–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Idaho National Laboratory

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Idaho National Laboratory. The Federal Advisory Committee Act (Pub. L. No. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Wednesday, September 29, 2010; 8 a.m.–5 p.m.

Opportunities for public participation will be from 1:30 p.m. to 1:45 p.m. and from 3:30 p.m. to 3:45 p.m.

These times are subject to change; please contact the Federal Coordinator (below) for confirmation of times prior to the meeting.

ADDRESSES: Coeur d'Alene Resort, 115 South Second Street, Coeur d'Alene, Idaho 83814.

FOR FURTHER INFORMATION CONTACT: Robert L. Pence, Federal Coordinator, Department of Energy, Idaho Operations Office, 1955 Fremont Avenue, MS–1203, Idaho Falls, Idaho 83415. Phone (208) 526–6518; Fax (208) 526–8789 or e-mail: *pencerl@id.doe.gov* or visit the Board's Internet home page at: *http://www.inlemcab.org.*

SUPPLEMENTARY INFORMATION: *Purpose of the Board:* The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

Tentative Topics (agenda topics may change up to the day of the meeting; please contact Robert L. Pence for the most current agenda):

- Progress to Cleanup.
- Safety Performance Program—Idaho Completion Project.
- Overview Legacy Management—Long-Term Land Use at Idaho National Laboratory.
- Integrated Waste Treatment Unit.
- Remote-Handled Low-Level Waste.
- Buried Waste Lessons Learned—Idaho and Hanford Sites.

Public Participation: The EM SSAB, Idaho National Laboratory, 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 Robert L. Pence at least seven days in advance of the meeting at the phone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral presentations pertaining to agenda items should contact Robert L. Pence at the address or telephone number listed above. The request must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Robert L. Pence, Federal Coordinator, at the address and phone number listed above. Minutes will also be available at the following Web site: *http://www.inlemcab.org/meetings.html.*

Issued at Washington, DC, on September 10, 2010.

Carol A. Matthews,

Committee Management Officer.

[FR Doc. 2010–23119 Filed 9–15–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Energy Information Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: U.S. Energy Information Administration (EIA), Department of Energy (DOE).

ACTION: Agency information collection activities: Submission for OMB review; comment request.

SUMMARY: The EIA has submitted the forms EIA–63A, "Annual Solar Thermal Collector Manufacturers Survey," EIA–63B, "Annual Photovoltaic Module/Cell Manufacturers Survey," and the EIA–902, "Annual Geothermal Heat Pump Manufacturers Survey," to the Office of Management and Budget (OMB) for review and a three-year extension under section 3507(h)(1) of the Paperwork Reduction Act of 1995 (Pub. L. 104–13) (44 U.S.C. 3501 *et seq.*).

DATES: Comments must be filed by October 18, 2010. If you anticipate that you will be submitting comments but find it difficult to do so within that period, you should contact the OMB Desk Officer for DOE listed below as soon as possible.

ADDRESSES: Send comments to OMB Desk Officer for DOE, Office of Information and Regulatory Affairs, Office of Management and Budget. To ensure receipt of the comments by the due date, submission by FAX (202–395–7285) or e-mail to *Christine_J._Kymn@omb.eop.gov* is recommended. The mailing address is 725 17th Street, NW., Washington, DC 20503. The OMB Desk Officer may be telephoned at (202) 395–4638. (A copy of your comments should also be provided to EIA's Statistics and Methods Group at the address below.)

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Alethea Jennings. To ensure receipt of the comments by the due date, submission by FAX (202–

586–5271) or e-mail (alethea.jennings@eia.doe.gov) is also recommended. The mailing address is Statistics and Methods Group (EI–70), Forrestal Building, U.S. Department of Energy, 1000 Independence Ave, SW., Washington, DC 20585–0670. Ms. Jennings may be contacted by telephone at (202) 586–5879.

SUPPLEMENTARY INFORMATION: This section contains the following information about the energy information collection submitted to OMB for review: (1) The collection numbers and title; (2) the sponsor (*i.e.,* the Department of Energy component); (3) the current OMB docket number (if applicable); (4) the type of request (*i.e.,* new, revision, extension or reinstatement); (5) response obligation (*i.e.,* mandatory, voluntary, or required to obtain or retain benefits); (6) a description of the need for and proposed use of the information; (7) a categorical description of the likely respondents; (8) estimate number of respondents and (9) an estimate of the total annual reporting burden (*i.e.,* the estimated number of likely respondents times the proposed frequency of response per year times the average hours per response).

1. Forms EIA–63A, "Annual Solar Thermal Collector Manufacturers Survey," EIA–63B, "Annual Photovoltaic Module/Cell Manufacturers Survey," and the EIA–902, "Annual Geothermal Heat Pump Manufacturers Survey."
2. Energy Information Administration.
3. OMB Number 1905–0196.
4. Three-year extension to an existing approved request.
5. Mandatory.
6. Forms EIA–63A and EIA–63B collect data on the manufacture, shipment, stocks, and import/export of solar thermal collectors and photovoltaic modules/cells and the status of the industry. The data are used by the private sector, the renewable energy industry, the DOE, and other government agencies. Respondents are U. S. companies that manufactured, shipped, and/or imported solar thermal collectors and/or photovoltaic modules and cells. The EIA–902 is used to collect data about the manufacture, shipment, stocks, and import/export of geothermal heat pumps and the status of the industry. The information collected will be used by public and private analysts that are interested in geothermal heat pumps and related energy issues.
7. Business or other for-profit institutions.
8. 283 respondents.
9. 1,415 hours.

Please refer to the supporting statement as well as the proposed forms and instructions for more information about the purpose, who must report, when to report, where to submit, the elements to be reported, detailed instructions, provisions for confidentiality, and uses (including possible nonstatistical uses) of the information. For instructions on obtaining materials, *see* the **FOR FURTHER INFORMATION CONTACT** section.

Statutory Authority: Section 13(b) of the Federal Energy Administration Act of 1974, Public Law 93–275, codified at 15 U.S.C. 772(b).

Issued in Washington, DC, on September 9, 2010.

Stephanie Brown,

Director, Statistics and Methods Group, Energy Information Administration.

[FR Doc. 2010–23115 Filed 9–15–10; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2010–0768; FRL–8847–1]

EPA's Role in Advancing Sustainable Products

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA is interested in soliciting individual stakeholder input regarding the Agency's role in the "green" or sustainable products movement. The Agency will consider the information gathered from this notice and other sources as it works to define its role and develop a strategy that identifies how EPA can make a meaningful contribution to the development, manufacture, designation, and use of sustainable products.

DATES: Comments must be received on or before October 19, 2010.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2010–0768, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Hand Delivery:* OPPT Document Control Office (DCO), EPA East Bldg., Rm. 6428, 1201 Constitution Ave., NW., Washington, DC. Attention: Docket ID Number EPA–HQ–OPPT–2010–0768. The DCO is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the DCO is (202) 564–8930. Such deliveries are only accepted during the DCO's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to docket ID number EPA–HQ–OPPT–2010–0768. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov,* including any personal information provided, unless the 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 regulations.gov or e-mail. The 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 regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the 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 difficulties and 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.

Docket: All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* 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 in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the OPPT Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA West Bldg., 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding

legal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

FOR FURTHER INFORMATION CONTACT:

For technical information contact: Thomas Tillman, Pollution Prevention Division Mail Code (7409M), Office Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 564–8263; e-mail address: *tillman.thomas@epa.gov.*

For general information contact: The Pollution Prevention Information Clearinghouse (7409M), 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 566–0799; e-mail address: *PPIC@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you manufacture, distribute, label, certify, verify, and purchase or use consumer, commercial, or industrial products that may be considered as "green," "sustainable," or "environmentally preferable." Potentially affected entities may include, but are not limited to:

- Manufacturing (NAICS codes 31–33).
- Construction (NAICS code 23).
- Wholesale trade (NAICS code 42).
- Retail trade (NAICS codes 44–45).
- Professional, scientific and technical services (NAICS code 54).
- Accommodations and food services (NAICS code 72).
- Other services, except public administration (NAICS code 81).
- Public administration (NAICS code 92).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT.**

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Background

A. What action is the Agency taking?

EPA is interested in soliciting individual stakeholder input regarding the Agency's role in the "green" or sustainable products movement. The Agency will consider the information gathered from this notice and other sources as it works to define its role and develop a strategy that identifies how EPA can make a meaningful contribution to the development, manufacture, designation, and use of sustainable products.

More specifically, EPA would appreciate your individual views regarding the following types of questions:

1. What do you see as the major policy and research challenges, opportunities, and trends impacting the development, manufacture, designation, and use of sustainable products?

2. What do you see as EPA's overall role in addressing these challenges and opportunities?

3. In particular, how do you see EPA's role in:

- Assembling information and databases.
- Identifying sustainability "hotspots" and setting product sustainability priorities.
- Evaluating the multiple impacts of products across their entire life cycle.
- Defining criteria for more sustainable products.
- Generating eco-labels and/or standards.
- Establishing the scientific foundation for these eco-labels and/or standards.
- Verifying that products meet standards.
- Stimulating the market.
- Developing end-of-life management systems (reuse, recycling, etc.).
- Measuring results, evaluating programs.

B. What is the Agency's authority for taking this action?

Section 13103(b) of the Pollution Prevention Act of 1990 requires the Administrator of EPA to facilitate the adoption of source reduction techniques by businesses and to identify opportunities to use Federal procurement to encourage source reduction.

List of Subjects

Environmental protection, environmentally preferable products, green products, procurement, sustainable products.

Dated: September 10, 2010.

Wendy Cleland-Hamnett,

Director, Office of Pollution Prevention and Toxics.

[FR Doc. 2010–23123 Filed 9–15–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9202–5]

Clean Air Act Advisory Committee (CAAAC): Notice of Meeting

AGENCY: Environmental Protection Agency.

ACTION: Notice of Meeting.

SUMMARY: The Environmental Protection Agency (EPA) established the Clean Air Act Advisory Committee (CAAAC) on November 19, 1990, to provide independent advice and counsel to EPA on policy issues associated with implementation of the Clean Air Act of 1990. The Committee advises on economic, environmental, technical scientific, and enforcement policy issues.

Dates & Addresses: Open meeting notice; Pursuant to 5 U.S.C. App. 2 Section 10(a)(2), notice is hereby given that the Clean Air Act Advisory Committee will hold their next open meeting on Wednesday, October 6, 2010 from 8 a.m. to 4 p.m. at the Crowne Plaza at National Airport, located at 1489 Jefferson Davis Highway in Arlington, Virginia. Seating will be available on a first come, first served basis. The Economic Incentives and Regulatory Innovations subcommittee will meet on Tuesday, October 5, 2010 from 8:30 a.m. to 12 p.m. The Permits, New Source Reviews and Toxics subcommittee will meet on Tuesday, October 5, 2010 from approximately 12:45 p.m. to 5 p.m. The meetings will also be held at the Crown Plaza at National Airport, in Arlington, Virginia. The Mobile Sources Technical Review Subcommittee (MSTRS) will announce their upcoming meeting via a separate **Federal Register** notice. The agenda for the CAAAC full committee meeting on October 6, 2010 will be posted on the Clean Air Act Advisory Committee Web site at *http://www.epa.gov/oar/caaac/.*

Inspection of Committee Documents: The Committee agenda and any documents prepared for the meeting will be publicly available at the meeting. Thereafter, these documents, together with CAAAC meeting minutes, will be available by contacting the Office of Air and Radiation Docket and requesting information under docket OAR–2004–0075. The Docket office can be reached by e-mail at: *a-and-r-Docket@epa.gov* or FAX: 202–566–9744.

FOR FURTHER INFORMATION CONTACT: Concerning the CAAAC, please contact Pat Childers, Office of Air and Radiation, U.S. EPA, (202) 564–1082, FAX (202) 564–1352 or by mail at U.S. EPA, Office of Air and Radiation (Mail code 6102 A), 1200 Pennsylvania Avenue, NW., Washington, DC 20004. For information on the Subcommittees, please contact the following individuals: (1) Permits/NSR/Toxics—Liz Naess, (919) 541–1892; (2) Economic Incentives and Regulatory Innovations—Carey Fitzmaurice, (202) 564–1667; and (3) Mobile Source Technical Review—John Guy, (202) 343–9276. Additional Information on these meetings, CAAAC, and its Subcommittees can be found on the CAAAC Web site: *http://www.epa.gov/oar/caaac/.*

For information on access or services for individuals with disabilities, please contact Mr. Pat Childers at (202) 564–1082 or *childers.pat@epa.gov.* To request accommodation of a disability, please contact Mr. Childers, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: September 09, 2010.

Pat Childers,

Designated Federal Official, Clean Air Act Advisory Committee, Office of Air and Radiation.

[FR Doc. 2010–23125 Filed 9–15–10; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collections Approved by Office of Management and Budget

September 3, 2010.

The Federal Communications Commission (FCC) has received Office of Management and Budget (OMB) approval for the following public information collections pursuant to the Paperwork Reduction Act of 1995, Public Law 104–13. 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.

FOR FURTHER INFORMATION CONTACT: Contact Michael C. Smith, Federal Communications Commission, (202) 418–0584 or via the Internet at *MichaelC.Smith@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control No.: 3060–1135.

Expiration Date: 8/31/2013.

Title: Rules Authorizing the Operation of Low Power Auxiliary Stations (including Wireless Microphones).

Form No.: N/A.

Estimated Annual Burden: 127,500 responses; 31,875 total annual hours; .25 hours per response.

Needs and Uses: In the Report and Order [1] in WT Docket No. 08–166, WT Docket No. 08–167, ET Docket No. 10–24, FCC 10–16, adopted January 14, 2010 and released on January 15, 2010, the Federal Communications Commission ("Commission") modified the rules authorizing the operation of low power auxiliary stations (wireless microphones). The Report and Order requires all wireless microphones to cease operations in the 700 MHz Band (698–806 MHz) no later than June 12, 2010, making the band available for use by public safety entities such as police, fire, emergency services, and commercial licensees.

To effectuate the Commission's plan to clear wireless microphones from the 700 MHz Band, the Report and Order provides an early clearing mechanism for the 700 MHz Band; requires that any person who manufactures wireless microphones or sells, leases, or offers them for sale or lease must display a disclosure at the point of sale or lease that informs consumers of the conditions that apply to the operation of wireless microphones in the core TV bands; and requires any person who manufactures, sells, leases, or offers for sale or lease, wireless microphones capable of operating in the 700 MHz Band that are destined for non U.S. markets, to include labeling that makes clear that the devices cannot be operated in the United States.

On January 22, 2010, the Commission requested emergency approval of the information collection requirements from the Office of Management and Budget (OMB).[2] On February 17, 2010, the Commission received OMB approval.[3] The OMB control number for this collection is 3060–1135.

[1] Revisions to Rules Authorizing the Operation of Low Power Auxiliary Stations in the 698–806 MHz Band; Public Interest Spectrum Coalition, Petition for Rulemaking Regarding Low Power Auxiliary Stations, Including Wireless Microphones, and the Digital Television Transition; Amendment of Parts 15, 74 and 90 of the Commission's Rules Regarding Low Power Auxiliary Stations, Including Wireless Microphones, WT Docket Nos. 08–166, 08–167, ET Docket No. 10–24, *Report and Order and Further Notice of Proposed Rulemaking,* FCC 10–16 (rel. January 15, 2010); 75 FR 3622 (January 22, 2010).

[2] *See* Notice of Public Information Collection(s) Being Submitted for Review and Approval to the Office of Management and Budget (OMB), Comments Requested, 75 FR 3731 (January 22, 2010).

[3] *See* Revisions to Rules Authorizing the Operation of Low Power Auxiliary Stations in the 698–806 MHz Band; Public Interest Spectrum Coalition, Petition for Rulemaking Regarding Low Power Auxiliary Stations, Including Wireless Microphones, and the Digital Television Transition; Public Information Collection Approved by Office of Management and Budget, 75 FR 9113 (March 1, 2010).

After publishing notice of its intent to revise this collection,[4] the Commission submitted its request for revision to OMB on July 20, 2010. The revision was requested to both extend the expiration date of the collection and to eliminate the now obsolete early clearing mechanism. This revised collection, without the early clearing mechanism and its associated responses and burden hours, is identical to the previous collection in all other respects. The Office of Management and Budget approved this revised collection on August 27, 2010.

As noted previously, this information collection will be used to ensure that these microphones do not continue to be used or continue to be made available for use in the United States in the 700 MHz Band, in contravention of the steps taken by the Commission to make the 700 MHz Band available for use by public safety entities and commercial licensees, and to provide them a home in the core TV spectrum.

The Commission recognizes that a significant number of currently unauthorized users of wireless microphones and other low power auxiliary stations in the 700 MHz Band may have to purchase new equipment to transition into the core TV bands pursuant to our temporary waivers. Our intention in requiring display of the Consumer Disclosure is to make certain that these users understand their rights and obligations regarding the use of low power auxiliary stations in the core TV bands. This Consumer Disclosure should help assure that purchasers of low power auxiliary stations operate their devices in a manner in compliance with our rules and policies and thereby do not cause interference to authorized radio services in the core TV bands.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2010–23159 Filed 9–15–10; 8:45 am]

BILLING CODE 6712–01–P

[4] *See* Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested, 75 FR 25254 (May 7, 2010).

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission for Extension Under Delegated Authority, Comments Requested

September 10, 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 for small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a currently valid OMB control number.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before November 15, 2010. 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: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, via fax at 202–395–5167 or via email to Nicholas_A._Fraser@omb.eop.gov and to the Federal Communications Commission via email to PRA@fcc.gov and Cathy.Williams@fcc.gov.

FOR FURTHER INFORMATION CONTACT: Cathy Williams on (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0404.

Title: Application for an FM Translator or FM Booster Station License, FCC Form 350.

Form Number: FCC Form 350.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for–profit entities; Not–for–profit institutions; State, local or Tribal government.

Number of Respondents and Responses: 350 respondents and 350 responses.

Frequency of Response: On occasion reporting requirement.

Estimated Time per Response: 1.0 hours.

Total Annual Burden: 350 hours.

Total Annual Cost: $26,250.

Obligation to Respond: Required to obtain and retain benefits. The statutory authority for this information collection is contained in Sections 154(i), 307, 308 and 309 of the Communications Act of 1934, as amended.

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Privacy Impact Assessment(s): No impact(s).

Needs and Uses: Licensees and permittees of FM Translator or FM Booster stations are required to file FCC Form 350 to obtain a new or modified station license. The data is used by FCC staff to confirm that the station has been built to terms specified in the outstanding construction permit. Data is then extracted from FCC 350 for inclusion in the subsequent license to operate the station.

Federal Communications Commission.

Marlene H. Dortch,

Secretary,

Office of the Secretary,

Office of Managing Director.

[FR Doc. 2010–23168 Filed 9–15–10; 8:45 am]

BILLING CODE 6712–01–S

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

September 8, 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 for small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a currently valid OMB control number.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before October 18, 2010. 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: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, via fax at 202–395–5167 or via email to Nicholas_A._Fraser@omb.eop.gov and to the Federal Communications Commission via email to PRA@fcc.gov and Cathy.Williams@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: Cathy Williams on (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0466.

Title: Station Identification, Sections 73.1201, 74.783 and 74.1283.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for–profit entities; Not–for–profit institutions; State, Local and Tribal Government.

Number of Respondents and Responses: 4,200 respondents; 4,200 responses

Estimated Time per Response: 10 minutes to 1 hour.

Frequency of Response: Recordkeeping requirement; Third party disclosure requirement; On occasion reporting requirement.

Obligation to Respond: Required to obtain benefits – Statutory authority for this collection of information is contained in Sections 154(i), 303 and 308 of the Communications Act of 1934, as amended.

Total Annual Burden: 6,566 hours

Total Annual Costs: None.

Nature and Extent of Confidentiality: No need for confidentiality required with this collection of information.

Privacy Impact Assessment(s): No impact(s).

Needs and Uses: The information collection requirements covered under OMB control number 3060–0466 are as follows:

47 CFR Section 73.1201(a) requires television broadcast licensees to make broadcast station identification announcements at the beginning and ending of each time of operation, and hourly, as close to the hour as feasible, at a natural break in program offerings. Television and Class A television broadcast stations may make these announcements visually or aurally.

47 CFR Section 74.783(b) requires licensees of television translators whose station identification is made by the television station whose signals are being rebroadcast by the translator, must secure agreement with this television station licensee to keep in its file, and available to FCC personnel, the translator's call letters and location, giving the name, address and telephone number of the licensee or his service representative to be contacted in the event of malfunction of the translator. It shall be the responsibility of the translator licensee to furnish current information to the television station licensee for this purpose.

47 CFR Section 73.1201(b)(1) requires that the official station identification consist of the station's call letters immediately followed by the community or communities specified in its license as the station's location. The name of the licensee, the station's frequency, the station's channel number, as stated on the station's license, and/or the station's network affiliation may be inserted between the call letters and station location. Digital Television (DTV) stations, or DAB Stations, choosing to include the station's channel number in the station identification must use the station's major channel number and may distinguish multicast program streams. For example, a DTV station with major channel number 26 may use 26.1 to identify a High Definition Television (HDTV) program service and 26.2 to identify a Standard Definition Television (SDTV) program service. A radio station operating in DAB hybrid mode or extended hybrid mode shall identify its digital signal, including any free multicast audio programming streams, in a manner that appropriately alerts its audience to the fact that it is listening to a digital audio broadcast. No other insertion between the station's call letters and the community or communities specified in its license is permissible. A station may include in its official station identification the name of any additional community or communities, but the community to which the station is licensed must be named first.

47 CFR Section 74.783(e) permits low power TV permittees or licensees to request to be assigned four–letter call signs in lieu of the five–character alpha–numeric call signs.

47 CFR Section 74.1283(c)(1) requires a FM translator station licensee whose identification is made by the primary station must arrange for the primary station licensee to furnish the translator's call letters and location (name, address, and telephone number of the licensee or service representative) to the FCC. The licensee must keep this information in the primary station's files.

Federal Communications Commission.

Marlene H. Dortch,

Secretary,

Office of the Secretary,

Office of Managing Director.

[FR Doc. 2010–23167 Filed 9–15–10; 8:45 am]

BILLING CODE 6712–01–S

FEDERAL COMMUNICATIONS COMMISSION

[AU Docket No. 10–107; DA 10–1630]

Wireless Telecommunications Bureau Postpones Auction of 218–219 MHz Service and Phase II 220 MHz Service Licenses (Auction 89)

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This document announces the postponement of Auction 89.

FOR FURTHER INFORMATION CONTACT: *Wireless Telecommunications Bureau, Auctions and Spectrum Access Division:* Sayuri Rajapakse or Lisa Stover at (202) 418–0660.

SUPPLEMENTARY INFORMATION: This is a summary of the *Auction 89 Postponement Public Notice,* which was released on August 26, 2010. The complete text of the *Auction 89 Postponement Public Notice* and related Commission documents are available for public inspection and copying from 8 a.m. to 4:30 p.m. ET Monday through Thursday and from 8 a.m. to 11:30 a.m. ET on Fridays in the FCC Reference Information Center, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. The *Auction 89 Postponement Public Notice* and related Commission documents may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 202–488–5300, facsimile 202–488–5563, or Web site: *http://www.BCPIWEB.com,* using document number DA 10–1630 for the *Auction 89 Postponement Public Notice.* The *Auction 89 Postponement Public Notice* and related documents are also available on the Internet at the Commission's Web site: *http://wireless.fcc.gov/auctions/89/*.

1. The auction of 218–219 MHz Service and Phase II 220 MHz Service licenses (Auction 89) previously scheduled to begin December 7, 2010, is postponed until further notice to provide more time for bidder preparation and planning. A subsequent public notice will be released announcing a new starting date and other relevant dates for Auction 89.

2. Interested parties may keep apprised of the FCC's schedule for this auction through the Auction 89 Web site at *http://wireless.fcc.gov/auctions/89/.*

3. This action is taken by the Chief, Wireless Telecommunications Bureau pursuant to authority delegated by 47 CFR 0.131.

Federal Communications Commission.

Gary D. Michaels,

Deputy Chief, Auctions and Spectrum Access Division, WTB.

[FR Doc. 2010–23164 Filed 9–15–10; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Public Safety and Homeland Security Bureau; Federal Advisory Committee Act; Communications Security, Reliability, and Interoperability Council

AGENCY: Federal Communications Commission.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, this notice advises interested persons that the Federal Communications Commission's (FCC) Communications Security, Reliability, and Interoperability Council (CSRIC) will hold its third meeting on October 7, 2010, at 9 a.m. in the Commission Meeting Room of the Federal Communications Commission, Room TW–C305, 445 12th Street, SW., Washington, DC 20554.

DATES: October 7, 2010

ADDRESSES: Federal Communications Commission, Room TW–C305 (Commission Meeting Room), 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Jeffery Goldthorp, Designated Federal Officer of the FCC's CSRIC, (202) 418–1096 (voice) or *jeffery.goldthorp@fcc.gov* (e-mail); or Lauren Kravetz, Deputy Designated Federal Officer of the FCC's CSRIC, 202–418–7944 (voice) or *Lauren.kravetz@fcc.gov* (e-mail).

SUPPLEMENTARY INFORMATION: The CSRIC is a Federal Advisory Committee that will provide recommendations to the FCC regarding best practices and actions the FCC can take to ensure optimal security, reliability, and interoperability of communications systems. On March 19, 2009, the FCC, pursuant to the Federal Advisory Committee Act, renewed the charter for the CSRIC for a period of two years through March 18, 2011.

Several working groups will be presenting their proposed recommendations on issues such as public safety consolidation, E911 reliability and emergency alerting for consideration by the full Council. The Council may take action on any of the issues and recommendations presented during the meeting. The co-chairs of the remaining CSRIC working groups will provide updates on their plans for completing their tasks. Members of the general public may attend the meeting.

The FCC will attempt to accommodate as many people as possible. However, admittance will be limited to seating availability. The Commission will provide audio and/or video coverage of the meeting over the Internet from the FCC's Web page at *http://www.fcc.gov/live.* The public may submit written comments before the meeting to Jeffery Goldthorp, the FCC's Designated Federal Officer for the CSRIC by e-mail to *Jeffery.goldthorp@fcc.gov* or U.S. Postal Service Mail to Jeffery Goldthorp, Associate Chief for Cybersecurity and Communications Reliability Public Safety and Homeland Security Bureau, Federal Communications Commission, 445 12th Street, SW., Room 7–A325, Washington, DC 20554.

Open captioning will be provided for this event. Other reasonable accommodations for people with disabilities are available upon request. Requests for such accommodations should be submitted via e-mail to *fcc504@fcc.gov* or by calling the Consumer & Governmental Affairs 418–0432 (TTY). Such requests should include a detailed description of the accommodation needed. In addition, please include a way the FCC can contact you if it needs more information. Please allow at least five days advance notice; last minute requests will be accepted, but may be impossible to fill.

Additional information regarding the CSRIC can be found at: *http://www.fcc.gov/pshs/advisory/csric/.*

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2010–23161 Filed 9–15–10; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Privacy Act System of Records

AGENCY: Federal Communications Commission (FCC or Commission).

ACTION: Notice; one new Privacy Act system of records.

SUMMARY: Pursuant to subsection (e)(4) of the *Privacy Act of 1974,* as amended (Privacy Act), 5 U.S.C. 552a, the FCC proposes to add one new system of records, FCC/OMD–23, "Cadapult Space Management System (CSMS)." The FCC's Space Management Center (SMC) in the Office of Managing Director (OMD) will use the CSMS information system to allocate the offices, workstations, and facility workspaces

for FCC employees and contractors following the FCC/National Treasury Union (NTEU) space assignment policy. In the event of an emergency, the SMC staff will devise a "Reconstitution Plan" in which they will extract information from the CSMS information system to create the space requirements for alternative work location(s) in other buildings to be used to relocate FCC employees and/or contractors. This information may be shared with the General Services Administration (GSA), National Telecommunications and Information Administration (NTIA), Department of Homeland Security (DHS), and Federal Emergency Management Agency (FEMA), etc.; District of Columbia, Virginia, and Maryland state governments, etc.; and other Federal, state, and local agencies involved in Federal agency evacuation, emergency facilities, space management, and/or relocation policies and plans, etc., as part of the FCC's Reconstitution Plan.

DATES: In accordance with 5 U.S.C. 552a(e)(4) and (e)(11) of the Privacy Act, any interested person may submit written comments concerning the new system(s) of records on or before October 18, 2010. The Office of Management and Budget (OMB), which has oversight responsibility under the Privacy Act to review the system of records, and Congress may submit comments on or before October 26, 2010. The proposed new system of records will become effective on October 26, 2010 unless the FCC receives comments that require a contrary determination. The Commission will publish a document in the **Federal Register** notifying the public if any changes are necessary. As required by 5 U.S.C. 552a(r) of the Privacy Act, the FCC is submitting reports on this proposed new system to OMB and Congress.

ADDRESSES: Address comments to Leslie F. Smith, Privacy Analyst, Performance Evaluation and Records Management (PERM), Federal Communications Commission (FCC), 445 12th Street, SW., Washington, DC 20554, or via the Internet at *Leslie.Smith@fcc.gov*.

FOR FURTHER INFORMATION CONTACT: Contact Leslie F. Smith, Performance Evaluation and Records Management (PERM), Federal Communications Commission (FCC), 445 12th Street, SW., Washington, DC 20554, (202) 418–0217, or via the Internet at *Leslie.Smith@fcc.gov*.

SUPPLEMENTARY INFORMATION: As required by the *Privacy Act of 1974,* as amended, 5 U.S.C. 552a(e)(4) and (e)(11), this document sets forth notice of the proposed new system of records to be maintained by the FCC. This notice is a summary of the more detailed information about the proposed new system of records, which may be viewed at the location given above in the **ADDRESSES** section. The purpose for adding this new system of records, FCC/OMD–23, "Cadapult Space Management System (CSMS)" is to enable the FCC's Space Management Center (SMC) to use the CSMS information system to allocate the offices, workstations, and facility workspaces for FCC employees and contractors following the FCC/National Treasury Union (NTEU) space assignment policy. In the event of an emergency, the SMC staff will devise a "Reconstitution Plan" in which they will extract information from the CSMS information system to create the space requirements for alternative work location(s) in other buildings to be used to relocate FCC employees and/or contractors. This information may be shared with the General Services Administration (GSA), National Telecommunications and Information Administration (NTIA), Department of Homeland Security (DHS), and Federal Emergency Management Agency (FEMA), etc.; District of Columbia, Virginia, and Maryland state governments, etc.; and other Federal, state, and local agencies involved in Federal agency evacuation, emergency facilities, space management, and/or relocation policies and plans, etc., as part of the FCC's Reconstitution Plan.

This notice meets the requirement documenting the proposed new system(s) of records that is/are to be added to the systems of records that the FCC maintains, and provides the public, OMB, and Congress with an opportunity to comment.

FCC/OMD–23

SYSTEM NAME:

Cadapult Space Management System (CSMS).

SECURITY CLASSIFICATION:

The FCC's Security Operations Center (SOC) has not assigned a security classification to this system of records.

SYSTEM LOCATION:

Space Management Center (SMC), Office of Managing Director (OMD), Federal Communications Commission (FCC), 445 12th Street, SW., Washington, DC 20554.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The categories of individuals in this system are the FCC employees and contractors.

CATEGORIES OF RECORDS IN THE SYSTEM:

The categories of records in this system include each FCC employee and/or contractor's organization (bureau/office/division), pay type, grade, supervisory status, bargaining unit, workspace location (office or workstation), work telephone number, and barcode(s) on information technology (IT) equipment assigned to the employee or contractor.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, 44 U.S.C. 3101, Executive Order 12411, Government Work Space Management Reforms, Section 486 of Title 40 of the United States Code, and the NTEU/FCC Basic Negotiated Agreement, Article 9, Employee Space and Facilities.

PURPOSE(S):

Space Management Center (SMC) uses the CSMS information system to allocate the offices, workstations, and facility workspaces for FCC employees and contractors following the FCC/National Treasury Union (NTEU) space assignment policy. In the event of an emergency, the SMC staff will devise a "Reconstitution Plan" in which they will extract information from the CSMS information system to create the space requirements for alternative work location(s) in other buildings to be used to relocate FCC employees and/or contractors. This information may be shared with the General Services Administration (GSA), National Telecommunications and Information Administration (NTIA), Department of Homeland Security (DHS), and Federal Emergency Management Agency (FEMA), etc.; District of Columbia, Virginia, and Maryland state governments, etc.; and other Federal, state, and local agencies involved in Federal agency evacuation, emergency facilities, space management, and/or relocation policies and plans, etc., as part of the FCC's Reconstitution Plan.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Information about individuals in this system of records may routinely be disclosed under the following conditions:

1. Emergency Response—A record on an individual in this system of records may be disclosed to emergency medical personnel, *e.g.,* doctors, nurses, and/or paramedics, or to law enforcement officials in case of a medical or other emergency involving the FCC employee without the subsequent notification to the individual identified in 5 U.S.C. 552a(b)(8);

2. First Responders—A record from this system of records may be disclosed to law enforcement officials, Department of Homeland Security (DHS), Federal Emergency Management Agency (FEMA), Department of Defense (DOD), National Telecommunications and Information Administration (NTIA), White House Communications Agency, other federal agencies, and state and local emergency response officials, *e.g.,* fire, safety, and rescue personnel, etc., and medical personnel, *e.g.,* doctors, nurses, and paramedics, etc., in case of an emergency situation at FCC facilities without the subsequent notification to the individual identified in 5 U.S.C. 552a(b)(8);

3. Reconstitution Plan—A record from this system of records may be disclosed to the General Services Administration (GSA), National Telecommunications and Information Administration (NTIA), Department of Homeland Security (DHS), and Federal Emergency Management Agency (FEMA), etc.; District of Columbia, Virginia, and Maryland state governments, etc.; and other Federal, state, and local agencies involved in Federal agency evacuation, emergency facilities, space management, and/or relocation policies and plans, etc.

4. Congressional Inquiries—When requested by a Congressional office in response to an inquiry by an individual made to the Congressional office for their own records;

5. Government-wide Program Management and Oversight—When requested by the National Archives and Records Administration (NARA) for the purpose of records management inspections conducted under authority of 44 U.S.C. 2904 and 2906; when the U.S. Department of Justice (DOJ) is contacted in order to obtain that department's advice regarding disclosure obligations under the Freedom of Information Act; or when the Office of Management and Budget (OMB) is contacted in order to obtain that office's advice regarding obligations under the Privacy Act;

6. Breach Notification—A record from this system may be disclosed to appropriate agencies, entities, and persons when (1) the Commission suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (2) the Commission has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the Commission or another agency or entity) that rely upon the compromised information; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Commission's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

In each of these cases, the FCC will determine whether disclosure of the records is compatible with the purpose for which the records were collected.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Information in the Cadapult Space Management System (CSMS) consists of electronic data, files, and records, which are housed in the FCC's computer network databases.

RETRIEVABILITY:

Information in the CSMS information system is retrieved by the FCC employee or contractor's name, workspace location, and organizational unit, *e.g.,* bureau/office.

SAFEGUARDS:

The CSMS information system's electronic records, data, and files are maintained in the FCC's computer network databases. Access to the information in these databases is restricted to authorized CMS supervisors, staff, and contractors and to staff and contractors in the Information Technology Center (ITC), who maintain the FCC's computer network databases. Other FCC employees and contractors may be granted access on a "need-to-know" basis. The FCC's computer network databases are protected by the FCC's security protocols, which include controlled access, passwords, and other security features. The information that is resident on the SMC database is backed-up routinely onto magnetic media. Back-up tapes are stored on-site and at a secured, off-site location.

RETENTION AND DISPOSAL:

The FCC maintains information about the FCC employee and/or contractor only as long as he/she works at the Commission. The records in this system are deleted entirely upon the FCC employee's retirement, voluntary resignation, transfer, or re-assignment outside the Commission, and when the contractor is no longer working at the Commission. The CMS staff uses a sign-out procedure to verify that the FCC employee or contractor is no longer working at the Commission, then the individual's information is deleted from the CSMS system.

SYSTEM MANAGER(S) AND ADDRESS:

Space Management Center (SMC), Office of Managing Director (OMD), Federal Communications Commission (FCC), 445 12th Street, SW., Washington, DC 20554.

NOTIFICATION PROCEDURE:

Address inquiries to the Space Management Center (SMC), Office of Managing Director (OMD), Federal Communications Commission (FCC), 445 12th Street, SW., Washington, DC 20554.

RECORD ACCESS PROCEDURES:

Address inquiries to the Space Management Center (SMC), Office of Managing Director (OMD), Federal Communications Commission (FCC), 445 12th Street, SW., Washington, DC 20554.

CONTESTING RECORD PROCEDURES:

Address inquiries to the Space Management Center (SMC), Office of Managing Director (OMD), Federal Communications Commission (FCC), 445 12th Street, SW., Washington, DC 20554.

RECORD SOURCE CATEGORIES:

The sources for the records in the CSMS information system include the FCC employee and/or contractor, his/her workspace requirements, organization, pay type, grade, supervisory status, bargaining unit, workspace location, work telephone number, and IT barcodes on IT equipment assigned to the employee or contractor.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2010–23163 Filed 9–15–10; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are

set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than October 1, 2010.

A. Federal Reserve Bank of Minneapolis (Jacqueline G. King, Community Affairs Officer) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. The Margaret E. Thelen Revocable Trust dated January 5, 2000, Margaret E. Thelen, Trustee, Baxter, Minnesota, individually, and with John A. Thelen, Jr., Baxter, Minnesota; Nancy M. Shipman, Brainerd, Minnesota; Sharon M. Watland, Baxter, Minnesota; Robert T. Thelen, Baxter, Minnesota; Michael J. Thelen, Nisswa, Minnesota; Kathryn M. Stalheim, Oviedo, Florida; Steven D. Thelen, Tampa, Florida; Luke D. Shipman, Brainerd, Minnesota; Daniel J. Shipman, Brainerd, Minnesota; Elizabeth A. Shipman, Breezy Point, Minnesota; and Adam J. Shipman, Brainerd, Minnesota, as a group acting in concert; to retain control of American Bancorporation of Minnesota, Inc., Brainerd, Minnesota, and thereby indirectly retain control of American National Bank of Minnesota, Baxter, Minnesota.

Board of Governors of the Federal Reserve System, September 13, 2010.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2010–23109 Filed 9–15–10; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Proposed Collection; Comment Request

AGENCY: Federal Trade Commission ("FTC" or "Commission").

ACTION: Notice.

SUMMARY: The information collection requirements described below will be submitted to the Office of Management and Budget ("OMB") for review, as required by the Paperwork Reduction Act ("PRA"). The FTC is seeking public comments on its proposal to extend through January 31, 2014, the current PRA clearance for information collection requirements contained in its Rule Governing Pre-Sale Availability of Written Warranty Terms. This clearance is scheduled to expire on January 31, 2011.

DATES: Comments must be received on or before November 15, 2010.

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form, by following the instructions in the Request for Comments to 60-Day Notice part of the **SUPPLEMENTARY INFORMATION** section below. Comments in electronic form should be submitted by using the following Web link: (*https://ftcpublic.commentworks.com/ftc/presaleavailabilitypra*) (and following the instructions on the web-based form). Comments in paper form should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H–135 (Annex J), 600 Pennsylvania Avenue, NW, Washington, DC 20580, in the manner detailed in the **SUPPLEMENTARY INFORMATION** section below.

FOR FURTHER INFORMATION CONTACT: Requests for copies of the collection of information and supporting documentation should be addressed to Allyson Himelfarb, Investigator, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, Room H-286, 600 Pennsylvania Ave., NW, Washington, DC 20580, (202) 326-2505.

SUPPLEMENTARY INFORMATION:

Proposed Information Collection Activities

Under the PRA, 44 U.S.C. 3501-3521, federal agencies must obtain approval from OMB for each collection of information they conduct or sponsor. "Collection of information" means agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. 44 U.S.C. § 3502(3), 5 CFR § 1320.3(c). Because the number of entities affected by the Commission's requests will exceed ten, the Commission plans to seek OMB clearance under the PRA. As required by § 3506(c)(2)(A) of the PRA, the Commission is providing this opportunity for public comment before requesting that OMB extend the existing paperwork clearance for the information collection requirements associated with the Commission's regulations under the FTC's Rule Governing Pre-Sale Availability of Written Warranty Terms (the "Pre-Sale Availability Rule") (OMB Control Number 3084-0112), 16 CFR 702.

The Pre-Sale Availability Rule is one of three rules[1] that the FTC implemented pursuant to requirements of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301 *et seq.* ("Warranty Act" or "Act").[2] The Pre-Sale Availability Rule requires sellers and warrantors to make the text of any written warranty on a consumer product costing more than $15 available to the consumer before sale. Among other things, the Rule requires sellers to make the text of the warranty readily available either by (1) displaying it in close proximity to the product or (2) furnishing it on request and posting signs in prominent locations advising consumers that the warranty is available. The Rule requires warrantors to provide materials to enable sellers to comply with the Rule's requirements and also sets out the methods by which warranty information can be made available before the sale if the product is sold through catalogs, mail order, or door-to-door sales.

Request for Comments

The FTC invites comments on: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. All comments should be filed as prescribed below, and must be received on or before November 15, 2010.

Because comments will be made public, they should not include any sensitive personal information, such as an individual's Social Security Number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical

[1] The other two rules relate to the information that must appear in a written warranty on a consumer product costing more than $15 if a warranty is offered and minimum standards for informal dispute settlement mechanisms that are incorporated into a written warranty.

[2] 40 FR 60168 (Dec. 31, 1975).

records or other individually identifiable health information. In addition, comments should not include any "[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential" as provided in Section 6(f) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c), 16 CFR 4.9(c).[3]

Because paper mail addressed to the FTC is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted by using the following web link: (*https://ftcpublic.commentworks.com/ftc/presaleavailabilitypra*) (and following the instructions on the web-based form). To ensure that the Commission considers an electronic comment, you must file it on the web-based form at the web link: (*https://ftcpublic.commentworks.com/ftc/presaleavailabilitypra*). If this Notice appears at (*http://www.regulations.gov/search/index.jsp*), you may also file an electronic comment through that website. The Commission will consider all comments that regulations.gov forwards to it. You may also visit the FTC Website at (*http://www.ftc.gov*) to read the Notice and the news release describing it.

A comment filed in paper form should include the "Pre-Sale Availability Rule: Paperwork Comment, FTC File No. P044403" reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H-135 (Annex J), 600 Pennsylvania Avenue, NW, Washington, DC 20580. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC Website, to the extent practicable, at (*http://www.ftc.gov/os/publiccomments.shtm*). As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at (*http://www.ftc.gov/ftc/privacy.shtm*).

Pre-Sale Availability Rule Burden Statement:

Total annual hours burden: 2,490,000 rounded to the nearest thousand. In its 2007 submission to OMB, FTC staff estimated that the information collection burden of making the disclosures required by the Pre-Sale Availability Rule was approximately 2,328,000 hours per year. Although there has been no change in the Rule's information collection requirements since 2007, staff has adjusted its previous estimate of the number of manufacturers subject to the Rule based on recent Census data. Based on that, staff now estimates that there are approximately 478 large manufacturers and 15,444 small manufacturers subject to the Rule. In addition, recent Census data suggests that there are an estimated 7,431 large retailers and 452,014 small retailers impacted by the Rule.

In its 2007 submission to OMB, staff took note that some online retailers had begun to make warranty information directly available on their websites, thereby reducing their paperwork burden under the Rule. As e-commerce continues to grow, it is likely that even more retailers are posting warranty information online than they were in 2007. Nevertheless, because the staff assumes that only a small percentage of retailers would be significantly less burdened by posting warranty information online – namely, retailers with a large Internet presence or whose inventory is mainly composed of warranted products – the staff has retained its previous estimates of the hour burden for retailers. Therefore, staff continues to estimate that large retailers spend an average of 20.8 hours per year and small retailers spend an average 4.8 hours per year to comply with the Rule.[4] Accordingly, the total annual burden for retailers is approximately 2,315,608 hours ((6,892 large retailers x 20.8 burden hours) + (452,553 small retailers x 4.8 burden hours)).

Staff also estimates that more manufacturers are beginning to provide retailers with warranty information in electronic form in fulfilling their obligations under the Rule. Therefore, staff finds it necessary at this time to adjust the hour burden for manufacturers as it did with retailers in its previous submission to OMB. Applying a 20% reduction to its previous estimates, the staff now assumes that large manufacturers spend an average of 42 hours per year and that small manufacturers spend an average of 10 hours per year to comply with the Rule. Accordingly, the total annual burden incurred by manufacturers is approximately 174,516 hours ((478 large manufacturers x 42 hours) + (15,444 small manufacturers x 10 hours)).

Thus, the total annual burden for all covered entities is approximately 2,490,124 hours (2,315,608 hours for retailers + 174,516 hours for manufacturers).

Total annual labor cost: $44,822,000 rounded to the nearest thousand.

The work required to comply with the Pre-Sale Availability Rule entails a mix of clerical work and work performed by sales associates. Staff estimates that half of the total burden hours would likely be performed by sales associates. At the manufacturing level, this work would entail ensuring that the written warranty accompanies every consumer product or that the required warranty information otherwise gets to the retailer. At the retail level, this work would entail ensuring that the written warranty is made available to the consumer prior to sale. The remaining half of the work required to comply with the Pre-Sale Availability Rule is clerical in nature, *e.g.*, shipping or otherwise providing copies of manufacturer warranties to retailers and retailer maintenance of them. Applying a sales associate wage rate of $21/hour to half of the burden hours and a clerical wage rate of $15/hour to half of the burden hours, the total annual labor cost burden is approximately $44,822,232 (1,245,062 hours x $21 per hour) + (1,245,062 hours x $15 per hour).[5]

[3] The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

[4] In addition, many online retailers also operate "brick-and-mortar" operations and still provide paper copies of warranties for review by customers who do not do business online.

[5] The wage rate used in this Notice reflect recent data from the Bureau of Labor Statistics National Compensation Survey.

Total annual capital or other non-labor costs: De minimis.

The vast majority of retailers and warrantors already have developed systems to provide the information the Rule requires. Compliance by retailers typically entails keeping warranties on file, in binders or otherwise, and posting an inexpensive sign indicating warranty availability. Manufacturer compliance entails providing retailers with a copy of the warranties included with their products.

David C. Shonka,

Acting General Counsel.

[FR Doc. 2010–23171 Filed 9–15–10; 8:45 am]

BILLING CODE 6750–01–S

FEDERAL TRADE COMMISSION

[File No. 101 0093]

Air Products and Chemicals, Inc.; Analysis of Proposed Agreement Containing Consent Orders to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed Consent Agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order — embodied in the consent agreement — that would settle these allegations.

DATES: Comments must be received on or before October 12, 2010.

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form. Comments should refer to"Air Products, Inc., File No. 101 0093" to facilitate the organization of comments. Please note that your comment — including your name and your state — will be placed on the public record of this proceeding, including on the publicly accessible FTC website, at (*http://www.ftc.gov/os/publiccomments.shtm*).

Because comments will be made public, they should not include any sensitive personal information, such as an individual's Social Security Number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, comments should not include any "[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential. . . .," as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and Commission Rule 4.10(a)(2), 16 CFR 4.10(a)(2). Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c), 16 CFR 4.9(c).[1]

Because paper mail addressed to the FTC is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted by using the following weblink: (*https://ftcpublic.commentworks.com/ftc/airproducts*) and following the instructions on the web-based form. To ensure that the Commission considers an electronic comment, you must file it on the web-based form at the weblink: (*https://ftcpublic.commentworks.com/ftc/airproducts*). If this Notice appears at (*http://www.regulations.gov/search/index.jsp*), you may also file an electronic comment through that website. The Commission will consider all comments that regulations.gov forwards to it. You may also visit the FTC website at (*http://www.ftc.gov/*) to read the Notice and the news release describing it.

A comment filed in paper form should include the "Air Products, Inc., File No. 101 0093" reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H-135 (Annex D), 600 Pennsylvania Avenue, NW, Washington, DC 20580. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

The Federal Trade Commission Act ("FTC Act") and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC website, to the extent practicable, at (*http://www.ftc.gov/os/publiccomments.shtm*). As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at (*http://www.ftc.gov/ftc/privacy.shtm*).

FOR FURTHER INFORMATION CONTACT: Gregory P. Luib (202-326-3249), Bureau of Competition, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and § 2.34 the Commission Rules of Practice, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for September 9, 2010), on the World Wide Web, at (*http://www.ftc.gov/os/actions.shtm*). A paper copy can be obtained from the FTC Public Reference Room, Room 130-H, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580, either in person or by calling (202) 326-2222.

Public comments are invited, and may be filed with the Commission in either paper or electronic form. All comments should be filed as prescribed in the **ADDRESSES** section above, and must be received on or before the date specified in the **DATES** section.

Analysis of Agreement Containing Consent Order to Aid Public Comment

I. Introduction

The Federal Trade Commission ("Commission") has accepted from Air Products and Chemicals, Inc. ("Air Products"), subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement"), which is designed to remedy the anticompetitive effects resulting from Air Products' proposed acquisition of Airgas, Inc. ("Airgas"). Under the terms of the

[1] The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

Consent Agreement, Air Products is required, among other things, to divest 15 air separation units ("ASUs") and related assets currently owned and operated by Airgas in the following locations: (1) Bozrah, Connecticut; (2) Carrollton, Kentucky; (3) Canton, Ohio; (4) Dayton, Ohio; (5) New Carlisle, Indiana; (6) Madison, Wisconsin; (7) Waukesha, Wisconsin; (8) Carrollton, Georgia; (9) Jefferson, Georgia; (10) Gaston, South Carolina (2 ASUs); (11) Rock Hill, South Carolina; (12) Chester, Virginia; (13) Mulberry, Arkansas; and (14) Lawton, Oklahoma. With the divestiture of these ASUs and related assets, the competition that would otherwise be eliminated through the proposed acquisition of Airgas by Air Products will be fully preserved.

The proposed Consent Agreement has been placed on the public record for thirty days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the proposed Consent Agreement and the comments received, and will decide whether it should withdraw from the proposed Consent Agreement, modify it, or make final the accompanying Decision and Order ("Order").

On February 11, 2010, Air Products announced its intention to acquire all of the outstanding shares of Airgas pursuant to an all-cash tender offer for an aggregate purchase price of approximately $7.0 billion. Consummation of this transaction is subject to acceptance of the offer by a sufficient number of the shareholders of Airgas. Airgas has repeatedly recommended that its shareholders not tender their shares, and a sufficient number of shares have not been tendered to date. It could be several months or more until the proposed acquisition is consummated, if it is consummated at all.

The Commission's complaint alleges the facts described below and that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening competition in certain regional markets in the United States for the manufacture and sale of bulk liquid oxygen and bulk liquid nitrogen.

II. The Parties

Air Products is a global supplier of industrial, medical, and specialty gases for use in a variety of industries, including health care, technology, and energy. Air Products is the second-largest industrial gas supplier in the United States with 32 liquid atmospheric gas-producing plants throughout the United States.

Airgas is the fifth-largest industrial gas supplier in the United States. Airgas operates 16 liquid atmospheric gas-producing plants in the United States, most of which are concentrated in the Eastern United States. Airgas also is the largest U.S. distributor of packaged industrial, medical, and specialty gases and hardgoods, such as welding equipment and supplies.

III. The Products and Structure of the Markets

Both Air Products and Airgas own and operate ASUs in the United States that produce liquid atmospheric gases, including liquid oxygen and liquid nitrogen. Each gas has specific properties that make it uniquely suited for the applications in which it is used. For most of these applications, there is no viable substitute for the use of oxygen or nitrogen. Accordingly, customers would not switch to another gas or product even if the price of liquid oxygen or liquid nitrogen increased by five to ten percent.

There are three primary and distinct methods of distributing oxygen and nitrogen: (1) in packaged form (typically delivered in gaseous cylinders or liquid dewars); (2) in bulk liquid form; and (3) in gaseous form via on-site ASUs or pipelines connecting customers to nearby ASUs. Customers choose a distribution method based on the volume of gas required. Customers who use bulk liquid oxygen or nitrogen require volumes of these gases that are too large to purchase economically in cylinders, but too small to justify the expense of an on-site ASU or pipeline. Thus, even if the price of liquid oxygen or liquid nitrogen increased by five to ten percent, customers would not switch to another method of distribution.

Due to high transportation costs, bulk liquid oxygen and nitrogen may only be purchased economically from a supplier with an ASU located within 150 to 250 miles of the customer. Therefore, it is appropriate to analyze the competitive effects of the proposed acquisition in regional geographic markets for bulk liquid oxygen and nitrogen. The relevant geographic markets in which to analyze the effects of the proposed acquisition are (1) the Northeast (including Connecticut, Maine, Massachusetts, New Hampshire, Eastern New York, Rhode Island, and Vermont), (2) the Eastern Midwest (including Eastern Indiana, Northern Kentucky, Southeastern Michigan, Ohio, Western Pennsylvania, and Northern West Virginia), (3) the Chicago-Milwaukee metropolitan area (including the area 150 miles around Chicago), (4) the Southeast (including part of Alabama, all of Georgia, North Carolina, and South Carolina, part of Tennessee, and Southern Virginia), and (5) Oklahoma and surrounding areas (including Western Arkansas, Southeastern Kansas, Southwestern Missouri, Oklahoma, and Northeastern Texas). Because the boundaries of the relevant geographic markets at issue are largely determined by the proximity of overlapping ASUs, those geographic markets with a greater number of proximate, overlapping ASUs – for example, the Southeast market – tend to be larger in size than those markets with fewer such ASUs – for example, the Chicago-Milwaukee market.

The markets for bulk liquid oxygen and nitrogen are highly concentrated. In all but the Oklahoma market, Air Products and Airgas are two of only five companies supplying bulk liquid oxygen and nitrogen to customers. In the Oklahoma market, Air Products is the largest supplier, and the parties are two of only six suppliers of bulk liquid oxygen and nitrogen.

IV. Effects of the Acquisition

In each of the relevant markets, as a result of the proposed acquisition, a significant competitor would be eliminated, and a small number of viable competitors would remain. Certain market conditions, including the relative homogeneity of the firms and products involved and availability of detailed market information, are conducive to the firms reaching terms of coordination and detecting and punishing deviations from those terms. Therefore, the proposed acquisition would enhance the likelihood of collusion or coordinated action between or among the remaining firms in each market.

The proposed acquisition also would eliminate direct and substantial competition between Air Products and Airgas in these areas, provide Air Products with a larger base of sales on which to enjoy the benefit of a unilateral price increase, and eliminate a competitor to which customers otherwise could have diverted their sales in markets where alternative sources of supply are already limited. The proposed acquisition, therefore, likely would allow Air Products to exercise market power unilaterally, increasing the likelihood that purchasers of bulk liquid oxygen or bulk liquid nitrogen would be forced to pay higher prices in these areas.

V. Entry

Significant impediments to new entry exist in the markets for bulk liquid oxygen and nitrogen. In order to be competitively viable in the relevant markets, an ASU must produce at least 250 to 300 tons per day of liquid product. The cost to construct a plant sufficiently large to be cost-effective can be 30 to 50 million dollars, most of which are sunk costs and cannot be recovered. Although an ASU can be constructed within two years, it is not economically justifiable to build an ASU before contracting to sell a substantial portion of the plant's capacity, either to an on-site customer or to liquid customers. On-site customers normally sign long-term contracts. Because such opportunities to contract with these customers are rare, it is uncertain whether such an opportunity would arise in the near future in any of the areas affected by the proposed acquisition. It is even more difficult and time-consuming for a potential new entrant to contract with enough liquid gas customers to justify building a new ASU. These customers are generally locked into contracts with existing suppliers that typically last between five and seven years. Even if the new entrant were able to secure enough customers to justify constructing a new ASU in any of the affected markets, the new entrant may still need to rely on incumbent suppliers to obtain liquid gases to service the new entrant's customers while the ASU was constructed. Given the difficulties of entry, it is unlikely that new entry could be accomplished in a timely manner in the bulk liquid oxygen and nitrogen markets to defeat a likely price increase caused by the proposed acquisition.

VI. The Consent Agreement

The proposed Consent Agreement remedies the acquisition's likely anticompetitive effects in the markets for bulk liquid oxygen and bulk liquid nitrogen. Pursuant to the Consent Agreement, Air Products will divest all of the Airgas business and assets relating to the manufacture or sale of bulk liquid oxygen and nitrogen in the identified geographic markets. The Consent Agreement provides that Air Products must find a buyer for the ASUs, at no minimum price, that is acceptable to the Commission, no later than four months from the date on which Air Products consummates its acquisition of Airgas. If Air Products is unable to consummate the acquisition by February 15, 2011, however, the Commission, in its discretion, may require Air Products to seek prior approval of a buyer before Air Products can close any transaction with Airgas. This provision provides the Commission an opportunity to evaluate the continued availability of acceptable purchasers – if, for example, economic conditions were to deteriorate significantly – if the closing of the Air Products-Airgas transaction takes place after February 15, 2011.

Any acquirer of the divested assets must receive the prior approval of the Commission. The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the acquisition. A proposed acquirer of divested assets must not itself present competitive problems. There are a number of parties interested in purchasing the ASUs and related assets to be divested that have the expertise, experience, and financial viability to successfully purchase and manage these assets and retain the current level of competition in the relevant markets. The Commission is therefore satisfied that sufficient potential buyers for the divested bulk liquid oxygen and nitrogen assets currently exist.

If the Commission determines that Air Products has not provided an acceptable buyer for the ASUs within the required time period, or that the manner of the divestiture is not acceptable, the Commission may appoint a trustee to divest the assets. The trustee would have the exclusive power and authority to accomplish the divestiture.

The Consent Agreement also contains an Order to Hold Separate and Maintain Assets, which will serve to protect the viability, marketability, and competitiveness of the divestiture asset package until the assets are divested to a buyer approved by the Commission.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Consent Agreement or to modify its terms in any way.

By direction of the Commission.

Donald S. Clark

Secretary.

[FR Doc. 2010–23132 Filed 9–15–10; 7:50 am]

BILLING CODE 6750–01–S

GENERAL SERVICES ADMINISTRATION

[OMB Control No. 3090–00XX; Docket 2010–0002; Sequence 21]

Office of Governmentwide Policy: Submission for OMB Review; Information Collection, Real Property Status Report, Standard Form (SF–XXXX)

AGENCY: Office of Governmentwide Policy, General Services Administration (GSA).

ACTION: Submission for OMB Review; Comment Request and Final Notice of the Real Property Status Report (RPSR) form.

SUMMARY: Effective with publication of this notice in the **Federal Register**, agencies will be able to utilize a new standard form to collect information on the status of real property under financial assistance awards. Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the GSA Office of Governmentwide Policy is submitting to the Office of Management and Budget (OMB) a request to review and approve a new information collection requirement concerning reporting real property status. The GSA, on behalf of the Grants Policy Committee proposes to issue a new standard form, the Real Property Status Report (RPSR) (SF–XXXX). Two notices were published in the **Federal Register** at 72 FR 64646, November 16, 2007 and 73 FR 67177, November 13, 2008.

This notice is being issued to address comments received as a result of the notice published in the **Federal Register** at 73 FR 67177, November 13, 2008 and to present changes made to the report as a result of those comments. We anticipate this being the final notice before the form and instructions are finalized. The general public and Federal agencies, however, are invited to comment on the proposed final format during the 30 day public comment period.

To view the report and the full list of comments received along with work group responses go to OMB's web page at *http://www.OMB.gov* and click on the link "Management," then the link "Grants Management," then the link "Forms," then the link "Proposed Government-Wide Standard Grants Reporting Forms."

DATES: *Comment Due Date:* October 18, 2010.

ADDRESSES: Submit comments identified by Information Collection 3090–00XX, Real Property Status

Report, Standard Form (SF–XXXX), by any of the following methods:

• *Regulations.gov: http://www.regulations.gov.*

Submit comments via the Federal eRulemaking portal by inputting "Information Collection 3090–00XX; Real Property Status Report, Standard Form (SF–XXXX)" under the heading "Enter Keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "Information Collection 3090–00XX; Real Property Status Report, Standard Form (SF–XXXX)." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "Information Collection 3090–00XX; Real Property Status Report, Standard Form (SF–XXXX)" on your attached document.

• *Fax:* 202–501–4067.

• *Mail:* General Services Administration, Regulatory Secretariat (MVCB), 1800 F Street, NW., Room 4041, Washington, DC 20405. ATTN: Hada Flowers/IC 3090–00XX.

Instructions: Please submit comments only and cite Information Collection 3090–00XX; Real Property Status Report, Standard Form (SF–XXXX), in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Michael Nelson, Chair, Post-Award Workgroup; telephone (301)443–6808; fax (301)443–6686; e-mail *MNelson@hrsa.gov;* mailing address, 5600 Fishers Lane, Room 11–03, Rockville, MD 20857.

SUPPLEMENTARY INFORMATION:

A. Purpose

The report will be used to collect information related to real property when required by a Federal financial assistance award. The SF–XXXX includes a cover page, Attachment A, "General Reporting," Attachment B, "Request to Acquire, Improve or Furnish," Attachment C, "Disposition Request," and instructions. The purpose of this new report is to assist recipients of grants and cooperative agreements when they are required to provide a Federal agency with information related to real property to which the Federal government holds an interest as a result of the real property being acquired, improved, or furnished under a Federal financial assistance award, and for real property that was donated to a Federal project in the form of a required match or cost sharing donation. The report establishes a standard format for reporting real property status under financial assistance awards. This rule also establishes an annual reporting date of September 30 to be used if an award does not specify an annual reporting date, unless Federal interest in the real property extends 15 years or longer.

In those instances where recipients have real property with Federal interest attached for a period of 15 years or more, Federal agencies, at their option, may require their recipients to report on various multi-year frequencies (*e.g.* every two years or every three years, not to exceed a five-year reporting period; or an agency may require annual reporting for the first three years of an award and thereafter require reporting every five years.)

To create uniformity of collection and support future electronic submission of information, the standard reporting form will replace any agency unique forms currently in use.

Background

The GSA, on behalf of the Federal Grants Streamlining Initiative, announced in the **Federal Register** on November 16, 2007 (72 FR 64646), its intent to issue a new standard report, the Real Property Status Report (SF–XXXX).

Public Law 106–107 required the OMB to direct, coordinate, and assist Executive Branch departments and agencies in establishing an interagency process to streamline and simplify Federal financial assistance procedures for non-Federal entities. The law also required executive agencies to develop, submit to the Congress, and implement a plan to achieve streamlined and simplified procedures.

Twenty-six Executive Branch agencies jointly submitted a plan to the Congress in May 2001, as the Act required. The plan described the interagency process through which the agencies would review current policies and practices, and seek to streamline and simplify them. The process involved interagency work groups under the auspices of the Grants Management Committee of the Chief Financial Officers Council. The plan also identified substantive areas in which the interagency work groups had begun their review.

One of the substantive areas that the agencies identified in the plan was a need to streamline and simplify Federal grant reporting requirements and procedures and associated business processes to reduce unnecessary burdens on recipients and to improve the timeliness, completeness, and quality of the information collected.

Under the standards for management and disposition of federally owned property, and real property acquired under assistance awards (real property status) in 2 CFR 215, the "Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations," and the "Uniform Administrative Requirements for Grants and Agreements with State and Local Governments," codified by Federal agencies at 53 FR 8048 (March 11, 1988), recipients may be required to provide Federal agencies with information concerning property in their custody annually, at award closeout, or when the property is no longer needed.

During the public consultation process mandated by Public Law 106–107, recipients suggested the need for clarification of these requirements and the establishment of a standard report to help them submit appropriate property information when required. The Real Property Status Report is to be used in connection with the requirements listed in the table below and Federal awarding agency guidelines:

For . . .	A recipient must . . .	When . . .
Government Furnished Property.	Submit an inventory listing. (Use: Cover Page and Attachment A).	Annually, with information accurate as of September 30, unless the award specifies a different date.
	Report the property to the Federal awarding agency and request disposition instructions. (Use: Cover Page and Attachments A and C).	The property is no longer needed. Upon completion of the award or at the point Federal interest in the property ceases.
	Notify the Federal awarding agency (Use: Cover Page and Attachment A).	Immediately upon finding property damaged, significantly altered, or when there is an anticipated change expected during the next reporting period.

For . . .	A recipient must . . .	When . . .
Real property improved, donated or acquired in whole or in part under an assistance award..	Request authority to furnish real property. (Use: Cover Page and Attachment B).	The recipient is authorized, via the assistance award, to request to furnish real property for the purposes of the project or program.
	Report the final disposition of the property. (Use: Cover Page and Attachment A).	After the recipient has completed the final disposition of the property in accordance with agency instructions.
	Request authority to acquire or improve real property. (Use: Cover Page and Attachment B).	The recipient is authorized, via the assistance award, to request authorization from the awarding agency, during the post-award phase, to acquire or improve real property for the purposes of the project or program.
	Request disposition instructions. (Use: Cover Page and Attachment C).	The recipient no longer needs the property for any purpose.
	Report that the property has been sold and reimburse the Federal awarding agency for the Federal share. (Use: Cover Page and Attachment A).	The recipient is directed to sell the property under guidelines provided by the Federal awarding agency.
	Report the Transfer of title to the property to the Federal Government or to an eligible third party.	The recipient is directed to transfer title by the Federal awarding agency or its successor; or,
	Compensate the original Federal awarding agency or its successor. (Use: Cover Page and Attachment A).	The recipient wants to retain title without further obligation to the Federal Government.
	Obtain the approval of the Federal awarding agency. (Use: Cover Page and Attachment B).	Before making capital expenditures for improvements to property that materially increase its value or useful life.
	Obtain the approval of the Federal awarding agency. (Use: Cover Page and Attachment B).	The recipient wants to use the real property in other Federally-sponsored projects or programs that have purposes consistent with those authorized for support by the Federal awarding agency when the recipient determines that the property is no longer needed for the purposes of the original project.
	Report the final disposition of the property. (Use: Cover Page and Attachment A).	After the recipient has completed the final disposition of the property in accordance with agency instructions.
	Request release from the obligation to report on real property. (Use: Cover Page and Attachment C).	The Federal interest in the property expires, or the real property has been disposed of in accordance with agency instructions.

Discussion of Comments

Twenty-seven (27) comments were received in response to the November 13, 2008, **Federal Register** notice (73 FR 67177) regarding the Real Property Status Report (RPSR). All the comments came from two Federal agencies. Following the close of the comment period, an interagency team met to review the comments and make appropriate upgrades to the draft report. A summary of the comments and the work group responses are below:

Comment 1: The team received 1 comment that indicated some of the data in the RPSR are currently being reported in electronic form to the Federal Real Property Council (FRPC) and suggested that we coordinate the reporting requirements with the FRPC to eliminate duplication of effort and reporting systems.

Response: The commenter is referring to Federal property owned by the Government, not real property held by a grant/cooperative agreement recipient in which the Government maintains an interest. In those cases the RPSR would not be used. It would only be used by recipients of grants and cooperative agreements, not by a Federal agency reporting on real property.

Comment 2: The team received 4 comments expressing concern about the lack of current requirements in 2 CFR Part 215, the "Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations," and the "Uniform Administrative Requirements for Grants and Agreements with State and Local Governments," codified by Federal agencies at 53 FR 8048 (March 11, 1988), that address the specific reporting requirements being implemented by the RPSR.

Response: The Grants Policy Committee (GPC) of the Chief Financial Officers Council is in the process of developing the related policy requirements for the implementation of the RPSR. As a result, OMB has decided to release the report as final at this time. However, agencies are not required to implement the use of the report until the final release of the related real property reporting requirements in the proposed 2 CFR Part 45. Agencies that wish to implement the RPSR requirements prior to the finalization of the related requirements in 2 CFR Part 45 may do so provided they issue related agency or program specific requirements. Such agency or program specific requirements would have to be amended once the RPSR policy requirements are finalized in 2 CFR Part 45.

Comment 3: The team received 1 comment stating that agencies should be provided the option to apply this reporting requirement retroactively to grantees with existing Federal interest in their facilities without having to seek a waiver from OMB.

Response: Agencies have the option to impose the requirement retroactively if they choose to do so via their individual agency implementation of the requirement. However, the reason the requirement is not required to be imposed retroactively is to reduce the impact of the requirement on the recipient community.

Comment 4: The team received 1 comment that recommended the instructions and forms should be clarified to reflect that the RPSR applies to new construction. They indicated that the term "acquisition" could be interpreted as being applicable to purchases only versus constructing a new facility.

Response: In response to the comment the general report instructions have been revised to include an example of the definition of acquisition as follows: "* * * acquired (*i.e.,* purchased or constructed) in whole or in part under a Federal financial assistance award.

Comment 5: The team received 1 comment that suggested that the section of the **Federal Register** notice (73 FR

67177, November 13, 2008) which provides a chart listing when a recipient is to use the report, should where possible, reference the appropriate report attachment to use for reporting/requesting related information. They also suggested an additional line be added stating, "The recipient must report to the agency when it has completed disposition of the property."

Response: In response to the comment the chart has been revised as requested.

Comment 6: The team received 1 question asking if an agency already has the authority to request information, such as a detailed floor plan, why would it need to request additional OMB approval?

Response: Once the RPSR is issued as final it may not be modified to meet program specific requirements without first obtaining OMB approval.

Comment 7: The team received 1 comment/question that indicated it is unclear if under the situation where an agency already collects real property related information through other means, such as an electronic system(s), or as part of another OMB approved form(s), whether the RPSR report or format would still be required, or whether the other existing collection methods satisfy the RPSR information collection requirement.

Response: Agencies may use electronic systems or formats to collect the information required by the RPSR as long as they are consistent with the data elements contained in the RPSR. However, other real property forms/reports will be discontinued once the related real property reporting requirements are implemented as final under the proposed 2 CFR, Part 45.

Comment 8: The team received 1 question regarding Attachment A, "General Reporting," block 14e, "Real Property Ownership Types." The commenter asked if the selection option of, "A. Owned" is defined as "grantee" owned or "Federally" owned. They also asked if more than one option can be checked (such as "Owned" and "Fee Simple").

Response: The Attachment A, block 14e, selection option "A. Owned" is defined as grantee ownership. Also, the report and instructions have been revised to include "Government Furnished Property (GFP)" as an ownership type to cover Federal ownership. If multiple ownership types apply then each applicable type may be checked. This change is also reflected on Attachment B, block 14b, "Proposed Real Property Ownership Type."

Comment 9: The team received 1 question concerning Attachment A, block 14f, "Beginning date of Federal Interest." The commenter asked if it is necessary for grantees to report this information twice since the same information appears to be given in block 13, "Period of Federal Interest."

Response: In response to the comment, block 14f has been eliminated and the options to which the Federal interest is tied (*e.g.,* Acquisition, Renovation, etc.) have been moved to block 13. The numbering of the report and instructions has been revised accordingly.

Comment 10: The team received 1 question regarding Attachment A, original block 14h, "Has a deed, lien, covenant, or other related documentation been recorded to establish Federal interest in this real property?" The commenter asked, since this is a report to be used throughout the period of Federal interest, shouldn't the grantee have already provided this information before the project is completed and/or before closeout? Therefore, doesn't it seem burdensome to ask for this information for each reporting period?

Response: In response to the question we have revised what is now block 14g as follows: "* * * If yes (unless previously reported), describe the * * *"

Comment 11: The team received 1 question/comment regarding the instructions related to Attachment A, block 14h, which, as noted above, is now 14g. The commenter asked if it would be burdensome to request this information during each reporting period. The commenter stated that some of their operating divisions require this information 10 days after the Notice is filed. Therefore, the commenter suggested adding "unless previously reported" at the end of the "Yes" selection option.

Response: In response to the comment we have revised the instructions for what is now 14g as follows: "* * * If yes (unless previously reported), describe the * * *"

Comment 12: The team received 3 questions/comments concerning Attachment A, block 14j, "Are there any Uniform Relocation Act (URA) requirements applicable to this real property?"; block 14k, "Are there any environmental compliance requirements related to the real property?"; and block 14l, "In accordance with the National Historic Preservation Act (NHPA), does the property possess historic significance, and/or is listed or eligible for listing in the National Register of Historic Places?" The commenter stated that the questions in these blocks are being asked in the present tense when it would only be applicable to some projects at the pre-award stage. Therefore, how would the grantee answer the questions if they were applicable at the pre-award stage but not during the post-award stage? The commenter further asked if we should consider adding "N/A" if these questions need to be addressed during the post-award stage.

Response: The RPSR is a post-award report that only applies during the post-award stage. The sections of the report mentioned in this comment are used to document whether the URA, environmental compliance requirements, or NHPA apply to the real property during the post-award stage. The URA, environmental compliance requirements, or NHPA could potentially change during the award period or during the period under which Federal interest is maintained. Therefore, we did not revise the report in response to the questions raised. Note that blocks 14j, 14k, and 14l have been renumbered as 14i, 14j, and 14k, respectively.

Comment 13: The team received 1 comment regarding the instructions related to Attachment A, blocks 14j, 14k, and 14l, which, as noted above, are now 14i, 14j, and 14k, respectively. The commenter stated that the requirements are more applicable during the pre-award stage as opposed to the post-award stage. Therefore, it is not clear why they are being addressed on the RPSR.

Response: As previously mentioned in the response to comment 12, the sections of the report mentioned in this comment are used to document whether the URA, environmental compliance requirements, or NHPA apply to the real property which could potentially change during the award period or during the period under which Federal interest is maintained. Therefore, we did not revise the report in response to the comment.

Comment 14: The team received 1 comment concerning Attachment A, block 15, suggesting that it be edited to read as follows: "Has a significant change occurred with the use of real property, *or is there an anticipated change expected during the next reporting period*?" The commenter suggested that the use of the phrase "* * * that is not otherwise captured above * * *" is unnecessary.

Response: In response to the comment both this block of the report and the related instructions have been revised as follows: "Has a significant change occurred with the real property, or is there an anticipated change expected during the next reporting period?"

Comment 15: The team received 1 question concerning Attachment A, block 16, "Real Property Disposition Status." The commenter asked why a question regarding "disposition of property" is being asked on this report. How would the grantee address the question if disposition is not applicable during the prescribed reporting period? The commenter stated that if the question is not omitted, "N/A" should be added as an option.

Response: In response to the comment, both block 16 of the report and the related instructions have been revised to add the option "N/A."

Comment 16: The team received 1 comment regarding a specific agency requirement related to Attachment A, block 16, "Real Property Disposition Status." The commenter indicated that their program regulation allows an institution to transfer the usage obligation to another facility, not another "award" during the required usage period. The commenter stated that if option "B. Transfer to different award" applies to this described situation, it does not appear to be applicable to the "disposition status" and therefore, should be removed.

Response: Block 16.B. is intended to cover those instances where the Federal interest in real property is transferred to a different award in accordance with 2 CFR Part 215.32(b).

Comment 17: The team received 1 comment suggesting that language should be added to Attachment B, "Request to Acquire, Improve or Furnish," that ensures grantees will not fill out the Attachment unless they have received specific instructions by the awarding agency. The commenter suggests that this language will help avoid confusion on the part of grantees who may view Attachment B as a way to request new award funding. The commenter also suggested that the term "furnish" should be defined, as it could imply equipment which may or may not be permanently affixed to real property.

Response: In response to the comments the report instructions have been revised to clarify that Attachment B should only be used if the applicable program authority or budget allows recipients to acquire, improve or furnish real property. The term "furnish" has been replaced with the term Government Furnished Property.

Comment 18: The team received 1 comment regarding Attachment C, "Disposition Request," blocks 14f, "Are there any Uniform Relocation Act (URA) requirements applicable to this real property?"; 14g, "Are there any environmental compliance requirements related to the real property?"; and 14h, "In accordance with the National Historic Preservation Act (NHPA), does the property possess historic significance, and/or is listed or eligible for listing in the National Register of Historic Places?" The commenter recommended deleting these question blocks since they felt the questions do not appear applicable to the "Disposition Request" attachment.

Response: We did not delete those blocks because they are intended to provide information regarding real property for which either a request for disposition instructions or a request for a release from the obligation to report would be submitted.

Comment 19: The team received 1 comment regarding the instructions related to Attachment C, in the section titled, "Real Property Details." The commenter suggested that perhaps "N/A" should be added as an option on the report. The commenter pointed out that question blocks 14f, 14g, and 14h have only "Yes" and "No" options. The commenter suggested these questions should be deleted due to the nature of the report. The commenter also suggested that in block 13b, "Address of Real Property," the part that says, "Also, indicate zoning information related to the real property (*i.e.,* mixed use, residential, commercial, etc.)" should be deleted.

Response: Attachment C has been revised to say: "If a section does not apply, enter 'N/A'." Attachment C, blocks 14f, 14g and 14h have been retained because they are intended to provide relevant information regarding the URA, environmental, and NHPA requirements related to any property that a recipient would be requesting disposition instructions or requesting a release from the obligation to report. The reference to zoning information in block 13b has also been retained because it requests information that is relevant to the zoning status of property for which a disposition request or a request for a release from the obligation to report would be made.

Comment 20: The team received 1 question and comment regarding Attachment C, block 15, "If this is a request for a release from the obligation to report on the real property, describe the reasons for the request." The commenter asked why it would be necessary for a grantee to "request the release from the obligation to report" when a Federal agency's authorizing or appropriation language does not require disposition beyond a prescribed usage period, and suggested revising the report to accommodate this situation.

Response: Block 15 is provided to document any event that would allow the recipient to request to be released from the obligation to report. In the examples provided in the instructions we believe that the agency and the recipient would benefit from the documentation of the release from the obligation to report, which is accommodated by block 15 of Attachment C. Therefore, block 15 has been retained.

B. Annual Reporting Burden

The burden estimates below are for the following agencies: NEH, HUD, DOE, VA, IMLS, ED, HHS, and DOT.

Estimated Total Annual Burden Hours: 3,543,685.45.

Estimated Cost: There is no expected cost to the respondents or to OMB.

ANNUAL BURDEN ESTIMATES

Instrument	Agency	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Real Property Status Report (RPSR) and Attachments	NEH	10	1	4	40
Real Property Status Report (RPSR) and Attachments	HUD	748	1.3	3.66	3,559
Real Property Status Report (RPSR) and Attachments	DOE	500	1	2	1,000
Real Property Status Report (RPSR) and Attachments	VA	200	1	2	400
Real Property Status Report (RPSR) and Attachments	IMLS	10	1	4	40
Real Property Status Report (RPSR) and Attachments	ED	1,694	1	8.3	14,060.2
Real Property Status Report (RPSR) and Attachments	DOT	1,100	800	4	3,520,000
Real Property Status Report (RPSR) and Attachments	HHS	1,223	1.5	2.5	4,586.25

Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (MVCB), 1800 F Street, NW., Room 4041, Washington, DC 20405, telephone (202) 501–4755, or by faxing your request to (202) 501–4067. Please cite the title, OMB Control No. 3090–00XX, Real Property Status Report (SF–XXXX), in all correspondence.

Dated: August 27, 2010.

Casey Coleman,

Chief Information Officer.

[FR Doc. 2010–23032 Filed 9–15–10; 8:45 am]

BILLING CODE 6820–RH–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60 Day–10–0406]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–5960 and send comments to CDC/ATSDR Reports Clearance Officer, 1600 Clifton Road NE, MS–D74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov.*

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. Written comments should be received within 60 days of this notice.

Proposed Project

State and Local Area Integrated Telephone Survey (SLAITS), (OMB No. 0920–0406, Expiration 04/30/2011)—Revision—National Center for Health Statistics (NCHS), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Section 306 of the Public Health Service (PHS) Act (42 U.S.C. 242k), as amended, authorizes that the Secretary of Health and Human Services (DHHS), acting through NCHS, shall collect statistics on the extent and nature of illness and disability of the population of the United States. The State and Local Area Integrated Telephone Survey (SLAITS) mechanism has been conducted since 1997. This is a request to continue for three years the integrated and coordinated survey system designed to collect needed health and well-being data at the national, state, and local levels, in accordance with the 1995 initiative to increase the integration of surveys within DHHS. The survey is being revised to allow for increased burden that may be associated with some topical areas.

Using the large sampling frame of the ongoing National Immunization Survey (NIS) and Computer Assisted Telephone Interviewing (CATI), and when necessary independent samples, mail, and internet modes to support data collection activities, SLAITS has quickly collected and produced household and person-level data to monitor health-related areas. Questionnaire content is drawn from existing surveys within DHHS and other Federal agencies, or developed specifically to meet project sponsor needs. Examples of topical areas include infant, child, adolescent, parent, and family health, well-being, and knowledge, attitude, and behaviors; children with special health care needs (CSHCN); functioning; life course and social determinants of health; developmental delays and disabilities; acute and chronic conditions; immunizations; access to and use of health care; program participation; adoption; and changes in health insurance coverage and experiences.

Since its inception, data from the SLAITS mechanism have been used by researchers in the government, university, commercial, and private sectors; policymakers; and advocates to evaluate content and/or programs. SLAITS data continue to be heavily used by Federal and state Maternal and Child Health Bureau Directors to evaluate programs and service needs. Several SLAITS modules provided data for multiple Congressionally-mandated reports on healthcare disparities and quality; at least one report to Congress on health insurance coverage among children; and reports of the National Academy of Sciences. Within DHHS, the Office of the Assistant Secretary for Planning and Evaluation and the Administration for Children and Families used SLAITS to collect data for the first nationally representative survey of adoptive families across adoption types for children with and without special health care needs, and to assess their post-adoption service use and unmet needs. There is no cost to respondents other than their time to participate.

ESTIMATED ANNUALIZED BURDEN HOURS

Respondents	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden hours
Household screening	1,800,000	1	2/60	60,000
Household interview	306,000	1	25/60	127,500
Pilot work, pre-testing, and planning activities	12,300	1	35/60	7,175
Total				194,675

Dated: September 10, 2010.

Maryam Daneshvar,

Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 2010–23093 Filed 9–15–10; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Comment Request

In compliance with the requirement for opportunity for public comment on proposed data collection projects (section 3506(c)(2)(A) of Title 44, United States Code, as amended by the Paperwork Reduction Act of 1995, Pub. L. 104–13), the Health Resources and Services Administration (HRSA) publishes periodic summaries of proposed projects being developed for submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995. To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, e-mail *paperwork@hrsa.gov* or call the HRSA Reports Clearance Officer at (301) 443–1129.

Comments are invited on: (a) The proposed collection of information for the proper performance of the functions of the agency; (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.

Proposed Project: Nurse Faculty Loan Program (NFLP) Annual Operating Report (AOR) Form (OMB No. 0915–0314)—[Extension]. This clearance request is for approval of the modified AOR for applicants to report NFLP loan fund activity annually. The modified form will collect additional data from applicants will include information on the total number of enrollees, graduates, and graduates employed as nurse faculty by, (1) Age and Gender, (2) Nursing Programs, (3) Nursing Degrees. Under Title VIII, section 846A of the Public Health Service Act, as amended by Public Law 111–148, the Secretary of Health and Human Services (HHS) enters into an agreement with a school of nursing and makes an award to the school. The award is used to establish a distinct account for the NFLP loan fund at the school. The school of nursing makes loans from the NFLP fund to students enrolled full-time in a master's or doctoral nursing education program that will prepare them to become qualified nursing faculty. Following graduation from the NFLP lending school, loan recipients may receive up to 85 percent NFLP loan cancellation over a consecutive four-year period in exchange for service as full-time faculty at a school of nursing located in the U.S. and all of its territories where a school of nursing may be located. The NFLP lending school collects any portion of the loan that is not cancelled and any loans that go into repayment and deposits these monies into the NFLP loan fund to make additional NFLP loans. The school of nursing must keep records of all NFLP loan fund transactions. The NFLP Annual Operating Report is used to collect information relating to the NFLP loan fund operations and financial activities for a specified reporting period (July 1 through June 30 of the academic year). Participating schools will complete and submit the AOR annually. In addition to the newly required data, participating schools will provide the Federal Government with current and cumulative information on: (1) The number and amount of loans made, (2) the number of NFLP recipients and graduates, (3) the number and amount of loans collected, (4) the number and amount of loans in repayment, (5) the number of NFLP graduates employed as nurse faculty, (6) NFLP loan fund receipts, disbursements and other related cost. The NFLP loan fund balance is used to determine future awards to the school.

The estimate of burden for this form is as follows:

Form	Number of respondents	Responses per respondent	Total responses	Hours per responses	Total burden hours
Nurse Faculty Loan Program Annual Operating Report (AOR)	150	1	150	8	1200
Total Burden	150	1	150	8	1200

E-mail comments to *paperwork@hrsa.gov* or mail the HRSA Reports Clearance Officer, Room 10–33, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857. Written comments should be received within 60 days of this notice.

Dated: September 10, 2010.

Sahira Rafiullah,

Director, Division of Policy and Information Coordination.

[FR Doc. 2010–23135 Filed 9–15–10; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Proposed Projects:

Title: State Abstinence Education Program.

OMB No.: 0970–0381.

Description: The State Abstinence Program was extended through Fiscal Year 2014 under Patient Protection and Affordable Care Act of 2010 (Affordable Care Act, hereafter), Public Law 111–148.

The Family and Youth Services Bureau (FYSB) is accepting applications from States and Territories for the development and implementation of the State Abstinence Program. The purpose of this program is to support decisions to abstain from sexual activity by providing abstinence programming as defined by Section 510(b) of the Social Security Act (42 U.S.C. 710(b)) with a focus on those groups that are most likely to bear children out-of-wedlock, such as youth in or aging out of foster care.

States are encouraged to develop flexible, medically accurate and effective abstinence-based plans responsive to their specific needs. These plans must provide abstinence

education, and at the option of the State, where appropriate, mentoring, counseling, and adult supervision to promote abstinence from sexual activity, with a focus on those groups which are most likely to bear children out-of-wedlock. An expected outcome for all programs is to promote abstinence from sexual activity.

OMB approval is requested to solict comments from the public on paperwork reduction as it relates to ACYF's receipt of the following documents from applicants and awardees:

Application for Mandatory Formula Grant.

State Plan.

Performance Progress Report.

Respondents: 50 States and 9 Territories, to include, District of Columbia, Puerto Rico, Virgin Islands, Guam, American Samoa, Northern Mariana Islands, the Federated States of Micronesia, the Marshall Islands and Palau.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Application, to include program narrative	59	1	24	1,416
State Plan	59	1	40	2,360
Performance Progress Reports	59	2	30	3,540

Estimated Total Annual Burden Hours: 7,316.

In compliance with the requirements of Section 506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. E-mail address: *infocollection@acf.hhs.gov.* All requests should be identified by the title of the information collection.

The Department specifically requests comments 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) 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. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Dated: September 13, 2010.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2010–23096 Filed 9–15–10; 8:45 am]

BILLING CODE 4184–01–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 October 7, 2010, from 8 a.m. until 5 p.m. and on October 8, 2010, from 8 a.m. to 1 p.m.

Location: FDA White Oak Conference Center, 10903 New Hampshire Ave., Bldg. 31, rm. 1503, 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/Advisory Committees/default.htm*; under the heading "Resources for You" click on "White Oak Conference Center Parking and Transportation Information for FDA Advisory Committee Meetings."

Contact Person: Karen Templeton-Somers, Center for Tobacco Products, Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 1–877–287–1373 (choose Option 4), email: *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 October 7 and 8, 2010, the committee will hear and discuss presentations on the publicly available industry documents as they relate to the issue of the impact of the use of menthol in cigarettes on the public health, including such use among children, African-Americans, Hispanics, and other racial and ethnic minorities.

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 September 30, 2010. Oral presentations from the public will be scheduled between approximately 1:30 p.m. and 2:30 p.m. on October 7,

2010. Those desiring to make 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 September 22, 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 September 23, 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 Karen Templeton-Somers at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: September 10, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–23057 Filed 9–15–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Initial Review Group; Subcommittee F—Manpower & Training.

Date: September 21–22, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Alexandria Old Town, 1767 King Street, Alexandria, VA 22314.

Contact Person: Lynn M. Amende, PhD, Scientific Review Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 6116 Executive Blvd., Room 8105, Bethesda, MD 20892, 301–451–4759, *amendel@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to scheduling conflicts.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: September 10, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–23144 Filed 9–15–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Heart, Lung, and Blood Initial Review Group Clinical Trials Review Committee.

Date: October 25–26, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Keary A Cope, PhD, Scientific Review Officer, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7190, Bethesda, MD 20892–7924, 301–435–2222, *copeka@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: September 10, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–23149 Filed 9–15–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0001]

Joint Meeting of the Peripheral and Central Nervous System Drugs Advisory Committee and the Drug Safety and Risk Management 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 Committees: Peripheral and Central Nervous System Drugs Advisory Committee and the Drug Safety and Risk Management Advisory Committee.

General Function of the Committees: To provide advice and recommendations to the agency on FDA's regulatory issues.

Date and Time: The meeting will be held on November 3, 2010, from 8 a.m. to 5 p.m.

Location: Hilton Washington DC North/Gaithersburg, The Ballrooms, 620 Perry Pkwy., Gaithersburg, MD. The hotel telephone number is 301–977–8900.

Contact Person: Diem-Kieu Ngo, Center for Drug Evaluation and Research, Food and Drug

Administration, 10903 New Hampshire Ave., Bldg. 31, rm. 2417, Silver Spring, MD 20993–0002, 301–796–9001, FAX: 301–847–8533, email: *diem.ngo@fda.hhs.gov*, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), codes 3014512543 and 3014512535. 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 November 3, 2010, the committees will discuss a number of safety concerns with intravenous administration of the anti-seizure drugs phenytoin and fosphenytoin, including the condition known as Purple Glove Syndrome, and recommend what regulatory actions, if any, are necessary to diminish the risks.

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 October 20, 2010. Oral presentations from the public will be scheduled between approximately 1 p.m. and 2 p.m. Those desiring to make 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 October 12, 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 October 13, 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 Diem-Kieu Ngo at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: September 10, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–23044 Filed 9–15–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

National Institute for Occupational Safety and Health (NIOSH), Safety and Occupational Health Study Section (SOHSS)

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 following committee meeting.

Times and Dates:

8 a.m.–5 p.m., October 7, 2010 (Closed); 8 a.m.–5 p.m., October 8, 2010 (Closed).

Place: Embassy Suites Hotel, 1900 Diagonal Road, Alexandria, Virginia, 22314, Telephone (703) 684–5900, Fax (703) 684–1403.

Purpose: The Safety and Occupational Health Study Section will review, discuss, and evaluate grant application(s) received in response to the Institute's standard grants review and funding cycles pertaining to research issues in occupational safety and health, and allied areas.

It is the intent of NIOSH to support broad-based research endeavors in keeping with the Institute's program goals. This will lead to improved understanding and appreciation for the magnitude of the aggregate health burden associated with occupational injuries and illnesses, as well as to support more focused research projects, which will lead to improvements in the delivery of occupational safety and health services, and the prevention of work-related injury and illness. It is anticipated that research funded will promote these program goals.

Matters to be Discussed: The meeting agenda includes discussions on matters related to the conduct of Study Section business and for the study section to consider safety and occupational health-related grant applications. These portions of 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, Centers for Disease Control and Prevention, pursuant to Section 10(d) Public Law 92–463.

Agenda items are subject to change as priorities dictate.

Contact Person for More Information: Price Connor, PhD, NIOSH Health Scientist, 1600 Clifton Road, NE., Mailstop E–20, Atlanta, Georgia 30333, Telephone (404) 498–2511, Fax (404) 498–2571.

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 CDC and the Agency for Toxic Substances and Disease Registry.

Dated: September 10, 2010.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention .

[FR Doc. 2010–23101 Filed 9–15–10; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

National Center for Health Statistics (NCHS), Classifications and Public Health Data Standards Staff, Announces the Following Meeting

Name: ICD–9–CM Coordination and Maintenance Committee meeting.

Time and Date: 9 a.m.–5:30 p.m., September 15–16, 2010.

Place: Centers for Medicare and Medicaid Services (CMS) Auditorium, 7500 Security Boulevard, Baltimore, Maryland.

Status: Open to the public.

Purpose: The ICD–9–CM Coordination and Maintenance (C&M) Committee will hold the last meeting of the 2010 calendar year cycle on Wednesday and Thursday September 15–16, 2010. The C&M meeting is a public forum for the presentation of proposed modifications to the International Classification of Diseases, Ninth-Revision, Clinical Modification. There will be telephone lines available from 9 a.m. until 12:30 p.m. and 2:15 p.m. until 5:30 p.m. (Wednesday) and 9 until 12:30 and 1:30 until 3:15 p.m. (Thursday) for those who are unable to attend the meeting in person. The toll-free dial-in number for external participants is 1–800–837–1935; participant codes for the respective sessions are: 888801009, 88803327, 88805029, and 88808234. Participants attending by telephone do not need to formally register for the meeting. Dial-in lines are available on a first come, first served basis.

Matters To Be Discussed: Tentative agenda items include:

September 15, 2010
- ICD–10 Topics (9–12:30)
- Freeze update
- General Equivalence Maps (GEMs)*
- MS–DRG Impact Analysis
- V28.0 ICD–10 MS–DRGs
- ICD–10–CM/ICD–10–PCS updates

* Section 10109(c) of the Patient Protection and Affordable Care Act and the Reconciliation Act of 2010 (PPACA) requires the Secretary of Health and Human Services (HHS) to task the C&M Committee to convene a meeting before January 1, 2011, to receive stakeholder input regarding the crosswalk between the Ninth and Tenth Revisions of the International Classification of Diseases (ICD–9, and ICD–10, respectively), posted to the CMS Web site at *http://www.cms.gov/ICD10,* for the purpose of making appropriate revisions to said crosswalk.

Section 10109(c) further states that any revised crosswalk be treated as a code set for which a standard has been adopted by the Secretary, and that revisions to this crosswalk be posted to the CMS Web site.

The C&M Committee will use the first half of the first day of the September C&M Committee meeting, 9 a.m. to 12:30 p.m. Wednesday, September 15, 2010, to fulfill the above-referenced PPACA requirements for this meeting to be held prior to January 1, 2011, and receive public input regarding the above-referenced crosswalk revision.

No other meeting will be convened by the C&M Committee for this purpose. Interested parties and stakeholders should be prepared to submit their written comments and other relevant documentation at the meeting, or no later than November 12, 2010 to the following addresses:

ICD–9–CM procedure topics:
- Contrast Dye Removal
- Endovascular partial occlusion of abdominal aorta
- Endovascular Intracranial Aneurysm Embolization
- Fenestrated AAA Endovascular Graft
- Implantation of an Anti-Microbial Envelope
- Pulmonary Artery Pressure Monitoring
- Addenda (procedures)

September 16, 2010
- Corticobasal degeneration
- Complication of stem cell transplant
- Gastroparesis
- Glaucoma
- Hepatopulmonary syndrome
- Interstitial lung diseases
- Malnutrition
- Mesh erosion
- Pseudobulbar affect
- Transfusion transmitted infections
- Genitourinary conditions
- Addenda (diagnoses)

Contact Person for Additional Information: Donna Pickett, Medical Systems Administrator, Classifications and Public Health Data Standards Staff, NCHS, 3311 Toledo Road, Room 2337, Hyattsville, Maryland 20782, e-mail *dfp4@cdc.gov,* telephone 301–458–4434 (diagnosis), Mady Hue, Health Insurance Specialist, Division of Acute Care, CMS, 7500 Security Blvd., Baltimore, Maryland 21244, e-mail *marilu.hue@cms.hhs.gov,* telephone 410–786–4510 (procedures).

Note: CMS and NCHS will no longer be providing paper copies of handouts for the meeting. Electronic copies of all meeting materials will be posted on the CMS and NCHS Web sites prior to the meeting at *http://www.cms.hhs.gov/ICD9ProviderDiagnosticCodes/03_meetings.asp#TopOfPage* and *http://www.cdc.gov/nchs/icd/icd9cm_maintenance.htm.*

Notice: Because of increased security requirements CMS has instituted stringent procedures for entrance into the building by non-government employees. Persons without a government I.D. will need to show an official form of picture I.D. (such as a drivers license), and sign-in at the security desk upon entering the building.

Those who wish to attend a specific ICD–9–CM C&M meeting in the CMS auditorium must submit their name and organization in addition to the meeting visitor list. Those wishing to attend the September 15–16, 2010 meeting must submit their name and organization by September 10, 2010 for inclusion on the visitor list. This visitor list will be maintained at the front desk of the CMS building and used by the guards to admit visitors to the meeting. Those who attended previous ICD–9–CM C&M meetings will no longer be automatically added to the visitor list. You must request inclusion of your name prior to each meeting you attend.

Register to attend the meeting on-line at: *http://www.cms.hhs.gov/apps/events/.*

For questions about the registration process please contact Mady Hue (410–786–4510 or *Marilu.hue@cms.hhs.gov*).

Notice: This is a public meeting. However, because of fire code requirements, should the number of attendants meet the capacity of the room, the meeting will be closed.

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 CDC and the Agency for Toxic Substances and Disease Registry.

Dated: September 8, 2010.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2010–23092 Filed 9–15–10; 8:45 am]

BILLING CODE 4160–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; 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 meetings of the National Advisory Neurological Disorders and Stroke Council.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in sections 552b(c)(6), Title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted they the National Institute of Neurological Disorders and Stroke, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors, National Institute of Neurological Disorders and Stroke.

Date: October 24–25, 2010.

Time: 7 p.m. to 6:30 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin

Avenue, Chesapeake Room, Bethesda, MD 20814.

Contact Person: Alan P. Koretsky, PhD, Scientific Director, Division of Intramural Research, National Institute of Neurological Disorders and Stroke, National Institutes of Health, 35 Convent Drive, Room 6A 908, Bethesda, MD 20892, (301) 435–2232, *koretskya@ninds.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS).

Dated: September 9, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–23156 Filed 9–15–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Initial Review Group; Population Sciences Subcommittee.

Date: November 8–9, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road, NW., Washington, DC 20015.

Contact Person: Carla T. Walls, PhD, Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5B01, Bethesda, MD 20892, 301–435–6898, *wallsc@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: September 10, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–23155 Filed 9–15–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the Board of Scientific Counselors, NIA.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the National Institute on Aging, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors, NIA.

Date: October 26, 2010.

Closed: 8 a.m. to 8:30 a.m.

Agenda: To review and evaluate opening remarks; Board business; Review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Institute on Aging, Biomedical Research Center, 251 Bayview Boulevard, 3rd Floor Conference Room, Baltimore, MD 21224.

Open: 8:30 a.m. to 12 p.m.

Agenda: Committee discussion, individual presentations, laboratory overview.

Place: National Institute on Aging, Biomedical Research Center, 251 Bayview Boulevard, 3rd Floor Conference Room, Baltimore, MD 21224.

Closed: 12 p.m. to 12:15 p.m.

Agenda: To review and evaluate senior laboratory investigators meet individually and privately with BSC members.

Place: National Institute on Aging, Biomedical Research Center, 251 Bayview Boulevard, 3rd Floor Conference Room, Baltimore, MD 21224.

Closed: 12:15 p.m. to 3 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Institute on Aging, Biomedical Research Center, 251 Bayview Boulevard, 3rd Floor Conference Room, Baltimore, MD 21224.

Contact Person: Michele K. Evans, MD, Acting Scientific Director, National Institute on Aging, 251 Bayview Boulevard, Suite 100, Room 04C221, Baltimore, MD 21224, 410–558–8110, *ME42V@NIH.GOV.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: September 10, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–23154 Filed 9–15–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; NIDDK DEM Fellowships.

Date: October 13–14, 2010.

Time: 7 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Radisson National Airport, 2020 Jefferson Davis Highway, Arlington, VA 22202.

Contact Person: Michael W. Edwards, PhD, Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 750, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–8886, *edwardsm@extra.niddk.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: *September 10, 2010.*

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–23153 Filed 9–15–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; Peyronie's Disease Ancillary Studies.

Date: November 1, 2010.

Time: 4 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Carol J. Goter-Robinson, PhD, Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 748, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–7791, *goterrobinsonc@extra.niddk.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: September 10, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–23152 Filed 9–15–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of 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 open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Initial Review Group; Digestive Diseases and Nutrition C Subcommittee.

Date: November 7–9, 2010.

Open: November 7, 2010, 4 p.m. to 4:30 p.m.

Agenda: To review procedures and discuss policies.

Place: Crowne Plaza Washington National Airport, 1489 Jefferson Davis Hwy, Arlington, VA 22202.

Closed: November 7, 2010, 4:30 p.m. to 7 p.m.

Agenda: To review and evaluate grant applications.

Place: Crowne Plaza Washington National Airport, 1489 Jefferson Davis Hwy, Arlington, VA 22202.

Closed: November 8, 2010, 8:30 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Crowne Plaza Washington National Airport, 1489 Jefferson Davis Hwy, Arlington, VA 22202.

Closed: November 9, 2010, 8:30 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Crowne Plaza Washington National Airport, 1489 Jefferson Davis Hwy, Arlington, VA 22202.

Contact Person: Robert Wellner, PhD, Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 706, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, *rw175w@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: September 10, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–23151 Filed 9–15–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Heart, Lung, and Blood Advisory Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Advisory Council.

Date: October 26, 2010.

Open: 8 a.m. to 12 p.m.

Agenda: To discuss program policies and issues.

Place: National Institutes of Health, Building 31, 31 Center Drive, Conference Room 10, Bethesda, MD 20892.

Closed: 1 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Building 31, 31 Center Drive, Conference Room 10, Bethesda, MD 20892.

Contact Person: Stephen C. Mockrin, PhD, Director, Division of Extramural Research Activities, National Heart, Lung, and Blood Institute, National Institutes of Health, 6701 Rockledge Drive, Room 7100, Bethesda, MD 20892, (301) 435–0260, *mockrins@nhlbi.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http://www.nhlbi.nih.gov/meetings/index.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: September 10, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–23150 Filed 9–15–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Notice of Meetings

In accordance with section 10(d) of the Federal Advisory Committee Act as amended (5 U.S.C., Appendix 2), the Agency for Healthcare Research and Quality (AHRQ) announces meetings of scientific peer review groups. The subcommittees listed below are part of the Agency's Health Services Research Initial Review Group Committee.

The subcommittee meetings will be closed to the public in accordance with the Federal Advisory Committee Act, section 10(d) of 5 U.S.C., Appendix 2 and 5 U.S.C. 552b(c)(6). Grant applications are to be reviewed and discussed at these meetings. These discussions are likely to involve information concerning individuals associated with the applications, including assessments of their personal qualifications to conduct their proposed projects. This information is exempt from mandatory disclosure under the above-cited statutes.

1. *Name of Subcommittee:* Health Care Research Training.

Date: October 14–15, 2010 (Open from 8 a.m. to 8:15 a.m. on October 14 and closed for remainder of the meeting).

Place: Marriott Gaithersburg Hotel, 9751 Washingtonian Boulevard, Conference Room TBD, Gaithersburg, MD 20878.

2. *Name of Subcommittee:* Health Systems Research.

Date: October 19–20, 2010 (Open from 8:30 a.m. to 8:45 a.m. on October 19 and closed for remainder of the meeting).

Place: Marriott Gaithersburg Hotel, 9751 Washingtonian Boulevard, Conference Room TBD, Gaithersburg, MD 20878.

3. *Name of Subcommittee:* Health Care Quality and Effectiveness Research.

Date: October 19–20, 2010 (Open from 8:30 a.m. to 8:45 a.m. on October 19 and closed for remainder of the meeting).

Place: Marriott Gaithersburg Hotel, 9751 Washingtonian Boulevard, Conference Room TBD, Gaithersburg, MD 20878.

4. *Name of Subcommittee:* Health Care Technology and Decision Sciences.

Date: October 27–28, 2010 (Open from 8:30 a.m. to 8:45 a.m. on October 27 and closed for remainder of the meeting).

Place: The Legacy Hotel & Meeting Centre, 1775 Rockville Pike, Conference Room TBD, Rockville, Maryland 20850.

Contact Person: Anyone wishing to obtain a roster of members, agenda or minutes of the nonconfidential portions of the meetings should contact Mrs. Bonnie Campbell, Committee Management Officer, Office of Extramural Research, Education and Priority Populations, AHRQ, 540 Gaither Road, Suite 2000, Rockville, Maryland 20850, Telephone (301) 427–1554.

Agenda items for these meetings are subject to change as priorities dictate.

Dated: September 7, 2010.

Carolyn M. Clancy,

Director.

[FR Doc. 2010–23112 Filed 9–15–10; 8:45 am]

BILLING CODE 4160–90–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Notice of Meeting

In accordance with section 10(d) of the Federal Advisory Committee Act (5 U.S.C., appendix 2), announcement is made of a Health Care Policy and Research Special Emphasis Panel (SEP) meeting.

A Special Emphasis Panel is a group of experts in fields related to health care research who are invited by the Agency for Healthcare Research and Quality (AHRQ), and agree to be available, to conduct on an as needed basis, scientific reviews of applications for AHRQ support.

Individual members of the Panel do not attend regularly-scheduled meetings and do not serve for fixed terms or a long period of time. Rather, they are asked to participate in particular review meetings which require their type of expertise.

Substantial segments of the upcoming SEP meeting listed below will be closed to the public in accordance with the Federal Advisory Committee Act, section 10(d) of 5 U.S.C., appendix 2 and 5 U.S.C. 552b(c)(6). Grant applications for the CHIPRA Pediatric Healthcare Quality Measures (U18) applications are to be reviewed and discussed at this meeting. These discussions are likely to reveal personal information concerning individuals associated with the applications. This information is exempt from mandatory disclosure under the above-cited statutes.

SEP Meeting on: CHIPRA Pediatric Healthcare Quality (U18)

Date: October 18, 2010 (Open on October 18 from 8:30 a.m. to 8:45 a.m. and closed for the remainder of the meeting).

Place: Hilton Washington DC/Rockville, Hotel & Executive Meeting Center, 1750 Rockville Pike, Conference Room TBD, Rockville, MD 20852.

Contact Person: Anyone wishing to obtain a roster of members, agenda or minutes of the nonconfidential portions of this meeting should contact Mrs. Bonnie Campbell, Committee Management Officer, Office of Extramural Research, Education and Priority Populations, AHRQ, 540 Gaither Road, Room 2038, Rockville, Maryland 20850, Telephone (301) 427–1554.

Agenda items for this meeting are subject to change as priorities dictate.

Dated: September 7, 2010.

Carolyn M. Clancy,

Director.

[FR Doc. 2010–23111 Filed 9–15–10; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Development—2 Study Section, October 7, 2010, 8 a.m. to October 8, 2010, 5 p.m., The River Inn, 924 25th Street, NW., Washington,

DC 20037 which was published in the **Federal Register** on August 31, 2010, 75 FR 53317–53319.

The meeting will be one day only October 7, 2010, from 8 a.m., to 6 p.m. The meeting location remains the same. The meeting is closed to the public.

Dated: *September 10, 2010.*

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–23148 Filed 9–15–10; 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: Skeletal Biology.

Date: September 29–30, 2010.

Time: 9 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact: Rajiv Kumar, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4122, MSC 7802, Bethesda, MD 20892, 301–435–1212, *kumarra@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Cardiac Ion Channels.

Date: September 29, 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: Joseph Thomas Peterson, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4118, MSC 7814, Bethesda, MD 20892, 301–443–8130.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Mental Health and Developmental Disorders.

Date: October 1, 2010.

Time: 11 a.m. to 1 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact: Samuel C. Edwards, PhD, Chief, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5210, MSC 7846, Bethesda, MD 20892, (301) 435–1246, *edwardss@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Oncology 2—Translational Clinical Integrated Review Group; Cancer Immunopathology and Immunotherapy Study Section.

Date: October 4–5, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Hotel on Capitol Hill, 400 New Jersey Avenue, NW., Washington, DC 20001.

Contact: Denise R Shaw, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6158, MSC 7804, Bethesda, MD 20892, 301–435–0198, *shawdeni@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflicts: Computational Data Management and Analysis.

Date: October 7–8, 2010.

Time: 8 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact: Joseph D Mosca, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5158, MSC 7808, Bethesda, MD 20892, (301) 408–9465, *moscajos@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Special Topic: Bioanalytical Chemistry Reviews.

Date: October 7–8, 2010.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The Westin St. Francis, 335 Powell Street, San Francisco, CA 94102.

Contact: Ross D Shonat, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6172, MSC 7892, Bethesda, MD 20892, 301–435–2786, *ross.shonat@nih.hhs.gov.*

Name of Committee: Vascular and Hematology Integrated Review Group; Vascular Cell and Molecular Biology Study Section.

Date: October 11–12, 2010.

Time: 8 a.m. to 6:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact: Anshumali Chaudhari, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4124, MSC 7802, Bethesda, MD 20892, (301) 435–1210, *chaudhaa@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Memory and Cognition.

Date: October 12–13, 2010.

Time: 8 a.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact: Edwin C Clayton, PhD, scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5180, MSC 7844, Bethesda, MD 20892, 301–408–9041, *claytone@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Shared Instrumentation: Miscellaneous.

Date: October 14–15, 2010.

Time: 11 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact: 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.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Genes Genomes and Genetics Instrumentation.

Date: October 21, 2010.

Time: 11 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Renaissance Washington, DC Downtown Hotel, 999 Ninth Street, NW., Washington, DC 20001 (Virtual Meeting).

Contact: Richard Panniers, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2212, MSC 7890, Bethesda, MD 20892, (301) 435–1741, *pannierr@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: September 10, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–23143 Filed 9–15–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–R9–MB–2010–0060; 91200–1231–9BPP]

Migratory Birds; Take of Migrant Peregrine Falcons for Use in Falconry

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: In December 2008, we completed an Environmental Assessment (EA) on take of peregrine falcons for use in falconry. This notice is to inform the public of the allocation of take of migrant peregrine falcons in 2010 agreed on by the States.

FOR FURTHER INFORMATION CONTACT: Dr. George Allen, Division of Migratory Bird Management, U.S. Fish and Wildlife Service, at 703–358–1825.

SUPPLEMENTARY INFORMATION: Our authority to govern take of raptors is derived from the Migratory Bird Treaty Act (16 U.S.C. 703–712), which prohibits any person from taking, possessing, purchasing, bartering, selling, or offering to purchase, barter, or sell, among other things, raptors (birds of prey) listed in 50 CFR 10.13 unless the activities are allowed under Federal regulations. Take and possession of raptors for use in falconry is governed by regulations at 50 CFR 21.29.

We completed an EA on take of migrant peregrine falcons in 2008 (73 FR 74508; December 8, 2008). Our preferred alternative allows a take of 36 fall first-year (passage) migrant peregrine falcons from 20 September through 20 October, from anywhere in the United States east of 100 degrees W longitude. Allocation of the 36 passage peregrine falcons to be taken from the United States east of 100 degrees W longitude was agreed upon by the Atlantic, Mississippi, and Central Flyways. We expect the allowed take of the passage peregrines in 2010 to be as follows:

State	Allowed take
Atlantic Flyway	
Maine	2
Maryland	2
Virginia	1
North Carolina	2
South Carolina	1
Georgia	2
Florida	2
Mississippi Flyway	
Minnesota	1
Arkansas	3
Mississippi	8
Central Flyway	
Oklahoma	1
Texas	11
Total	36

Interested individuals will need to contact each State that will allow take of passage peregrine falcons to learn whether the State will allow take by a resident of another State.

We expect the Flyways to review the allocation of the take of passage peregrines each year. We will continue to work with them on the issue, and may publish notices about it in the future. As noted in the Final EA on take of migrant peregrines, we will review population and harvest data for Canada, the United States, and Mexico every 5 years, or at the request of the Flyway Councils, to reassess the allowable harvest limits. We will publish a notice in the **Federal Register** if we determine that the take of passage peregrine falcons should be changed.

Dated: August 27, 2010.

Wendi Weber,

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

[FR Doc. 2010–23137 Filed 9–15–10; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

National Park Service

National Register of Historic Places; Notification of Pending Nominations and Related Actions

Nominations for the following properties being considered for listing or related actions in the National Register were received by the National Park Service before August 21, 2010. Pursuant to § 60.13 of 36 CFR Part 60, written comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation. Comments may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St., NW., 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service, 1201 Eye St., NW., 8th floor, Washington, DC 20005; or by fax, 202–371–6447. Written or faxed comments should be submitted by October 1, 2010.

Before including your 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.

J. Paul Loether,

Chief, National Register of Historic Places/National, Historic Landmarks Program.

CALIFORNIA

Alameda County

Olsen, Donald and Helen, House, 771 San Diego Rd, Berkeley, 10000812

MAINE

Androscoggin County

Webster Grammar School, 95 Hampshire St, Auburn, 10000806

Kennebec County

Waterville High School, 21 Gilman St, Waterville, 10000807

NEW JERSEY

Hunterdon County

Van Syckle, John, House, 195 Rummel Rd, Holland Township, 10000814

Middlesex County

Goldman House, 143 School St, Piscataway Township, 10000813

NEW YORK

Cattaraugus County

Olean School #10, 411 W Henley St, Olean, 10000810

Columbia County

North Hillsdale Methodist Church, 1012 County Rte 2, North Hillsdale, 10000811

Niagara County

Park Place Historic District, Park Place, portions of Prince Ave, 4th St, and Main St, Niagara Falls, 10000809

Rockland County

Houser—Conklin House, 246 Rte 306, Monsey, 10000808

[FR Doc. 2010–23173 Filed 9–15–10; 8:45 am]

BILLING CODE 4312–51–P

DEPARTMENT OF THE INTERIOR

National Park Service

National Register of Historic Places; Notification of Pending Removal of Listed Property

Pursuant to section 60.15 of 36 CFR part 60, comments are being accepted on the following properties being considered for removal from the

National Register of Historic Places. Comments may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St., NW., MS 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service, 1201 Eye St., NW., 8th floor, Washington, DC 20005; or by fax, 202–371–6447. Written or faxed comments should be submitted by October 1, 2010.

Before including your 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.

J. Paul Loether,

Chief, National Register of Historic Places/ National Historic Landmarks Program.

Request for REMOVAL has been made for the following resource:

INDIANA

Brown County

Grandview Church, Grandview Ridge Rd. SE of New Bellsville, New Bellsville, 91001160

[FR Doc. 2010–23174 Filed 9–15–10; 8:45 am]

BILLING CODE 4312–51–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–468 and 731–TA–1166–1167 (Final)]

Certain Magnesia Carbon Bricks From China and Mexico

Determinations

On the basis of the record [1] developed in the subject investigations, the United States International Trade Commission (Commission) determines, pursuant to section 705(b) and 735(b) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)) and 19 U.S.C. 1673d(b)) (the Act), that an industry in the United States is materially injured by reason of imports from China and Mexico of certain magnesia carbon bricks, provided for in subheadings 6902.10.10, 6902.10.50, 6815.91.99, and 6815.99.00 of the Harmonized Tariff Schedule of the United States, that have been found by the Department of Commerce (Commerce) to be subsidized by the Government of China and to be sold in the United States at less than fair value (LTFV).[2] [3]

Background

The Commission instituted these investigations effective July 29, 2009, following receipt of a petition filed with the Commission and Commerce by Resco Products Inc., Pittsburgh, PA. The final phase of the investigations was scheduled by the Commission following notification of preliminary determinations by Commerce that imports of certain magnesia carbon bricks from China were being subsidized within the meaning of section 703(b) of the Act (19 U.S.C. 1671b(b)) and that imports of certain magnesia carbon bricks from China and Mexico were being sold at LTFV within the meaning of section 733(b) of the Act (19 U.S.C. 1673b(b)). Notice of the scheduling of the final phase of the Commission's investigations and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of April 23, 2010 (75 FR 21346). The hearing was held in Washington, DC, on July 27, 2010, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determinations in these investigations to the Secretary of Commerce on September 8, 2010. The views of the Commission are contained in USITC Publication 4182 (September 2010), entitled *Certain Magnesia Carbon Bricks from China and Mexico: Investigation Nos. 701–TA–468 and 731–TA–1166–1167 (Final).*

By order of the Commission.

Issued: September 10, 2010.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 2010–23062 Filed 9–15–10; 8:45 am]

BILLING CODE 7020–02–P

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

[2] The Commission also finds that imports subject to Commerce's affirmative critical circumstances determination are not likely to undermine seriously the remedial effect of the antidumping duty order on China.

[3] Chairman Deanna Tanner Okun, and Commissioners Daniel R. Pearson and Shara L. Aranoff determine that an industry in the United States is threatened with material injury by reason of imports of certain magnesia carbon bricks from China and determine that an industry in the United States is not materially injured or threatened with material injury, or that the establishment of an industry in the United States is materially retarded, by reason of imports from Mexico of certain magnesia carbon bricks.

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–678]

In the Matter of Certain Energy Drink Products; Notice of Issuance of a General Exclusion; Termination of the Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has issued a general exclusion order in the above-captioned investigation and has terminated the investigation.

FOR FURTHER INFORMATION CONTACT: Jia Chen, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone 202–708–3747. Copies of all nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone 202–205–2000. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION: This trademark and copyright-based investigation was instituted by the Commission on June 17, 2009, based on a complaint filed by Red Bull GmbH of Fuschl am See, Austria, and Red Bull North America, Inc. of Santa Monica, California (collectively, "Red Bull"). 74 FR 28725 (Jun. 17, 2009). The respondents named in the notice of investigation were: Chicago Import Inc. of Chicago, Illinois ("Chicago Import"); Lamont Distr., Inc., a/k/a Lamont Distributors Inc., of Brooklyn, New York ("Lamont"); India Imports, Inc., a/k/a International Wholesale Club, of Metairie, Louisiana ("India Imports"); Washington Food and Supply of D.C., Inc., a/k/a Washington Cash & Carry, of Washington, DC ("Washington Food"); Vending Plus, Inc. d/b/a Baltimore Beverage Co., of Glen Burnie, Maryland ("Vending Plus"); Posh Nosh Imports (USA), Inc. of South Kearny, New Jersey

("Posh Nosh"); Greenwich, Inc. of Florham Park, New Jersey ("Greenwich"); Advantage Food Distributors Ltd. of Suffolk, UK ("Advantage Food"); Wheeler Trading, Inc. of Miramar, Florida ("Wheeler Trading"); Avalon International General Trading, LLC of Dubai, United Arab Emirates ("Avalon"); and Central Supply, Inc. of Brooklyn, New York ("Central Supply"). The complaint further alleged that an industry in the United States exists as required by subsection (a)(2) of section 337. The asserted trademarks are U.S. Trademark Reg. Nos. 3,092,197; 2,946,045; 2,994,429; and 3,479,607. The asserted copyright is U.S. Copyright Registration No. VA0001410959.

On January 5, 2010, the Commission determined not to review two initial determinations ("IDs") (Order Nos. 21 and 22) finding Lamont and Avalon in default pursuant to Commission Rule 210.16. On January 28, 2010, the Commission determined not to review two additional IDs (Order Nos. 29 and 30) finding respondents Posh Nosh, Greenwich, Advantage Food, and Chicago Imports in default pursuant to Commission Rule 210.16. On February 16, 2010, the Commission determined not to review an ID (Order No. 32) finding respondent Central Supply in default pursuant to Commission Rule 210.16.

Wheeler Trading, Washington Food, India Imports, and Vending Plus were the only respondents that responded to the complaint and notice of investigation. On January 20, 2010, the Commission determined not to review four IDs (Order Nos. 24, 25, 26, and 27) terminating the investigation as to those respondents on the basis of settlement agreements. Thus, defaulting respondents Posh Nosh, Greenwich, Advantage Food, Chicago Imports, Avalon, Central Supply, and Lamont were the only respondents remaining in the investigation.

On December 2, 2009, Red Bull moved for summary determination on the issues of domestic industry, importation, and violation of Section 337. Pursuant to Commission Rule 210.16(c)(2), 19 CFR 216(c)(2), Red Bull also stated that it was seeking a general exclusion order. On March 31, 2010, the presiding ALJ issued the subject ID, Order No. 34, granting Red Bull's motion for summary determination of violation with respect to respondents Avalon, Posh Nosh, Greenwich, Advantage Food, Central Supply, and Chicago Import, but not with respect to Lamont. He also issued his recommendations on remedy and bonding in Order No. 34. Specifically, the ALJ recommended issuance of a general exclusion order and a bond of 100 percent. No petitions for review were filed.

On May 14, 2010, the Commission issued notice of its determination not to review the ID granting summary determination of violation in part, and requesting briefing on remedy, the public interest, and bonding. On May 28, 2010, Red Bull submitted briefing on remedy, the public interest, and bonding. Specifically, Red Bull requested a general exclusion order. The IA also submitted briefing on May 28, 2010, in support of a general exclusion order. No other submissions were received.

Having reviewed the record in this investigation, including the ALJ's recommended determination, the Commission has determined that the appropriate relief is a general exclusion order prohibiting the unlicensed entry of certain energy drink products that (i) infringe U.S. Trademark Registration Nos. 3,092,197; 2,946,045; 2,994,429; or 3,479,607 or any marks confusingly similar thereto or that are otherwise misleading as to source, origin, or sponsorship, or (ii) bear Red Bull's U.S. Copyright Registration No. VA0001410959 or a design confusingly similar thereto or that are otherwise misleading as to source, origin or sponsorship.

The Commission has further determined that the public interest factors listed in section 337(d)(1) do not preclude issuance of the general exclusion order. Finally, the Commission has determined that the amount of bond to permit temporary importation during the period of Presidential review shall be in the amount of 100 percent of the value of the infringing products that are subject to the general exclusion order. The Commission's order and opinion were delivered to the President and to the United States Trade Representative on the day they were issued.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in sections 210.49–50 of the Commission's Rules of Practice and Procedure, 19 CFR 210.49–50.

Issued: September 8, 2010.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 2010–23045 Filed 9–15–10; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OJP (OJP) Docket No. 1528]

Meeting of the Department of Justice's (DOJ's) Global Justice Information Sharing Initiative Federal Advisory Committee

AGENCY: Office of Justice Programs (OJP), Justice.

ACTION: Notice of meeting.

SUMMARY: This is an announcement of a meeting of DOJ's Global Justice Information Sharing Initiative (Global) Federal Advisory Committee (GAC) to discuss the Global Initiative, as described at *http://www.it.ojp.gov/global.*

DATES: The meeting will take place on Thursday, October 7, 2010, from 8:30 a.m. to 12:30 p.m. ET.

ADDRESSES: The meeting will take place at the Embassy Suites Washington, DC Convention Center Hotel, 900 10th Street, NW., Washington, DC 20001, Phone: (202) 739–2001.

FOR FURTHER INFORMATION CONTACT: J. Patrick McCreary, Global Designated Federal Employee (DFE), Bureau of Justice Assistance, Office of Justice Programs, 810 7th Street, Washington, DC 20531; Phone: (202) 616–0532 [**Note:** This is not a toll-free number]; E-mail: *James.P.McCreary@usdoj.gov.*

SUPPLEMENTARY INFORMATION: This meeting is open to the public. Due to security measures, however, members of the public who wish to attend this meeting must register with Mr. J. Patrick McCreary at the above address at least seven (7) days in advance of the meeting. Registrations will be accepted on a space available basis. Access to the meeting will not be allowed without registration. All attendees will be required to sign in at the meeting registration desk. Please bring photo identification and allow extra time prior to the meeting.

Anyone requiring special accommodations should notify Mr. McCreary at least seven (7) days in advance of the meeting.

Purpose

The GAC will act as the focal point for justice information systems integration activities in order to facilitate the coordination of technical, funding, and legislative strategies in support of the Administration's justice priorities.

The GAC will guide and monitor the development of the Global information sharing concept. It will advise the Assistant Attorney General, OJP; the

Attorney General; the President (through the Attorney General); and local, State, tribal, and Federal policymakers in the executive, legislative, and judicial branches. The GAC will also advocate for strategies for accomplishing a Global information sharing capability.

Interested persons whose registrations have been accepted may be permitted to participate in the discussions at the discretion of the meeting chairman and with approval of the DFE.

J. Patrick McCreary,

Global DFE, Bureau of Justice Assistance, Office of Justice Programs.

[FR Doc. 2010–23124 Filed 9–15–10; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF LABOR

Office of the Secretary: Combating Exploitative Child Labor by Promoting Sustainable Livelihoods and Educational Opportunities for Children in Egypt and Jordan

AGENCY: Bureau of International Labor Affairs, U.S. Department of Labor.

ACTION: Notice of Intent to Solicit Cooperative Agreement Applications.

SUMMARY: The U.S. Department of Labor (USDOL), Bureau of International Labor Affairs (ILAB), intends to award, through a competitive and merit-based process, two or more cooperative agreements to organizations to implement projects to combat exploitative child labor by promoting educational and training opportunities for target children and sustainable livelihoods for their households. In FY 2010, ILAB received Congressional authority to fund subgrants and microfinance activities.

ILAB intends to obligate up to $9.5 million for a child labor elimination project(s) in *Egypt* and up to $4 million for a child labor elimination project(s) in *Jordan.* Projects to be funded under these solicitations will need to address the following five goals:

1. Reducing exploitative child labor, especially the worst forms through the provision of direct educational services and by addressing root causes of child labor, including innovative strategies to promote sustainable livelihoods of target households;

2. Strengthening policies on child labor, education, and sustainable livelihoods, and the capacity of national institutions to combat child labor, address its root causes, and promote formal, nonformal and vocational education opportunities to provide children with alternatives to child labor;

3. Raising awareness of exploitative and hazardous child labor and its root causes, and the importance of education for all children and mobilizing a wide array of actors to improve and expand education infrastructures;

4. Supporting research, evaluation, and the collection of reliable data on child labor, its root causes, and effective strategies, including educational and vocational alternatives, microfinance and other income generating activities to improve household income; and

5. Ensuring the long-term sustainability of these efforts.

ILAB intends to solicit cooperative agreement applications from qualified organizations (*i.e.,* any commercial, international, educational, or non-profit organization, including any faith-based, community-based, or public international organization(s), capable of successfully developing and implementing child labor projects) to implement these projects. Please refer to *http://www.dol.gov/ILAB/grants/main.htm* for examples of previous notices of availability of funds and solicitations for cooperative agreement applications (SGAs).

Key Dates: The forthcoming SGAs will be published on *http://www.grants.gov* and USDOL/ILAB's Web site. A brief synopsis of the SGA(s), which will include Web site links to the full text solicitation(s), will be published in the **Federal Register.** The SGA(s) will remain open for at least 45 days from the date of publication. All cooperative agreement awards will be made on or before December 31, 2010.

Submission Information: Applications in response to the forthcoming SGAs may be submitted electronically via *http://www.grants.gov* or hard copy by mail. Hard copy applications must be delivered to: U.S. Department of Labor, Procurement Services Center, 200 Constitution Avenue, NW., Room S–4307, Washington, DC 20210, Attention: Georgiette Nkpa. Any application sent by other delivery methods, including e-mail, telegram, or facsimile (FAX) will not be accepted.

FOR FURTHER INFORMATION CONTACT: Mrs. Georgiette Nkpa. E-mail address: *nkpa.georgiette@dol.gov.* All inquiries should make reference to the USDOL Combating Exploitative Child Labor by Promoting Sustainable Livelihoods and Educational Opportunities for Children in Egypt and Jordan—Solicitations for Cooperative Agreement Applications. Information on specific target groups, sectors, geographic regions, and funding levels for the potential projects in the countries listed above will be addressed in one or more solicitations for cooperative agreement applications to be published prior to September 30, 2010. Potential applicants should not submit inquiries to USDOL for further information on these award opportunities until after USDOL's publication of the solicitation(s). For a list of frequently asked questions on ILAB's Solicitations for Cooperative Agreement Applications (based on last year's solicitation, SGA 09–06), please visit *http://www.dol.gov/ilab/grants/20090624/SGAQandAs.pdf.*

Background Information: Since 1995, the U.S. Congress has appropriated over $780 million to ILAB for efforts to combat exploitative child labor internationally. This funding has been used to support technical cooperation projects to combat exploitative child labor, including the worst forms, in more than 80 countries around the world. Technical cooperation projects funded by USDOL range from targeted action programs in specific sectors of work to more comprehensive programs that support national efforts to eliminate the worst forms of child labor, as defined by International Labor Organization (ILO) Convention 182. USDOL-funded projects have withdrawn or prevented over 1.4 million children from exploitative child labor.

Signed at Washington, DC, this 7th day of September, 2010.

Cassandra R. Mitchell,

Grant Officer.

[FR Doc. 2010–23081 Filed 9–15–10; 8:45 am]

BILLING CODE 4510–28–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Proposed Information Collection Request Submitted for Public Comment and Recommendations; Safety Defects; Examination, Correction and Records, 30 CFR 56/57.14100, 56/57.13015, 56/57.13030, and 56/57.18002 (Pertains to Metal and Nonmetal (M/NM) Surface and Underground Mines)

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 [44 U.S.C. 3506(c)(2)(A)]. This program

helps to assure 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 Mine Safety and Health Administration (MSHA) is soliciting comments concerning the extension of the information collection for Safety Defects; Examination, Correction and Records, 30 CFR 56/57.14100, 56/57.13015, 56/57.13030, and 56/57.18002.

DATES: All comments must be received by midnight Eastern Daylight Saving Time on November 15, 2010.

ADDRESSES: Comments must clearly be identified with the rule title and may be submitted to MSHA by any of the following methods:

(1) *Electronic mail: zzMSHA-Comments@dol.gov.*

(2) *Facsimile:* (202) 693–9441.

(3) *Regular Mail:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Blvd., Room 2350, Arlington, VA 22209–3939.

(4) *Hand Delivery or Courier:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Blvd., Room 2350, Arlington, VA 22209–3939. Sign in at the receptionist's desk on the 21st floor.

FOR FURTHER INFORMATION CONTACT: Mario Distasio, Chief of the Economic Analysis Division, Office of Standards, Regulations, and Variances, MSHA, at *distasio.mario@dol.gov* (e-mail), 202–693–9445 (voicemail), 202–693–9441 (facsimile).

SUPPLEMENTARY INFORMATION:

I. Background

Section 103(h) of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. 13(h), authorizes MSHA to collect information necessary to carry out its duty in protecting the safety and health of miners.

- Compressed-air receivers and other unfired pressure vessels must be inspected by inspectors holding a valid National Board Commission and in accordance with the applicable chapters of the National Board Inspection Code, a Manual for Boiler and Pressure Vessels Inspectors, 1979. Safety defects found on compressed-air receivers and other unfired pressure vessels have caused injuries and fatalities in the mining industry. Records of inspections are required to be kept in accordance with the requirements of the National Board Inspection Code and the records must be made available to the Secretary or an authorized representative.
- Fired pressure vessels (boilers) must be equipped with water level gauges, pressure gauges, automatic pressure-relief valves, blowdown piping and other safety devices approved by the American Society of Mechanical Engineers (ASME) to protect against hazards from overpressure, flameouts, fuel interruptions and low water level. These sections also require that records of inspection and repairs be kept by the mine operator in accordance with the requirements of the ASME Boiler and Pressure Vessel Code, 1977, and the National Board Inspection Code (progressive records—no limit on retention time) and must be made available to the Secretary or an authorized representative.
- Operators must inspect equipment, machinery, and tools that are to be used during a shift for safety defects before the equipment is placed in operation. Defects affecting safety are required to be corrected in a timely manner. In instances where the defect makes continued operation of the equipment hazardous to persons, the equipment must be removed from service, tagged to identify that it is out of use, and repaired before use is resumed. Safety defects on self-propelled mobile equipment account for many injuries and fatalities in the mining industry. Inspection of this equipment prior to use is required to assure safe operation. The equipment operator is required to make a visual and operational check of the various primary operating systems that affect safety, such as brakes, lights, horn, seatbelts, tires, steering, back-up alarm, windshield, cab safety glass, rear and side view mirrors, and other safety and health related items. Any defects found are required to be either corrected immediately, or reported to and recorded by the mine operator prior to the timely correction. A record is not required if unsafe conditions are not present upon examination prior to use if the defect is corrected immediately. The precise format in which the record is kept is left to the discretion of the mine operator. Reports of uncorrected defects are required to be recorded by the mine operator and kept at the mine office from the date the defects are recorded, until the defects are corrected.
- A competent person designated by the operator must examine each working place at least once each shift for conditions which may adversely affect safety or health. A record of such examinations must be kept by the operator for a period of one year and must be made available for review by the Secretary or an authorized representative.

II. Desired Focus of Comments

MSHA is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including 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.

A copy of the proposed information collection request can be obtained by contacting the employee listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice, or viewed on the Internet by selecting "Rules & Regs", and then selecting "FedReg.Docs". On the next screen, select "Paperwork Reduction Act Supporting Statement" to view documents supporting the **Federal Register** notice.

III. Current Actions

This request for collection of information contains notification and recordkeeping provisions for the Proposed Information Collection Request Submitted for Public Comment and Recommendations; Safety Defects; Examination, Correction and Records, 30 CFR 56/57.14100, 56/57.13015, 56/57.13030, and 56/57.18002. MSHA does not intend to publish the results from this information collection and is not seeking approval to either display or not display the expiration date for the OMB approval of this information collection.

There are no certification exceptions identified with this information collection and the collection of this information does not employ statistical methods.

Type of Review: Extension

Agency: Mine Safety and Health Administration

OMB Number: 1219–0089

Frequency: On Occasion

Affected Public: Business or other for-profit

Cost to Federal Government: No additional cost

Total Burden Respondents: 12,557

Total Number of Responses: 11,502,241

Total Burden Hours: 1,223,104

Total Hour Burden Cost (operating/maintaining): $47,719,917

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Patricia W. Silvey,

Director, Office of Standards, Regulations, and Variances.

[FR Doc. 2010–23086 Filed 9–15–10; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Proposed Information Collection Request Submitted for Public Comment and Recommendations; Health Standards for Diesel Particulate Matter Exposure (Underground Coal Mines) 30 CFR 75.1915/72.503, 72.510, 72.520 and Part 7 or Part 36 as a Result of § 72.500

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 [44 U.S.C. 3506(c)(2)(A)]. This program helps to assure 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 Mine Safety and Health Administration (MSHA) is soliciting comments concerning the extension of the information collection for 30 CFR 75.1915/72.503, 72.510, 72.520 and Part 7 or Part 36 as a result of § 72.500.

DATES: All comments must be received by midnight Eastern Daylight Savings Time on November 15, 2010.

ADDRESSES: Comments must clearly be identified with the rule title and may be submitted to MSHA by any of the following methods:

(1) *Electronic mail: zzMSHA–Comments@dol.gov.*

(2) *Facsimile:* (202) 693–9441.

(3) *Regular Mail:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Blvd., Room 2350, Arlington, VA 22209–3939.

(4) *Hand Delivery or Courier:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Blvd., Room 2350, Arlington, VA 22209–3939. Sign in at the receptionist's desk on the 21st floor.

FOR FURTHER INFORMATION CONTACT: Mario Distasio, Chief of the Economic Analysis Division, Office of Standards, Regulations, and Variances, MSHA, at *distasio.mario@dol.gov* (e-mail), 202–693–9445 (voicemail), 202–693–9441 (facsimile).

SUPPLEMENTARY INFORMATION:

I. Background

Section 101(a) of the Federal Mine Safety and Health Act of 1977 (Mine Act), provides that the Secretary of Labor shall develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines. In addition, Section 103(h) of the Mine Act mandates that mine operators keep any records and make any reports that are reasonably necessary for the Mine Safety and Health Administration to perform its duties under the Mine Act.

MSHA established standards and regulations for diesel-powered equipment in underground coal mines that provide additional important protection for coal miners who work on and around diesel-powered equipment. The standards were designed to reduce the risks to underground coal miners of serious health hazards associated with exposure to high concentrations of diesel particulate matter. The standards contain information collection requirements for underground coal mine operators in Health Standards for Diesel Particulate Matter Exposure (Underground Coal Mines) 30 CFR 75.1915/72.503, 72.510, 72.520 and Part 7 or Part 36 as a result of § 72.500.

- After-treatment devices installed on diesel-powered equipment must be maintained according to manufacturer specifications. Since these devices are not usually on diesel machinery, maintenance personnel have to be trained to maintain them.
- Persons required to perform maintenance on diesel-powered equipment must successfully complete a training and qualification program in accordance with § 75.1915(a). The mine operator must maintain a copy of the required training and qualification program and a record of the names of all qualified persons under the program.
- Underground coal mine operators are required to keep a record of those trained for one year.
- Underground coal mine operators exposed to diesel emissions are required to be trained annually. The training must include: Health risks associated with exposure to diesel particulate matter; methods used in the mine to control diesel particulate concentrations; identification of the personnel responsible for maintaining those controls; and actions miners must take to assure controls operate as intended.
- Underground coal mine operators are required to keep a record of the training for one year.
- Underground coal mine operators are required to maintain an inventory of diesel-powered equipment units, together with a list of information about any unit's emission control or filtration system. The list must be updated within 7 calendar days of any change.
- As a result of § 72.503(d), which requires all permissible equipment to have after-treatment or filtration devices, diesel manufacturers are required to amend existing diesel machine approval applications under Part 7 or Part 36. Few machine approvals are approved under Part 36, while most machine approvals are approved under Part 7.

II. Desired Focus of Comments

MSHA is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including 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.

A copy of the proposed information collection request can be obtained by contacting the employee listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice, or viewed on the Internet by selecting "Rules & Regs", and then selecting "FedReg.Docs". On the next screen, select "Paperwork Reduction Act Supporting Statement" to view documents supporting the **Federal Register** notice.

III. Current Actions

This request for collection of information contains notification and recordkeeping provisions for the Proposed Information Collection Request Submitted for Public Comment and Recommendations; Health Standards for Diesel Particulate Matter Exposure (Underground Coal Mines) 30 CFR 75.1915/72.503, 72.510, 72.520 and Part 7 or Part 36 as a result of § 72.500. MSHA does not intend to publish the results from this information collection and is not seeking approval to either display or not display the expiration date for the OMB approval of this information collection.

There are no certification exceptions identified with this information collection and the collection of this information does not employ statistical methods.

Type of Review: Extension

Agency: Mine Safety and Health Administration

OMB Number: 1219–0124

Frequency: On Occasion

Affected Public: Business or other for-profit

Cost to Federal Government: $5,040

Total Burden Respondents: 165

Total Number of Responses: 165

Total Burden Hours: 623

Total Hour Burden Cost (operating/maintaining): $6,425.39

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Patricia W. Silvey,

Director, Office of Standards, Regulations, and Variances.

[FR Doc. 2010–23085 Filed 9–15–10; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Proposed Information Collection Request Submitted for Public Comment and Recommendations; Hazardous Conditions Complaints 30 CFR 43.4 and 43.7

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 [44 U.S.C. 3506(c)(2)(A)]. This program helps to assure 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 Mine Safety and Health Administration (MSHA) is soliciting comments concerning the extension of the information collection for Hazardous Conditions Complaints 30 CFR 43.4 and 43.7.

DATES: All comments must be received by midnight Eastern Daylight Savings Time on *November 15, 2010.*

ADDRESSES: Comments must clearly be identified with the rule title and may be submitted to MSHA by any of the following methods:

(1) *Electronic mail: zzMSHA–Comments@dol.gov.*

(2) *Facsimile:* (202) 693–9441.

(3) *Regular Mail:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Blvd., Room 2350, Arlington, VA 22209–3939.

(4) *Hand Delivery or Courier:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Blvd., Room 2350, Arlington, VA 22209–3939. Sign in at the receptionist's desk on the 21st floor.

FOR FURTHER INFORMATION CONTACT: Mario Distasio, Chief of the Economic Analysis Division, Office of Standards, Regulations, and Variances, MSHA, at *distasio.mario@dol.gov* (e-mail), 202–693–9445 (voicemail), 202–693–9441 (facsimile).

SUPPLEMENTARY INFORMATION:

I. Background

Under Section 103(g) of the Federal Mine Safety and Health Act of 1977, as amended (Mine Act), a representative of miners, or any individual miner where there is no representative of miners, may submit a written or oral notification of the alleged violation of the Mine Act or a mandatory standard or an imminent danger. The notifier has the right to obtain an immediate inspection by the Mine Safety and Health Administration (MSHA). A copy of the notice must be provided to the operator, with individual miner names redacted.

MSHA regulations at 30 CFR part 43 implement Section 103(g) of the Mine Act. These regulations provide the procedures for submitting notification of the alleged violation or imminent danger and the actions that MSHA must take after receiving the notice. Although the regulations contain a review procedure (required by Section 103(g)(2) of the Mine Act) whereby a miner or a representative of miners may in writing request a review if no citation or order is issued as a result of the original notice, the option is so rarely used that it was not considered in the burden estimates.

II. Desired Focus of Comments

MSHA is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including 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.

A copy of the proposed information collection request can be obtained by contacting the employee listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice, or viewed on the Internet by selecting "Rules & Regs", and then selecting "FedReg.Docs". On the next screen, select "Paperwork Reduction Act Supporting Statement" to view documents supporting the **Federal Register** notice.

III. Current Actions

This request for collection of information contains notification and recordkeeping provisions for the Proposed Information Collection Request Submitted for Public Comment and Recommendations; Hazardous Conditions Complaints 30 CFR 43.4 and 43.7. MSHA does not intend to publish the results from this information collection and is not seeking approval to either display or not display the expiration date for the OMB approval of this information collection.

There are no certification exceptions identified with this information collection and the collection of this information does not employ statistical methods.

Type of Review: Extension.

Agency: Mine Safety and Health Administration.

OMB Number: 1219–0014.

Frequency: On Occasion.

Affected Public: Business or other for-profit.

Cost to Federal Government: $176,343.

Total Burden Respondents: 2,278.

Total Number of Responses: 2,278.

Total Burden Hours: 456.

Total Hour Burden Cost (operating/maintaining): $0.00.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Patricia W. Silvey,

Director, Office of Standards, Regulations, and Variances.

[FR Doc. 2010–23084 Filed 9–15–10; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Proposed Information Collection Request Submitted for Public Comment and Recommendations; Slope and Shaft Sinking Plans, 30 CFR 77.1900 (Pertains to Surface Work Areas of Underground Coal Mines)

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 [44 U.S.C. 3506(c)(2)(A)]. This program helps to assure 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 Mine Safety and Health Administration (MSHA) is soliciting comments concerning the extension of the information collection for Slope and Shaft Sinking Plans, 30 CFR 77.1900.

DATES: All comments must be received by midnight Eastern Daylight Savings Time on November 15, 2010.

ADDRESSES: Comments must clearly be identified with the rule title and may be submitted to MSHA by any of the following methods:

(1) *Electronic mail: zzMSHA–Comments@dol.gov.*

(2) *Facsimile:* (202) 693–9441.

(3) *Regular Mail:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Blvd., Room 2350, Arlington, VA 22209–3939.

(4) *Hand Delivery or Courier:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Blvd., Room 2350, Arlington, VA 22209–3939. Sign in at the receptionist's desk on the 21st floor.

FOR FURTHER INFORMATION CONTACT: Mario Distasio, Chief of the Economic Analysis Division, Office of Standards, Regulations, and Variances, MSHA, at *distasio.mario@dol.gov* (e-mail), 202–693–9445 (voicemail), 202–693–9441 (facsimile).

SUPPLEMENTARY INFORMATION:

I. Background

Section 103(h) of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. 813, authorizes MSHA to collect information necessary to carry out its duty in protecting the safety and health of miners.

Underground coal mine operators are required to submit for approval a plan that will provide the safety of workmen in each slope or shaft that is commenced or extended from the surface to the underground coal mine. Each slope or shaft sinking operation is unique in that each operator uses different methods and equipment and encounters different geological strata which make it impossible for a single set of regulations to assure the safety of the miners under all circumstances. This makes an individual slope or shaft sinking plan necessary.

II. Desired Focus of Comments

MSHA is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including 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.

A copy of the proposed information collection request can be obtained by contacting the employee listed in the **FOR FURTHER INFORMATION** section of this notice, or viewed on the Internet by selecting "Rules & Regs", and then selecting "FedReg.Docs". On the next screen, select "Paperwork Reduction Act Supporting Statement" to view documents supporting the **Federal Register** notice.

III. Current Actions

This request for collection of information contains notification and recordkeeping provisions for the Proposed Information Collection Request Submitted for Public Comment and Recommendations; Safety Defects; Examination, Correction and Records, Slope and Shaft Sinking Plans, 30 CFR 77.1900. MSHA does not intend to publish the results from this information collection and is not seeking approval to either display or not display the expiration date for the OMB approval of this information collection.

There are no certification exceptions identified with this information collection and the collection of this information does not employ statistical methods.

Type of Review: Extension.

Agency: Mine Safety and Health Administration.

OMB Number: 1219–0019.

Frequency: On Occasion.

Affected Public: Business or other for-profit.

Cost to Federal Government: $41,993.

Total Burden Respondents: 73.

Total Number of Responses: 73.

Total Burden Hours: 1,460.

Total Hour Burden Cost (operating/maintaining): $123,662.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Patricia W. Silvey,

Director, Office of Standards, Regulations, and Variances.

[FR Doc. 2010–23083 Filed 9–15–10; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Proposed Information Collection Request Submitted for Public Comment and Recommendations; Ventilation Plan and Main Fan Maintenance Record 30 CFR 57.8520, § 57.8525 (Pertains to Metal and Nonmetal Underground Mines)

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 [44 U.S.C. 3506(c)(2)(A)]. This program helps to assure 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 Mine Safety and Health Administration (MSHA) is soliciting comments concerning the extension of the information collection for Ventilation Plan and Main Fan Maintenance Record 30 CFR 57.8520, § 57.8525.

DATES: All comments must be received by midnight Eastern Daylight Saving Time on *November 15, 2010.*

ADDRESSES: Comments must clearly be identified with the rule title and may be submitted to MSHA by any of the following methods:

(1) *Electronic mail: zzMSHA-Comments@dol.gov.*

(2) *Facsimile:* (202) 693–9441.

(3) *Regular Mail:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Blvd., Room 2350, Arlington, VA 22209–3939.

(4) *Hand Delivery or Courier:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Blvd., Room 2350, Arlington, VA 22209–3939. Sign in at the receptionist's desk on the 21st floor.

FOR FURTHER INFORMATION CONTACT: Mario Distasio, Chief of the Economic Analysis Division, Office of Standards, Regulations, and Variances, MSHA, at *distasio.mario@dol.gov* (e-mail), 202–693–9445 (voicemail), 202–693–9441 (facsimile).

SUPPLEMENTARY INFORMATION:

I. Background

Section 103(h) of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. 813, authorizes the Mine Safety and Health Administration (MSHA) to collect information necessary to carry out its duty in protecting the safety and health of miners.

Underground mines usually present harsh and hostile working environments. The ventilation system is the most vital life support system in underground mining and a properly operating ventilation system is essential for maintaining a safe and healthful working environment. A well planned mine ventilation system is necessary to assure a fresh air supply to miners at all working places, to control the amounts of harmful airborne contaminants in the mine atmosphere, and to dilute possible accumulation of explosive gases.

Lack of adequate ventilation in underground mines has resulted in fatalities from asphyxiation and/or explosions due to a buildup of explosive gases. Inadequate ventilation can be a primary factor for deaths caused by disease of the lungs (*e.g.* silicosis).

In addition, poor working conditions from lack of adequate ventilation contribute to accidents resulting from heat stress, limited visibility, or impaired judgment from exposure to contaminants.

- The mine operator is required to prepare a written plan of the mine ventilation system. The plan is required to be updated at least annually. Upon written request of the District Manager, the plan or revisions must be submitted to MSHA for review and comment.
- The main ventilation fans for an underground mine must be maintained either according to manufacturers' recommendations or a written periodic schedule. Upon request of an Authorized Representative of the Secretary of Labor, this fan maintenance schedule must be made available for review. The records assure compliance with the standard and may serve as a warning mechanism for possible ventilation problems before they occur.

II. Desired Focus of Comments

MSHA is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including 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.

A copy of the proposed information collection request can be obtained by contacting the employee listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice, or viewed on the Internet by selecting "Rules & Regs", and then selecting "FedReg.Docs". On the next screen, select "Paperwork Reduction Act Supporting Statement" to view documents supporting the **Federal Register** notice.

III. Current Actions

This request for collection of information contains notification and recordkeeping provisions for the Proposed Information Collection Request Submitted for Public Comment and Recommendations; Ventilation Plan and Main Fan Maintenance Record 30 CFR 57.8520, § 57.8525. MSHA does not intend to publish the results from this information collection and is not seeking approval to either display or not display the expiration date for the OMB approval of this information collection.

There are no certification exceptions identified with this information collection and the collection of this information does not employ statistical methods.

Type of Review: Extension.

Agency: Mine Safety and Health Administration.

OMB Number: 1219–0016.

Frequency: On Occasion.

Affected Public: Business or other for-profit.

Cost to Federal Government: $6,450.

Total Burden Respondents: 245.

Total Number of Responses: 272.

Total Burden Hours: 5,894.

Total Hour Burden Cost (Operating/maintaining): $382,302.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Patricia W. Silvey,

Director, Office of Standards, Regulations, and Variances.

[FR Doc. 2010–23082 Filed 9–15–10; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–72,575]

Dell Products LP, Winston-Salem (WS–1) Division Including On-Site Leased Workers From Adecco, Spherion, Patriot Staffing, Manpower, Teksystems, APN, Iconma, Staffing Solutions, South East and Omni Resources and Recovery; Winston-Salem, NC; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended ("Act"), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on March 1, 2010, applicable to workers of Dell Products LP, Winston-Salem (WS–1) Division, including on-site leased workers from Adecco, Spherion, Patriot Staffing, Manpower, TEKsystems, APN and ICONMA, Winston-Salem, North Carolina. The notice was published in the **Federal Register** on April 23, 2010 (75 FR 21361). The notice was amended on March 30, 2010 to include on-site leased workers from Staffing Solutions, South East. The notice was published in the **Federal Register** on April 19, 2010 (75 FR 20385).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in employment related to the production of desktop computers.

New information shows that workers leased from Omni Resources and Recovery were employed on-site at the Winston-Salem, North Carolina location of Dell Products LP, Winston-Salem (WS–1) Division. The Department has determined that on-site workers from Omni Resources and Recovery were sufficiently under the control of the subject firm to be covered by this certification.

Based on these findings, the Department is amending this certification to include workers leased from Omni Resources and Recovery working on-site at the Winston-Salem, North Carolina location of Dell Products LP, Winston-Salem (WS–1) Division.

The amended notice applicable to TA–W–72,575 is hereby issued as follows:

All workers of Dell Products LP, Winston-Salem (WS–1) Division, including on-site leased workers of Adecco, Spherion, Patriot Staffing, Manpower, TEKsystems, APN, ICONMA, and Staffing Solutions, South East, and Omni Resources and Recovery, Winston-Salem, North Carolina, who became totally or partially separated from employment on or after October 13, 2008 through March 1, 2012, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed at Washington, DC this 31st day of August, 2010.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2010–23065 Filed 9–15–10; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

Prohibited Transaction Exemptions and Grant of Individual Exemptions Involving: 2010–26, PNC Financial Services Group, Inc. (PNC or the Applicant), D–11456; and 2010–27, The Finishing Trades Institute of the Mid-Atlantic Region (the Plan), L–11609

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Grant of Individual Exemptions.

SUMMARY: This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code).

A notice was published in the **Federal Register** of the pendency before the Department of a proposal to grant such exemption. The notice set forth a summary of facts and representations contained in the application for exemption and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, DC. The notice also invited interested persons to submit comments on the requested exemption to the Department. In addition, the notice stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicant has represented that it has complied with the requirements of the notification to interested persons. No requests for a hearing were received by the Department. Public comments were received by the Department as described in the granted exemption.

The notice of proposed exemption was issued and the exemption is being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990) and based upon the entire record, the Department makes the following findings:

(a) The exemption is administratively feasible;

(b) The exemption is in the interests of the plan and its participants and beneficiaries; and

(c) The exemption is protective of the rights of the participants and beneficiaries of the plan.

PNC Financial Services Group, Inc.
(PNC or the Applicant)
Located in Pittsburgh, Pennsylvania
[Prohibited Transaction Exemption 2010–26;
Application No. D–11456]

Exemption

Section I—Exemption for Receipt of Fees

In connection with the investment in an open-end investment company (a Fund(s)), as defined, below, in Section III, by certain employee benefit plans (Client Plan(s)) for which PNC (PNC or the Applicant), as defined below, serves as a fiduciary and is a party in interest with respect to such Client Plan, the restrictions of sections 406(a)(1)(D) and 406(b) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(D) through (F) [1] of the Code, shall not apply, effective February 1, 2008 to:

"(a) the receipt of fees by PNC and its affiliate PNC Capital Advisors, Inc. (PCA) from the Funds in connection with the investment by the Client Plans in shares of the Funds where PNC or its affiliate PCA acts as an investment advisor for such Funds; and

"(b) the receipt of fees by PNC or its affiliates from the Funds in connection with providing certain secondary services, as defined below, (Secondary Services) to such Funds in which a Client Plan invests;

[1] For purposes of this exemption reference to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

provided that the conditions of Section II are met."

Section II—General Conditions

(a) PNC, which serves as a fiduciary for a Client Plan, satisfies any one (but not all) of the following:

(1) A Client Plan invested in a Fund does not pay any plan-level investment management fee, investment advisory fee, or similar fee (Plan-Level Fee(s)) to PNC or its affiliates with respect to any of the assets of such Client Plan which are invested in shares of such Fund for the entire period of such investment (the Offset Fee Method). This condition does not preclude the payment of investment advisory fees by the Funds to PNC under the terms of an investment management agreement adopted in accordance with section 15 of the Investment Company Act of 1940 (the "1940 Act");

(2) A Client Plan invested in the Funds pays an investment management fee or similar fee based on total Client Plan assets from which a credit has been subtracted representing such Client Plan's pro rata share of investment advisory fees paid by the Funds to PNC (the Subtraction Fee Method). If, during any fee period for which a Client Plan has prepaid its investment management or similar fee, the Client Plan purchases shares of such Fund, the requirement of this Section II(a)(2) shall be deemed to have been met with respect to such prepaid fee if, by a method reasonably designed to accomplish the same, the amount of the prepaid fee that constitutes the fee with respect to plan assets invested in shares of such Fund (i) is anticipated and subtracted from the prepaid fee at the time of payment of such fee, (ii) is returned to the Client Plan no later than during the immediately following fee period, or (iii) is offset against the prepaid fee for the immediately following fee period or for the fee period immediately following thereafter. For purposes of this Section II(a)(2), a fee shall be deemed to have been prepaid for any fee period if the amount of such fee is calculated as of a date not later than the first day of such period; or

(3) A Client Plan invested in a Fund receives a "credit" [2] (the Credit Fee Method) of such Plan's proportionate share of all fees charged to the Funds by PNC for investment advisory or similar services, on a date which is no later than one business day after receipt of such fees by PNC from the Fund. The crediting of all such fees to such Client Plan by PNC is audited by an independent accountant firm (the Auditor) on at least an annual basis to verify the proper crediting of such fees to such Client Plan.

(a) The price paid or received by a Client Plan for shares in a Fund is the net asset value per share at the time of the transaction, as defined, below in Section III, and is the same price which would have been paid or received for such shares by any other investor in such Fund at that time;

(b) PNC, including any officer or director of PNC, does not purchase or sell shares of the Funds from or to any Client Plan;

(c) A Client Plan does not pay sales commissions in connection with any purchase or sale of shares of a Fund, and a Client Plan does not pay redemption fees in connection with any sale of shares to a Fund, unless

(1) such redemption fee is paid only to a Fund, and

(2) The existence of such redemption fee is disclosed in the prospectus for such Fund in effect both at the time of the purchase of such shares and at the time of such sale;

(d) The combined total of all fees received by PNC for the provision of services by PNC to Client Plans and to Funds in which a Client Plan invests, is not in excess of "reasonable compensation" within the meaning of section 408(b)(2) of the Act;

(e) PNC does not receive any fees payable pursuant to Rule 12b–1 under the 1940 Act in connection with the transactions;

(f) No Client Plan is an employee benefit plan sponsored or maintained by PNC;

(g) A second fiduciary (Second Fiduciary), as defined below in Section III, who is acting on behalf of a Client Plan receives, in advance of any initial investment by a Plan Client in a Fund, full and detailed written disclosure of information concerning such Fund including but not limited to:

(1) A current prospectus for each Fund in which a Client Plan is considering investing;

(2) A statement describing the fees, including the nature and extent of any differential between the rates of such fees for:

(i) Any investment advisory or similar services to be paid by such Fund,

(ii) any Secondary Services to be paid by such Fund to PNC, and

(iii) all other fees to be charged to or paid by the Client Plan and by such Fund;

(3) The reason why PNC, acting as a fiduciary for such Client Plan, considers investment in such Fund to be appropriate for such Client Plan;

(4) A statement describing whether there are any limitations applicable to PNC with respect to which assets of a Client Plan may be invested in such Fund, and if so, the nature of such limitations; and

(5) Upon the request of the Second Fiduciary, acting on behalf of a Client Plan, a copy of the proposed exemption and/or copy of the final exemption, if granted, once such documents are published in the **Federal Register**.

(h) On the basis of the information described, above, in Section II(h), a Second Fiduciary, acting on behalf of a Client Plan, authorizes in writing: (1) The investment of the assets of such Client Plan in shares of each particular Fund; and (2) the fees received by PNC in connection with services provided by PNC to such Fund. Such authorization by a Second Fiduciary must be consistent with the responsibilities, obligations, and duties imposed on fiduciaries by Part 4 of Title I of the Act.

(i)(1) All authorizations described above, in Section II(i), made by a Second Fiduciary, regarding:

(i) Investments by a Client Plan in a Fund;

(ii) fees paid to PNC for investment management advisory services or similar services; and

(iii) fees paid for Secondary Services shall be terminable at will by the Second Fiduciary, acting on behalf of such Client Plan, without penalty to such Client Plan, upon receipt by PNC, acting as fiduciary on behalf of such Client Plan, of a written notice of termination. A form (the Termination Form), as defined, below, in Section III(j), expressly providing an election to terminate the authorizations, described, above, in Section II(i), with instructions on the use of such Termination Form must be provided to such Second Fiduciary at least annually. However, if a Termination Form has been provided to such Second Fiduciary, pursuant to Section II(k) and (l), below, then a Termination Form need not be provided again, pursuant to this Section II(j), unless at least six (6) months but no more than twelve (12) months have elapsed, since a Termination Form was provided, pursuant to Section II(k) and (l), below.

With respect to j(1)(i), (ii), (iii) above, all such investments and fees shall be terminable at will by the Second

[2] PNC represents that it would be accurate to describe "the credit" as a "credited dollar amount" to cover situations in which the credited amount" is used to acquire additional shares of a Fund, rather than being held by a Client Plan in the form of cash. It is represented that the standard practice is to reinvest the "credited dollar amount" in additional shares of the same Fund with respect to which the fees were credited.

Fiduciary acting on behalf of such Client Plan.

(2) The instructions for the Termination Form must include the following information:

(i) The authorization, described above in Section II(i), is terminable at will by the Second Fiduciary acting on behalf of a Client Plan, without penalty to the Client Plan, upon receipt by PNC of written notice from such Second Fiduciary; and

(ii) Failure by such Second Fiduciary to return the Termination Form will be deemed to be an approval by the Second Fiduciary and will result in the continued authorization, as described above, in Section II(i) of PNC to engage in the transactions described in this proposed exemption;

(j) For a Client Plan invested in a Fund which uses one of the fee methods described, above, in Section II(a)(1), (a)(2), or (a)(3) in the event of a proposed change from one of the fee methods to another or in the event of a proposed increase in the rate of any fee paid by such Fund to PNC for any investment advisory service or similar service that PNC provides to a Fund over an existing rate for such service or method of determining the fee for such service, which had been authorized by the Second Fiduciary for such Client Plan, in accordance with Section II(i), above, PNC, at least thirty (30) days in advance of the implementation of such change and/or such increase, provides a written notice (which may take the form of a proxy statement, letter, or similar communication that is separate from the prospectus of such Fund and which explains the nature and amount of such change from one of the fee methods to another or increase in fee) to the Second Fiduciary of each Client Plan affected by such change from one fee method to another fee method or increase in fee. Such notice shall be accompanied by a Termination Form, with instructions on the use of such Termination Form, as described, above, in Section II(j).

(k) In the event of:

(i) A proposed addition of a Secondary Service for which an additional fee is charged; or

(ii) A proposed increase in the rate of any fee paid by a Fund to PNC for any Secondary Service, or

(iii) A proposed increase in the rate of any fee paid for Secondary Services that results from the decrease in the number or kind of services performed by PNC for such fee over an existing rate for services which had been authorized, in accordance with Section II(i), by the Second Fiduciary for a Client Plan invested in such Fund, PNC will at least thirty (30) days in advance of the implementation of such fee increase or additional service for which an additional fee is charged or a decrease in the number or kind of services being performed, provide a written notice (which may take the form of a proxy statement, letter, or similar communication that is separate from the prospectus of such Fund and which explains the nature and amount of the additional service for which an additional fee is charged or the nature and amount of the increase in fees or the decrease in the number or kind of services) to the Second Fiduciary of each Client Plan invested in such Fund which is proposing to increase fees or add services for which an additional fee is charged or decreasing the number or kind of services being performed. Such notice shall be accompanied by a Termination Form, with instructions on the use of such Termination Form, as described, above in Section II(j);

(l) On an annual basis, PNC provides the Second Fiduciary of such Client Plan invested in a Fund with:

(1) A copy of the current prospectus for such Fund in which such Client Plan invests,

(2) Upon the request of such Second Fiduciary, a copy of the Statement of Additional Information for such Fund which contains a description of all fees paid by such Fund to PNC;

(3) A copy of the annual financial disclosure report which includes information about Fund portfolios, as well as the audit findings of an independent auditor, within sixty (60) days of the preparation of such report; and

(4) Oral or written responses to inquiries of the Second Fiduciary of such Client Plan, as such inquiries arise.

(m) All dealings between a Client Plan and a Fund are on a basis no less favorable to such Client Plan than dealings between such Fund and other shareholders invested in such Fund.

(n) PNC maintains for a period of six (6) years the records necessary to enable the persons described, below, in Section II(p) to determine whether the conditions of this exemption have been met, except that:

(1) A prohibited transaction will not be considered to have occurred, if solely because of circumstances beyond the control of PNC, the records are lost or destroyed prior to the end of the six-year period, and

(2) No party in interest other than PNC shall be subject to the civil penalty that may be assessed under section 502(i) of the Act or to the taxes imposed by section 4975(a) and (b) of the Code if the records are not maintained or are not available for examination as required by Section II(p), below.

(p)(1) Except as provided in Section II(p)(2) and notwithstanding any provisions of section 504(a)(2) of the Act, the records referred to in Section II(o) are unconditionally available at their customary location for examination during normal business hours by—

(i) Any duly authorized employee or representative of the Department or the Internal Revenue Service,

(ii) Any fiduciary of a Client Plan who has authority to acquire or dispose of shares of a Fund owned by such Client Plan, or any duly authorized employee or representative of such fiduciary, and

(iii) Any participant or beneficiary of a Client Plan or duly authorized employee or representative of such participant or beneficiary.

(2) None of the persons described in Section II(p)(1)(ii) and (iii) shall be authorized to examine trade secrets of PNC, or commercial or financial information which is privileged or confidential.

Section III—Definitions

For purposes of this exemption:

(a) The term "PNC" means The PNC Financial Services Group, Inc., and any affiliate thereof as defined below in paragraph (b) of this section.

(b) An "affiliate" of a person includes:

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person;

(2) Any officer, director, employee, relative, or partner in any such person; and

(3) Any corporation or partnership of which such person is an officer, director, partner, or employee.

(c) The term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(d) The term "Client Plan" means any employee benefit plan as defined in section 3(3) of the Act; as well as Keogh plans and individual retirement accounts, for which PNC is a fiduciary as defined in section 3(21) of the Act (excluding any employee benefit plans sponsored by PNC or its affiliates).

(e) The term "Fund" or "Funds" shall mean the PNC Funds, Inc. or any other diversified open-end investment company or companies registered under the 1940 Act for which PNC serves as an investment advisor, but not sub-advisor, and for which PNC may serve as a custodian, dividend disbursing agent, shareholder servicing agent, transfer agent, fund accountant, or

provide some other "Secondary Service," as defined below in Section III which has been approved by such Funds.

(f) The term "net asset value" means the amount for purposes of pricing all purchases and sales of shares of a Fund calculated by dividing the value of all securities, determined by a method as set forth in the Fund's prospectus and statement of additional information, and other assets belonging to the Fund or portfolio of the Fund, less the liabilities charged to each such portfolio or Fund, by the number of outstanding shares.

(g) The term "relative," means a relative as that term is defined in section 3(15) of the Act (or a member of the family as that term is defined in section 4975(e)(6) of the Code), or a brother, a sister, or a spouse of a brother or a sister.

(h) The term, "Second Fiduciary(ies)," means a fiduciary of a Client Plan who is independent of and unrelated to PNC. For purposes of this exemption, the Second Fiduciary will not be deemed to be independent of and unrelated to PNC if:

(1) Such fiduciary, directly or indirectly controls, through one or more intermediaries, is controlled by, or is under common control with PNC;

(2) Such fiduciary, or any officer, director, partner, employee, or relative of the fiduciary, is an officer, director, partner, or employee of PNC (or is a relative of such persons); or

(3) Such fiduciary, directly or indirectly, receives any compensation or other consideration for his or her personal account in connection with any transaction described in this exemption.

If an officer, director, partner, or employee of PNC (or relative of such persons) is a director of such Second Fiduciary, and if he or she abstains from participation in (i) the choice of such Client Plan's investment advisor, (ii) the approval of any such purchase or sale between such Client Plan and a Fund, and (iii) the approval of any change in fees charged to or paid by such Client Plan in connection with any of the transactions described in Section I above, then Section III(h)(2), above, shall not apply.

(i) The term, "Secondary Service(s)," means a service which is provided by PNC to a Fund, including custodial, accounting, and/or administrative services. The fees for providing Secondary Services to a Fund are paid to PNC by such Fund.

(j) The term, "Termination Form," means the form supplied to a Second Fiduciary which expressly provides an election to such Second Fiduciary to terminate on behalf of a Client Plan the authorization described, above, in Section II(i).

(k) The term, "business day," means any day that

(1) PNC is open for conducting all or substantially or substantially all of its banking functions, and

(2) The New York Stock Exchange (or any successor exchange) is open for trading.

Effective Dates: This exemption is effective as of February 1, 2008.

Written Comments

In the Notice of Proposed Exemption (the Notice), the Department of Labor (the Department) invited all interested persons to submit written comments and requests for a hearing on the proposed exemption within forty-five (45) days of the date of the publication of the Notice in the **Federal Register** on April 30, 2010. All comments and requests for a hearing from interested persons were due by June 14, 2010; however, because the Applicant required additional time to mail the Notice to all interested parties, the Department extended the due date to June 17, 2010 which was reflected in the Notice. The Department received no requests for a hearing. The Department received one written comment from the Applicant on June 15, 2010. The Applicant later clarified its written comments in a letter dated July 6, 2010.

1. Scope of Relief

The Applicant requested that the scope of relief provided in the Notice be expanded to include all of section 406(a) of the Act instead of only section 406(a)(1)(D) of the Act. The Applicant represents that the Department has provided relief from section 406(a) in similar prior exemptions. In response, it is the Department's view that the PNC Funds are not parties in interest under section 3(14) of the Act with respect to the Plan. Accordingly, the Department has determined not to provide the requested relief under section 406(a)(1)(A) of the Act. A similar analysis would apply to sections 406(a)(1)(B) and (C) of the Act. Therefore, the Department has decided to limit relief to sections 406(a)(1)(D) and 406(b) of the Act.

2. Credit Fee Method Implementation

The Applicant also requested that the Department clarify the timing as to when the Applicant implemented the Credit Fee Method. The Applicant represents that although the Applicant had systems in place to implement the Credit Fee Method, it implemented the Credit Fee Method for investments in the PNC Funds in June 2010. The Department, in order to clarify this issue, has added the following sentence to the end of Representation 11 as follows:

"PNC represents that it had systems in place as of February 8, 2008 to implement the Credit Fee Method; however, at that time PNC did not use the Credit Fee Method for Client Plan investments in the Funds."

In addition, due to a publication error, part of the first sentence of Footnote 3 in Representation 11 was missing. The first sentence of Footnote 3 in Representation 11 should have read:

"It is the view of PNC that the Credit Fee Method is covered by PTE 77–4."

3. Summary Prospectus

The Applicant also requested the Department's views on whether, for purposes of the exemptive relief requested, PNC may use a current "summary prospectus" to satisfy the conditions contained in section II(h)(1) and II(m)(1) of the Notice. The condition in section II(h)(1) of this grant requires that the Second Fiduciary, who is acting on behalf of a Client Plan, receives in advance of any initial investment in a Fund, among other things, a current "prospectus." The condition in section II(m)(1) of this grant also requires that, on an annual basis, PNC provides the Second Fiduciary of each Client Plan invested in a Fund with such Fund's current "prospectus." The Applicant also requested the Department's views on whether, for purposes of the individual exemptive relief granted to PNC in Prohibited Transaction Exemption 2009–22 (PTE 2009–22), it may use a current "summary prospectus" to satisfy the conditions contained in section II(h)(1) and II(m)(1) of PTE 2009–22. The Department notes that: (1) Neither exemption defines the term "prospectus;" (2) the "summary prospectus" includes, among other things, fee and expense information and a legend containing an internet address and telephone number for obtaining a "prospectus" for the relevant Fund and other information free of charge; and (3) the exemptive relief is conditioned upon the affected plans receiving a separate fee disclosure, in advance of any initial investment and upon the occurrence of certain specified events, which fee disclosure contains more detailed information than the general fee information required to be included in a "prospectus" or "summary prospectus." Accordingly, the Department wishes to clarify solely for purposes of section II(h)(1) and section II(m)(1) of this grant and section II(h)(1)

and section II(m)(1) of PTE 2009–22 that wherever a "prospectus" is required to be provided by those sections, such requirement can also be satisfied by the provision of a "summary prospectus." [3]

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on April 30, 2010 at 75 FR 22853.

For Further Information Contact: Mr. Anh-Viet Ly of the Department at (202) 693–8648. (This is not a toll-free number.)

The Finishing Trades Institute of the Mid-Atlantic Region (the Plan)
Located in Philadelphia, Pennsylvania
[Prohibited Transaction Exemption 2010– ; Exemption Application No. L–11609].

Exemption

The restrictions of sections 406(a)(1)(A) through (D) and 406(b)(1) and (b)(2) of the Act shall not apply to the proposed loan of approximately $1,081,416 (the Loan) to the Plan by the International Union of Painters and Allied Trades, District Council 21 (the Union), a party in interest with respect to the Plan, for (1) the repayment of an outstanding loan (the Original Loan) made to the Plan by Commerce Bank and currently held by TD Bank, both of which are unrelated parties; and (2) to facilitate the expansion of a training facility (the Facility) that is situated on certain real property (the Land) [4] owned by the Plan, provided that the following conditions are met:

(a) The terms and conditions of the Loan are at least as favorable to the Plan as those which the Plan could have obtained in an arm's length transaction with an unrelated party;

(b) The Plan's trustees determine in writing that the Loan is appropriate for the Plan and in the best interests of the Plan's participants and beneficiaries;

(c) A qualified, independent fiduciary that is acting on behalf of the Plan (the Qualified Independent Fiduciary) reviews the terms of the Loan and determines that the Loan is an appropriate investment for the Plan and protective of and in the best interests of the Plan and its participants and beneficiaries;

(d) In determining the fair market value of the Property that serves as collateral for the Loan, the Qualified Independent Fiduciary (1) obtains an appraisal of the Property from a qualified, independent appraiser (the Qualified Independent Appraiser); and (2) ensures that the appraisal prepared by the Qualified Independent Appraiser is consistent with sound principles of valuation;

(e) The Qualified Independent Fiduciary monitors the Loan, as well as the terms and conditions of the exemption, and takes whatever actions are necessary and appropriate to safeguard the interests of the Plan and its participants and beneficiaries under the Loan;

(f) The Loan is repaid by the Plan solely with the funds the Plan retains after paying all of its operational expenses; and

(g) The Plan does not pay any fees or other expenses in connection with the servicing or administration of the Loan.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on July 2, 2010 at 75 FR 38561.

For Further Information Contact: Brian Shiker of the Department, telephone (202) 693–8552. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) This exemption is supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(3) The availability of this exemption is subject to the express condition that the material facts and representations contained in the application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 10th day of September, 2010.

Ivan Strasfeld,

Director of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

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BILLING CODE 4510–29–P

[3] The Department notes that consistent with the prudence requirements of section 404, a fiduciary has a duty to consider all available relevant information regardless whether the information is actually provided to the fiduciary.

[4] Unless otherwise stated herein, the Facility and the Land are together referred to as the "Property."

DEPARTMENT OF LABOR

Employee Benefits Security Administration

[D–11400; D–11585; D–11603–07]

Application Nos. and Proposed Exemptions; D–11400, Wasatch Advisors, Inc.; D–11585, Retirement Plan for Employees of the Rehabilitation Institute of Chicago (the Plan); D–11603–07, Chrysler Group LLC and Daimler AG; et al.

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Notice of proposed exemptions.

SUMMARY: This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code).

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or requests for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, within 45 days from the date of publication of this **Federal Register** Notice. Comments and requests for a hearing should state: (1) The name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

ADDRESSES: All written comments and requests for a hearing (at least three copies) should be sent to the Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, Room N–5700, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Application No. _____, stated in each Notice of Proposed Exemption. Interested persons are also

invited to submit comments and/or hearing requests to EBSA via e-mail or FAX. Any such comments or requests should be sent either by e-mail to: *moffitt.betty@dol.gov,* or by FAX to (202) 219–0204 by the end of the scheduled comment period. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue, NW., Washington, DC 20210.

Warning: If you submit written comments or hearing requests, do not include any personally-identifiable or confidential business information that you do not want to be publicly-disclosed. All comments and hearing requests are posted on the Internet exactly as they are received, and they can be retrieved by most Internet search engines. The Department will make no deletions, modifications or redactions to the comments or hearing requests received, as they are public records.

Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of proposed exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

SUPPLEMENTARY INFORMATION: The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

Wasatch Advisers, Inc., Located in Salt Lake City, Utah

[Exemption Application Number D–11400.]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and section 4975(c)(2) of the Internal Revenue Code of 1986, as amended (the Code), and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).[1]

Section I—Exemption and Conditions

If the proposed exemption is granted, Wasatch Advisors, Inc. (Wasatch) shall not be precluded from qualifying as a "qualified professional asset manager" (a QPAM) pursuant to Prohibited Transaction Exemption 84–14 (hereinafter, either PTE 84–14 or the QPAM Class Exemption)[2] for the period from April 19, 2006 through July 13, 2007, solely because of its failure to satisfy the shareholders' equity requirement of PTE 84–14, section V(a)(4) (the Shareholders' Equity Requirement), provided that the following conditions were met:

(a) Upon learning that it did not have adequate shareholders' equity to satisfy the Shareholders' Equity Requirement, Wasatch took all steps necessary to protect the interests of its ERISA Clients (as defined in section II(b)), including obtaining a letter of credit (the Letter of Credit);

(b) The Letter of Credit was an irrevocable standby letter of credit for $1,000,000, structured in a manner that covered any ERISA Claim (as defined in section II(a)) occurring from April 19, 2006 (the date Wasatch learned it did not satisfy the Shareholders' Equity Requirement) through July 13, 2007 (the date on which Wasatch determined it satisfied the Shareholders' Equity Requirement);

(c) The Letter of Credit was issued by Zions First National Bank, which was independent of Wasatch and regulated by Federal banking authorities;

(d) The Letter of Credit was held by Zions First National Bank for the benefit of all ERISA Clients;

(e) The Letter of Credit was payable on demand solely to an ERISA Client (or its agent) if the ERISA Client provided:

(1) A certified copy of the final order for damages against Wasatch based on an ERISA Claim from a court of competent jurisdiction with all rights of appeal having expired or having been exhausted; or a true copy of a settlement agreement between the ERISA Client and Wasatch providing for damages to the ERISA Client with respect to an ERISA Claim;

(2) In the case of a final court judgment, a certified true copy of a Sheriff's or Marshall's levy and execution on the judgment, returned unsatisfied, or such other documentation, certified by an officer of the court in which the judgment was entered, stating that the judgment remains unsatisfied following attempts to collect the judgment in accordance with local court rules; and

(3) A certificate of an authorized representative of the ERISA Client stating the amount of the judgment or settlement which remains unsatisfied;

(f) From 1996 through 2007, Joseph S. Call, a certified public accountant who is independent of Wasatch, performed a yearly audit on Wasatch, using generally acceptable accounting principles to quantify Wasatch's shareholders' equity; and

(g) From 1996 through 2007, Wasatch's reliance on Mr. Call's determinations as to the dollar amount relevant to the Shareholders' Equity Requirement was reasonable.

Section II—Definitions

(a) The term "ERISA Claim" means: a civil proceeding for monetary relief which is commenced by the filing or service of a civil complaint or similar pleading or a request for monetary relief which could have been the subject of such a complaint or pleading but for a settlement agreement, filed against Wasatch or with respect to which a settlement is reached prior to July 13, 2007, by reason of Wasatch's breach or violation of a duty described in sections 404 or 406 of ERISA;

(b) The term "ERISA Client" means any employee benefit plan covered by Title I of ERISA to which Wasatch provides or provided investment management services on or before July 13, 2007;

(c) A person will be "independent" of another person only if:

(i) For purposes of this exemption, such person is not an affiliate of that other person; and

(ii) The other person, or an affiliate thereof, is not a fiduciary that has investment management authority or

[1] For purposes of this proposed exemption, references to section 406 of ERISA should be read to refer as well to the corresponding provisions of section 4975 of the Code.

[2] 49 FR 9494 (Mar. 13, 1984), as corrected at 50 FR 41430 (Oct. 10, 1985), and amended at 70 FR 49305 (Aug. 23, 2005) and at 75 FR 38837 (Jul. 6, 2010).

renders investment advice with respect to the assets of such person;

(d) An "affiliate" of a person means:

(i) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person. For purposes of this paragraph, the term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual;

(ii) Any officer, director, employee or relative (as defined in section 3(15) of the Act) of any such other person or any partner in any such person; and

(iii) Any corporation or partnership of which such person is an officer, director or employee or in which such person is a partner.

Summary of Facts and Representations

1. The applicant is Wasatch (hereinafter, either Wasatch or the Applicant), a registered investment advisor located in Salt Lake City, Utah. Wasatch, which was founded in 1976, has more than $9 billion in assets under its management, including approximately $1.5 billion in ERISA plan assets. Wasatch employs approximately 110 people, and has been structured as a privately-held, 100% employee-owned Subchapter S corporation since 1996.

2. The Applicant represents that for several years prior to April 19, 2006, Wasatch acted as a "qualified professional asset manager," as such term is defined in section V(a)(4) of the QPAM Class Exemption. The Applicant states that, to the best of its knowledge, during that time, Wasatch complied with all relevant provisions of that class exemption.

3. The Applicant also represents that, for the period from April 19, 2006 through July 13, 2007, Wasatch failed to satisfy section V(a)(4) of the QPAM Class Exemption. In this regard, section V(a)(4) of the QPAM Class Exemption requires, among other things, that an investment advisor have in excess of $1,000,000 in shareholders' or partners' equity; and section VI(m) of the QPAM Class Exemption defines "shareholders' or partners' equity" as meaning the equity shown in the most recent balance sheet prepared within the two years immediately preceding a transaction undertaken pursuant to the QPAM Class Exemption, in accordance with generally accepted accounting principles.[3]

4. The Applicant describes Wasatch's failure to meet the Shareholders' Equity Requirement as a one-time event resulting from unanticipated changes in certain factors affecting: deferred compensation agreements (the Compensation Agreements) covering key Wasatch employees (the Recipients); and a stock buy-sell agreement (the Buy-Sell Agreement). The Applicant makes the following representations regarding the Compensation Agreements.

Beginning in 1996, Wasatch entered into Compensation Agreements with Recipients to pay the Recipients a multiple of net revenue for each of the sixteen quarters following a Recipient's termination of employment with Wasatch. Many of the factors involved (*i.e.,* the separation dates of the Recipients and Wasatch's revenues during the four years following these dates) were difficult to quantify prior to 2005.

5. The Applicant makes the following representation regarding the Buy-Sell Agreement. The Buy-Sell Agreement was put in place to address succession planning. The Agreement, among other things, limits stock ownership to current employees and places a specific value on the shares. As with the Compensation Agreements, the value of the stock is based on a set multiple of net revenues and is paid out over the sixteen quarters following sale of the stock (which is required upon termination.)

6. For the years 1996–2004, Wasatch did not accrue for deferred compensation liability on its balance sheets. During this period, Wasatch took the position that there were too many variables to reasonably estimate its liabilities under the Compensation Agreements and the Buy-Sell Agreements (collectively, the Agreements). In this regard, the Applicants represent that: (1) Future revenues were extremely difficult to predict historically since: (A) Client assets can flood or exit a manager very rapidly; (B) during the fifteen years from 1989–2004 Wasatch's gross revenues showed a compound annual growth rate of 35%, with a standard deviation of 44%, a low of −11% and a high of 130%; and (C) Wasatch had a relatively small number of employees and many of Wasatch's assets were new, such that it was reasonable to expect a large portion of those assets would exit the company upon the departure of key employees; (2) it was extremely difficult to predict retirement dates given that the average age of employees was 33; and (3) structural aspects of the Agreements caused the timing of payments to be quite variable.[4]

7. The Applicant represents that with respect to Wasatch's 2005 calendar year, Mr. Joseph S. Call, Wasatch's independent auditor, determined that enough of these key variables had changed such that it was: (1) Possible to reasonably estimate the liability accrued under the Compensation Agreements; and (2) necessary to accrue a discounted value for the liability on Wasatch's financial statements. This determination was described in an audit report received by Wasatch on April 19, 2006 (the Audit Report). Specifically, the Audit Report stated that: (1) Wasatch had observed a relative stabilization in its business; (2) at least one key retirement date was set; and (3) changes in the tax law for deferred compensation caused Wasatch to modify the Compensation Agreements by taking away some of the provisions for pre-payment or delay of payment. Accordingly, Wasatch's 2005 balance sheet took into account accrued liability for the Compensation Agreements, and quantified such liability as approximating $25 million, putting Wasatch in an unexpected and unplanned-for negative equity position of $13 million.

8. The Applicant states that, prior to April 19, 2006, Wasatch did not know, nor have reason to anticipate, that its financial statements for the year ending December 31, 2005 would reflect less than the minimum amount of shareholders' equity set forth in the Shareholders' Equity Requirement. In this regard, the Applicant represents that Wasatch received no prior notice (other than in the Audit Report) that certain factors relevant to the quantification of Wasatch's shareholders' equity had stabilized and/or that the amount of Wasatch's shareholders' equity was in jeopardy of dropping below the amount required by the Shareholders' Equity Requirement. The Applicant represents further that Wasatch's reliance on the financial audits performed by Mr. Call, including those covering Wasatch's fiscal years prior to 2005, was reasonable.

[3] As noted in footnote 2, the QPAM Class Exemption was amended on August 23, 2005. Among other things, the amendment increases the dollar amount set forth in section V(a)(4) of the QPAM Class Exemption from $750,000 to $1,000,000. This increase, as it applies to Wasatch, is effective December 31, 2006, which is the last day of the first fiscal year of Wasatch beginning on or after August 23, 2005. References herein to the Shareholders' Equity Requirement with respect to any date that occurs prior to December 31, 2006 thus corresponds to the lesser (*i.e.,* $750,000) dollar amount.

[4] According to the Applicant, the nature and terms of the Agreements have been fully disclosed in Wasatch's audited financial statements since 1996.

9. The Applicant represents that Wasatch, upon learning it no longer had an amount of shareholders' equity necessary to satisfy the Shareholders' Equity Requirement, took immediate steps to protect its ERISA clients. In this regard, the Applicant states that after receiving the April 19, 2006 Audit Report, Wasatch stopped paying dividends and bonuses, and began retaining cash in an effort to offset the accrued deferred compensation liability. The Applicant represents that unaudited financial statements prepared by Wasatch for the quarter ended September 30, 2006 reflected shareholders' equity in excess of $1,000,000 due to Wasatch's efforts to retain cash.

10. The Applicant represents further that Wasatch, upon learning it no longer had a sufficient amount of shareholders' equity, set in motion the process of obtaining an irrevocable letter of credit in order to protect the interests of its ERISA Clients until Wasatch was able to once again meet the Shareholders' Equity Requirement. In this regard, on October 30, 2006, Wasatch executed the Letter of Credit, which is a $1,000,000 Letter of Credit with Zions First National Bank. The Applicant represents that, following October 30, 2006, Zions First National Bank held the Letter of Credit for the benefit of all ERISA Clients. The Applicant represents that the Letter of Credit was structured in a manner that allowed it to be applicable to ERISA Claims arising on or after April 19, 2006. The Applicant states further that the Letter of Credit remained in effect through July 13, 2007, which is the date on which Wasatch determined that it met the Shareholders' Equity Requirement. The Applicant notes that the Letter of Credit could be reduced only by ERISA Claims paid on behalf of ERISA Clients, if the ERISA Client provided: A certified copy of the final order for damages against Wasatch; or (2) a true copy of a settlement agreement between the ERISA Client and Wasatch. The Applicant states that there have been no judgments or settlements made by ERISA Clients, and there are no pending ERISA Claims.

11. In summary, the Applicant represents that the transactions described herein satisfy the statutory criteria set forth in section 408(a) of the Act and section 4975(c)(2) of the Code because:

(a) Wasatch, upon learning that it did not have adequate shareholders' equity to satisfy the Shareholders' Equity Requirement, took all steps necessary to protect the interests of its ERISA Clients, including obtaining the Letter of Credit from Zions First National Bank;

(b) The Letter of Credit was structured to cover any ERISA Claim occurring from April 19, 2006 through July 13, 2007;

(c) The amount available under the Letter of Credit was at least $1,000,000 on both October 31, 2006 and July 13, 2007, the former date being the date on which Wasatch obtained the Letter of Credit from Zions First National Bank and the latter date being the date on which Wasatch determined it satisfied the Shareholders' Equity Requirement;

(d) Wasatch caused the Letter of Credit to be issued by Zions First National Bank, and Zions First National Bank held the Letter of Credit for the benefit of all ERISA Clients;

(e) The Letter of Credit was payable on demand solely to an ERISA Client (or its agent) if the ERISA Client provided:

(1) A certified copy of the final order for damages against Wasatch based on the ERISA Claim from a court of competent jurisdiction with all rights of appeal having expired or having been exhausted; or a true copy of a settlement agreement between the ERISA Client and Wasatch providing for damages to the ERISA Client with respect to the ERISA Claim;

(2) In the case of a final court judgment, a certified true copy of a Sheriff's or Marshall's levy and execution on the judgment, returned unsatisfied, or such other documentation, certified by an officer of the court in which the judgment was entered, stating that the judgment remains unsatisfied following attempts to collect the judgment in accordance with local court rules; and

(3) A certificate of an authorized representative of the ERISA Client stating the amount of the judgment or settlement which remains unsatisfied;

(f) From 1996 through 2007, Joseph S. Call, a certified public accountant who is independent of Wasatch, performed a yearly audit on Wasatch, using generally accepted accounting principles to quantify Wasatch's shareholders' equity; and

(g) Each year, from 1996 through 2007, Wasatch's reliance on Mr. Call's determinations as to the dollar amount of Wasatch's shareholders' equity was reasonable.

Notice to Interested Persons

The persons who may be interested in the publication in the **Federal Register** of the Notice of Proposed Exemption (the Notice) include ERISA plans that used Wasatch as a QPAM during the period from April 19, 2006 through July 13, 2007 and that still (currently) use Wasatch as a QPAM. Wasatch will notify this class of interested persons, by mail, within fifteen (15) calendar days of publication of the Notice in the **Federal Register**; and such mailing will contain a copy of the Notice, a supplemental statement (as required pursuant to 29 CFR 2570.43(b)(2)), and a supplemental letter explaining the circumstances that gave rise for the need for a temporary exemption. Any written comments and/or requests for a hearing must be received by the Department from interested persons within 45 days of the publication of this proposed exemption in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Chris Motta of the Department, telephone (202) 693–8540. (This is not a toll-free number.)

Retirement Plan for Employees of the Rehabilitation Institute of Chicago (the Plan), Located in Chicago, Illinois.

[Application No. D–11585]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990).

Section I—Transactions

If the proposed exemption is granted, the restrictions of sections 406(a)(1)(B), 406(a)(1)(D), and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(B) and 4975(c)(1)(D) of the Code,[5] shall not apply:

(1) To a series of interest-free Advances in the aggregate amount of $701,117 (the Advances or individually, an Advance), made to Hewitt Associates, LLC (Hewitt), the Pension Benefit Guaranty Corporation (PBGC), the Internal Revenue Service (the IRS), and Deloitte and Touche, LLP (Deloitte),[6] during the period from September 28, 2006, through June 2, 2009, by the Rehabilitation Institute of Chicago (RIC), for the purpose of paying ordinary operating expenses incurred on behalf of the Plan; and

(2) To the reimbursement to RIC by the Plan of such Advances made during the period from September 28, 2006, through June 2, 2009, in an aggregate amount not to exceed $701,117, where

[5] For purposes of this proposed exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

[6] Hewitt, PBGC, IRS, and Deloitte are collectively referred to, herein, as the Service Providers.

each such reimbursement occurred at least sixty (60) days but no more than 365 days after the date of each such Advance; provided that the conditions as set forth in section II of this proposed exemption were satisfied.

Section II—Conditions

(1) During the period from September 28, 2006, through June 2, 2009, when RIC made each of the Advances and during the period at least sixty (60) days but no more than 365 days after the date of each such Advance, when the Plan reimbursed each such Advance, all of the requirements of Prohibited Transaction Exemption 80–26 (PTE 80–26), as amended, effective December 15, 2004,[7] were satisfied, except for the requirement in Section IV (f)(1) of PTE 80–26 that loans made on or after April 7, 2006, with a term of sixty (60) days or longer be made pursuant to a written loan agreement that contains all of the material terms of such loan;

(2) With regard to any reimbursement covered by the proposed exemption, an independent, qualified auditor certifies that such reimbursement matches each of the Advances, during the period from September 28, 2006, through June 2, 2009, made by RIC to the Service Providers on behalf of the Plan; and such reimbursements were made by the Plan to RIC during the period at least sixty (60) days but no more than 365 days after the date of each such Advance;

(3) The Advances made by RIC to the Service Providers, during the period from September 28, 2006, through June 2, 2009, were for the payment of ordinary operating expenses of the Plan which were properly incurred on behalf of the Plan;

(4) Within ninety (90) days of the publication in the **Federal Register** of the final exemption for the transactions which are the subject of this proposed exemption, RIC must refund to the Plan an amount equal to $74,555 (the Refund Amount), plus earning and interest. Such Refund Amount represents the total for certain reimbursements to RIC by the Plan in connection with payments by RIC to Monticello Associates Inc. (Monticello), Deloitte, the IRS, and the Department in the amounts, respectively of $55,500, $18,530, $375, and $150. Furthermore, RIC must refund to the Plan an additional amount attributable to lost earnings experienced by the Plan on the Refund Amount, and interest on such lost earnings, for the period from April 7, 2006, to the date upon which RIC has returned to the Plan the entire Refund Amount, the lost earnings on such Refund Amount, plus interest on such lost earnings. For the purpose of calculating the lost earnings on the Refund Amount due to the Plan, plus interest, on such lost earnings, RIC must use the Online Calculator for the Voluntary Fiduciary Correction Program[8] that appears on the Web site of the Employee Benefits Security Administration; and

(5) Within ninety (90) days of the publication in the **Federal Register** of the final exemption for the transactions which are the subject of this proposed exemption, RIC must file a Form 5330 with the IRS and pay to the IRS all applicable excise taxes, and any interest on such excise taxes deemed to be due and owing with respect to the Refund Amount.

Effective Date: This proposed exemption, if granted, will be effective, for each Advance to the Service Providers made by RIC from September 28, 2006, through June 2, 2009, and for reimbursements to RIC by the Plan of such Advances covered by this proposed exemption.

Summary of Facts and Representations

1. The Plan is a defined benefit pension plan. The estimated number of participants and beneficiaries in the Plan, as of November 3, 2009, was 2,457. The fair market value of the total assets of the Plan, as of August 31, 2009, was $52,895,253.39.

2. The administrator of the Plan is a committee (the Committee) composed of members who are appointed by the Board of Directors of RIC. The members of the Committee are employees and officers of RIC. As of March 13, 2006, and at the start of the relevant period for which relief is requested in this proposed exemption, the members of the Committee, were: (a) Wayne M. Lerner, President and Chief Executive Officer of RIC; (b) Edward B. Case (Mr. Case), Executive Vice President and Chief Financial Officer of RIC; (c) Susan H. Cerletty, Executive Vice President, Clinical, of RIC and (d) Nancy Paridy, Esq. (Ms. Paridy), Senior Vice President of RIC and General Counsel to RIC. The following individuals have been members of the Committee, since December 1, 2007: (a) Joanne C. Smith, M.D., President and Chief Executive Officer of RIC, (b) Mr. Case, and (c) Ms. Paridy. The Committee is a party in interest with respect to the Plan, as the administrator of the Plan, pursuant to section 3(14)(A) of the Act.

The persons who have investment discretion over the assets involved in the proposed transactions are the Executive Vice President, the Chief Executive Officer, and the Chief Financial Officer of RIC, the members of the investment committee, and the advisors to RIC at Monticello. As persons or entities who have investment discretion over the assets of the Plan, each is a fiduciary with respect to the Plan, pursuant to section 3(21)(A) of the Act. As fiduciaries of the Plan, each is also a party in interest with respect to such Plan, pursuant to section 3(14)(A) of the Act.

Northern Trust Company, as the trustee for the Plan, is a fiduciary with respect to such Plan, pursuant to section 3(21)(A) of the Act. Further, as trustee for the Plan, Northern Trust Company is a party in interest with respect to such Plan, pursuant to section 3(14)(A) of the Act.

3. RIC, the sponsor of the Plan, is an Illinois not-for-profit corporation. RIC is a provider of rehabilitative medicine and services to severely injured and handicapped individuals. As an employer any of whose employees are covered by the Plan, RIC is a party in interest with respect to the Plan, pursuant to section 3(14)(C) of the Act.

4. The applicant has requested a retroactive administrative exemption for Advances and for the reimbursement of such Advances to RIC by the Plan. Such transactions constitute the lending of money or other extension of credit between the Plan and RIC in violation of section 406(a)(1)(B) of the Act, and constitute the transfer to, or use by or for the benefit of RIC of the assets of the Plan in violation of 406(a)(1)(D) of the Act. The subject transactions also raise conflict of interest issues by fiduciaries of the Plan for which relief from the prohibitions of 406(b)(2) of the Act is needed.

Specifically, the applicants have requested retroactive relief for: (a) Advances made by RIC to the Service Providers for expenses incurred on behalf of the Plan, during the period from April 7, 2006, through August 28, 2009; and (b) for the subsequent reimbursements of such Advances to RIC by the Plan during the period at least sixty (60) days but no more than 365 days after the date of each such Advance.

Although, as stated above, the applicant requested relief for the period from April 7, 2006, through August 28, 2009, the Department has determined to propose relief for a shorter period of time than that requested by the applicant. In this regard, the Department is proposing relief only for Advances made during the period from September 28, 2006, through June 2, 2009, because

[7] 71 FR 17917, April 7, 2006.

[8] 70 FR 17516, April 6, 2005.

an audit prepared by Deloitte, as described in more detail in paragraph number 15, below, covers transactions only for the period from September 28, 2006, through June 2, 2009.

Further, the Department proposes to limit relief, during the period from September 28, 2006, through June 2, 2009, only to those Advances which were reimbursed to RIC by the Plan, at least sixty (60) days but no more than 365 days from the date of each such Advance, because: (i) PTE 80–26 would be available for loans or extensions of credit which were repaid in less than sixty (60) days, provided the conditions of PTE 80–26 were satisfied; and (ii) as discussed in paragraph number 8, below the applicant has already filed a Form 5330, paid excise tax, and refunded to the Plan certain reimbursements paid to RIC more than a year after RIC advanced payments on behalf of the Plan.

No relief from the prohibited transaction provisions of the Act is proposed, herein, during the period April 7, 2006, when the requirement for a written loan agreement, pursuant to PTE 80–26 became effective, through September 27, 2006, when RIC failed to comply with the conditions of PTE 80–26, as amended, but made payments for expenses incurred on behalf of the Plan and received reimbursements from the Plan, because an audit prepared by Deloitte, as described in more detail in paragraph number 15, below, did not cover that period. Further, no relief from the prohibited transaction provisions of the Act is proposed, herein, for payments by RIC on behalf of the Plan and subsequent reimbursement to RIC by the Plan after Deloitte had informed RIC of the amendment to PTE 80–26, on June 3, 2009.

5. It is represented that RIC did not make the Advances which are the subject of this proposed exemption as gifts to the Plan. In this regard, it is represented that a significant portion of the operating revenue of RIC comes from non-patient sources, such as donors and grants. Such sources prefer their awards to be utilized for providing patient care and other mission related programs. It is represented that including the administrative expenses of the Plan in the general administrative expenses of RIC, rather than as benefits expenses, would make RIC appear less efficient to such non-patient sources of revenue. Accordingly, it is represented that it was always the intention of RIC to have the administrative expenses of the Plan paid for from the assets of the Plan, rather than from RIC's assets. In this regard, it is represented that from the inception of the Plan, the Plan documents and the accompanying trust documents have provided that administrative expenses of the Plan would be paid out of the assets of the Plan. Specifically, section 3.3 of the trust states that the trustee may pay out of the trust the administrative expenses of the Plan, including any accounting, actuarial, investment and legal expenses and premiums, any taxes of any and all kinds that may be levied or assessed under existing or future laws upon the trust or the income thereof, and any other amounts payable pursuant to Title IV of the Act, as the plan administrator shall direct.

It is represented that RIC has employed an administrative and accounting procedure which has been in place for a long time and which has been consistently followed with respect to the payments made by RIC to certain service providers of various expenses incurred on behalf of the Plan. In this regard, the procedure involves RIC paying for such expenses directly to such service providers on behalf of the Plan and then posting the amount of such payments as receivables from the Plan in the accounting records of RIC. It is represented that RIC would generally make the payments incurred on behalf of the Plan for up to an entire Plan year. Further, it is represented that the reimbursements to RIC by the Plan were made in lump sums generally on an annual basis.

6. It is represented that RIC intended the accounting procedure, described in paragraph number 5, above, to comply with PTE 80–26.[9] PTE 80–26 is a class exemption that, among other transactions, permits parties in interest with respect to an employee benefit plan to make certain interest free loans or other extensions of credit to such plan and permits such parties in interest to receive repayment of such loans or other extensions of credit. The relief provided by PTE 80–26 is subject to the conditions that the proceeds of such loans or extensions of credit are unsecured, are not, directly or indirectly, made by an employee benefit plan, and are used only for the payment of ordinary operating expenses of a plan, including the payment of benefits in accordance with the terms of such plan and periodic premiums under an insurance or annuity contract or are used for a purpose incidental to the ordinary operation of such plan.

Pursuant to an amendment of PTE 80–26, effective as of December 15, 2004, any loan or extension of credit the proceeds of which are used for the payment of ordinary operating expenses that are entered into on or after April 7, 2006, and that have a term of sixty (60) days or longer must be made pursuant to a written loan agreement that contains all of the material terms of such loan or extension of credit. Any loan or extension of credit made for a purpose incidental to the ordinary operation of a plan that has a term of sixty (60) days or longer must also be made pursuant to a written loan agreement that contains all of the material terms of such loan or extension of credit.

7. After the December 15, 2004, amendment to PTE 80–26 and after April 6, 2006, the effective date of the requirement for a written loan agreement for certain loans, RIC continued to make payments to service providers on behalf of the Plan and to seek reimbursements of such payments from the Plan, pursuant to the accounting procedure which is described in paragraph number 4, above. In this regard, on and after April 7, 2006, it is represented that any payments made on behalf of the Plan by RIC to service providers with a term of sixty (60) days or longer were not made pursuant to written loan agreements that contained all of the material terms of such loan or extension of credit.

On or about June 2, 2009, during the course of audits for the Plan Years ending August 31, 2007, and August 31, 2008, Deloitte, the auditor of the Plan, brought to the attention of RIC the amendment to PTE 80–26, effective December 15, 2004. It is represented by the applicant that after the amendment to PTE 80–26, the accounting procedure employed by RIC no longer met the requirements of PTE 80–26, with respect to the payments by RIC on behalf of the Plan to service providers (and subsequent reimbursements to RIC by the Plan of such payments).

8. Upon consultation with its legal counsel, Greenberg Traurig, LLP, RIC determined that the subject transactions are similar to the terms of a revolving note which typically must be paid down on at least an annual basis. It is represented that RIC evaluated payments made by RIC on behalf of the Plan to certain service providers and the subsequent receipt of reimbursements by RIC from the Plan and determined that any such payments made on behalf

[9] The Department is offering no view, herein, as to RIC's reliance on PTE 80–26 for payments RIC made on behalf of the Plan or to reimbursements of such payments to RIC by the Plan. Further, the Department is not opining as to whether RIC satisfied the conditions of PTE 80–26 in connection with such payments made by RIC on behalf of the Plan, or in connection with the reimbursement of such payments to RIC by the Plan. Further, the Department, herein, is not providing relief for any payments made by RIC on behalf of the Plan or any reimbursements of such amounts to RIC by the Plan beyond that which is proposed herein.

of the Plan by RIC which were reimbursed within sixty (60) days complied with PTE 80–26. In this regard, the applicant represents that there were no reimbursements made on the sixtieth (60th) day following the date of any such payments.[10]

RIC determined that the receipt by RIC from the Plan of reimbursements more than a year after the date of such payments were not exempted by PTE 80–26 and that the amount of such payments reimbursed to RIC by the Plan should be returned by RIC to the Plan. The total amount RIC returned to the Plan on August 28, 2009, is represented to have been $110,711, plus lost earnings in the amount of $766.96 for a total of $111,477.96. In addition, Form 5330 was completed by RIC, filed on September 2, 2009, by RIC with a check in the amount of $115.04 to the IRS, as payment of excise taxes due. It is represented that the excise taxes were calculated on the $766.96 of interest on the amount of $110,711 returned to the Plan by RIC.

9. It is represented that the total amount of the payments made by RIC on behalf of the Plan after April 7, 2006, which were reimbursed to RIC by the Plan sixty (60) days or more after the date of each such payment is $886,383. After RIC returned $110,711 to the Plan on August 28, 2009, as described in paragraph number 8, above, in connection with the filing by RIC of Form 5330, the amount for which relief is requested is $775,672 (*i.e.,* $886,383 minus $110,711).

Notwithstanding the applicant's request for relief for certain payments made by RIC on behalf of the Plan and certain reimbursements received by RIC from the Plan in the amount of $775,672, the Department is proposing relief for $701,117. In this regard, of the $775,672 for which the applicant requested relief, the Department has disallowed, for various reasons discussed in the paragraphs immediately below, payments made by RIC on behalf of the Plan and reimbursement received by RIC from the Plan totaling $74,555. Accordingly, RIC has agreed to refund to the Plan an amount equal to $74,555 with interest calculated using the Department's online calculator. Further, within ninety (90) days of the publication in the **Federal Register** of the final exemption for the transactions which are proposed, herein, RIC will file Form 5330 with the IRS and pay any excise taxes, deemed to be due and owing on such Refund Amount.

Specifically, the Department is not proposing relief for certain payments made by RIC to Monticello, an investment advisor/manager to RIC and to the Plan, in the amount of $55,500 that was reimbursed to RIC by the Plan. In this regard, rather than the actual cost of services provided to the Plan by Monticello, the amount of payments made by RIC to Monticello represented an estimated 15 percent (15%) allocation of the cost for the investment management consulting services provided by Monticello both to the Plan and to RIC.

Further, the Department is not proposing relief for a certain payment made by RIC to the Department in the amount of $150 that was reimbursed to RIC by the Plan. In this regard, the applicant did not provide documentation that such amount was a Plan expense.

In addition the Department is not proposing relief for payments made by RIC to the IRS that was reimbursed to RIC by the Plan in the amount of $375 for fees for a Voluntary Correction Program filing which has been deemed a "settlor function," as set forth on January 18, 2001, in Advisory Opinion 2001–01A (AO 2001–01).[11]

Finally, the Department is not proposing relief for certain payments made by RIC to Deloitte, an accountant for the Plan and for RIC, in the amount of $18,530 that was reimbursed to RIC by the Plan. The $18,530 amount consists of overrun charges of $14,530 and out-of-pocket expenses of $4,000 which were paid to Deloitte by RIC and then subsequently reimbursed to RIC by the Plan. The Department is not proposing relief for the $14,530 paid by RIC on behalf of the Plan and subsequently reimbursed to RIC by the Plan, because, RIC does not have a specific invoice to document this amount was a Plan audit expense. Further, the Department is not proposing relief for an additional $4,000 in out-of-pocket expenses paid to Deloitte by RIC on behalf of the Plan and subsequently reimbursed to RIC by the Plan. In this regard, RIC has failed to sufficiently document that the $4,000 amount represented the correct allocation of out-of-pocket expenses to the Plan.

10. The Department has determined to provide relief, herein, for Advances made by RIC on behalf of the Plan, during the period from September 28, 2006, through June 2, 2009, and which were reimbursed to RIC by the Plan, at least sixty (60) days but no more than 365 days from the date of each such Advance to the following Service Providers in the following amounts:

(a) For Advances to Hewitt by RIC and for reimbursements of such Advances by the Plan to RIC in an amount totaling $478,857;

(b) For Advances to IRS by RIC and for reimbursements of such Advances by the Plan to RIC in amounts totaling $700, provided that such Advances were not expenses associated with settlor functions, as set forth in AO 2001–01;

(c) For Advances for the payment of premiums to the PBGC by RIC and to reimbursements of such Advances by the Plan to RIC in amounts totaling $139,060, where the payment of PBGC premiums by a plan is permitted under Title IV of the Act;[12] and

(d) For Advances to Deloitte by RIC and to reimbursements by the Plan to RIC in amounts totaling $82,500.

11. It is represented that the total amount of Advances which were made on behalf of the Plan by RIC to the Service Providers during the period from September 28, 2006, through June 2, 2009, and which were reimbursed to RIC by the Plan at least sixty (60) days but not more than 365 days after the date of each such Advance is $701,117.

12. The applicant represents that the transactions which are the subject of this proposed exemption were in the interest of the Plan, because the Advances made by RIC to the Service Providers on behalf of the Plan, permitted the Plan to keep in the trust, until such time as the Advances were

[10] The Department, herein, is expressing no views on the conclusions reached regarding the application of PTE 80–26 to these amounts.

[11] In AO 2001–01, the Department expressed its view that in the context of tax-qualification activities, that "the formation of a plan as a tax-qualified plan is a settlor activity for which a plan may not pay. Where a plan is intended to be a tax-qualified plan, however, implementation of this settlor decision may require plan fiduciaries to undertake activities relating to maintaining the plan's tax-qualified status for which a plan may pay reasonable expenses (*i.e.,* expenses reasonable in light of the services rendered). Implementation activities might include drafting plan amendments required by changes in the tax law, nondiscrimination testing, and requesting IRS determination letters. If, on the other hand, maintaining the plan's tax-qualified status involves analysis of options for amending the plan from which the plan sponsor makes a choice, the expenses incurred in analyzing the options would be settlor expenses."

[12] Section 4007(a) of Title IV of the Act provides, in part, that the "designated payor" of each plan shall pay premiums imposed by the PBGC when they are due. Section 4007(e)(1)(A) of Title IV of the Act defines the term, "designated payor," to mean either the "contributing sponsor" or the plan administrator, in the case of a single-employer plan. Section 29 CFR 2610.26(a) of the PBGC regulations clarifies that both the plan administrator and the contributing sponsor of a single employer plan are liable for premiums. With respect to ongoing plans, the PBGC has interpreted these provisions to permit the payment of premiums from plan assets.

reimbursed to RIC by the Plan, such amounts as would otherwise have been payable to such Service Providers. In addition, it is represented that the Plan retained any earnings and interest made from the amounts that remained invested in the trust for a longer period of time than were the Plan to have paid off expenses directly to the Service Providers as each such expense became due. Further, it is represented that there is no cost to the Plan, because RIC did not charge interest or fees to the Plan in connection with the transactions which are the subject of this proposed exemption.

13. The applicant represents that the proposed exemption is feasible. In this regard, relief is requested for a finite number of Advances that occurred for the period from September 28, 2006, through June 2, 2009.

14. The applicant represents that the proposed exemption provides sufficient safeguards for the protection of the Plan and its participants and beneficiaries. In this regard, it is represented that all of the requirements of PTE 80–26, as amended, effective December 15, 2004, were satisfied for the period from September 28, 2006, through June 2, 2009, except for the requirement, as set forth in Section IV (f)(1) of PTE 80–26, as amended. In this regard, Section IV (f)(1) of PTE 80–26 requires that loans made on or after April 7, 2006, with a term of sixty (60) days or longer must be made pursuant to a written loan agreement that contains all of the material terms of such loan.

In addition, Deloitte, an independent, qualified auditor: (a) Obtained a schedule prepared by Plan management (the Schedule) of Plan expenses, for the period September 28, 2006, through June 2, 2009, which were paid by RIC on behalf of the Plan; (b) tested the arithmetic accuracy of the Schedule and noted no errors; (c) reconciled each amount on the Schedule to a corresponding amount posted on RIC's miscellaneous receivables ledger and noted no differences; and (d) for all Plan reimbursements to RIC listed on the Schedule, reconciled the amount and date to a copy of the wire transfer to RIC's bank statement and noted no differences.

15. It is represented that on September 1, 2009, RIC entered into an interest-free written revolving loan agreement for a principal amount of $1 million or such lesser amount as shall be advanced from time to time. Such principal amount must be paid in full at least annually by the month of August, or as soon as administratively practicable thereafter. The principal may be prepaid in whole or in part at any time without penalty. All payments are applied to reduce the principal amount in the order of the earliest to the latest of the payments advanced by RIC. RIC has not sought relief for such future transactions in reliance on the belief that this revolving loan agreement between the RIC and the Plan satisfies the requirements of PTE 80–26.[13]

16. In summary, the applicant represents that the subject transactions satisfy the statutory criteria of section 408(a) of the Act and section 4975(c)(2) of the Code because:

(a) During the period from September 28, 2006, through June 2, 2009, when RIC made each of the Advances and during the period of at least sixty (60) days but no more than 365 days after the date of each such Advance, when RIC received each of the reimbursements, all of the requirements of PTE 80–26, as amended, effective December 15, 2004, were satisfied, except for the requirement, as set forth in Section IV (f)(1) of PTE 80–26;

(b) With regard to any reimbursement covered by the proposed exemption, Deloitte, an independent, qualified auditor certifies that such reimbursement matches each of the Advances, during the period from September 28, 2006, through June 2, 2009, made by RIC to the Service Providers on behalf of the Plan; and such reimbursements were made by the Plan to RIC during the period at least sixty (60) days but no more than 365 days after the date of each such Advance;

(c) The Advances made by RIC to the Service Providers, during the period from September 28, 2006, through June 2, 2009, were for the payment of ordinary operating expenses of the Plan which were properly incurred on behalf of the Plan;

(d) Within ninety (90) days of the publication in the **Federal Register** of the final exemption for the transactions which are the subject of this proposed exemption, RIC will refund to the Plan an amount equal to $74,555. Such Refund Amount represents the total for certain reimbursements to RIC by the Plan in connection with payments by RIC to Monticello, Deloitte, IRS, and the Department in amounts, respectively of $55,500, $18,530, $375, and $150. Furthermore, RIC will refund to the Plan an additional amount attributable to lost earnings experienced by the Plan on the Refund Amount, and interest on such lost earnings, for the period from April 7, 2006, to the date upon which RIC has returned to the Plan the entire Refund Amount, the lost earnings on such Refund Amount, plus interest on such lost earnings. For the purpose of calculating the lost earnings on the Refund Amount due to the Plan, plus interest, on such lost earnings, RIC will use the Online Calculator for the Voluntary Fiduciary Correction Program that appears on the Web site of the Employee Benefits Security Administration; and

(e) Within ninety (90) days of the publication in the **Federal Register** of the final exemption for the transactions which are the subject of this proposed exemption, RIC must file a Form 5330 with the IRS and pay to the IRS all applicable excise taxes, and any interest on such excise taxes deemed to be due and owing with respect to the Refund Amount.

[13] The Department is offering no view herein, as to whether the entry into a revolving loan agreement between RIC and the Plan is covered by the relief available under PTE 80–26, as amended, nor is the Department opining as to whether the entry into such a revolving loan agreement satisfies the conditions of PTE 80–26, as amended. Further, the Department is not providing, herein, any relief with respect to the entry between RIC and the Plan into any revolving loan agreement.

Notice to Interested Persons

The persons who may be interested in the publication in the **Federal Register** of the Notice of Proposed Exemption (the Notice) include participants and beneficiaries of the Plan and retirees receiving benefits.

It is represented that each of these classes of interested persons will be notified of the publication of the Notice by first class mail, within fourteen (14) days of publication of the Notice in the **Federal Register**. Such mailing will contain a copy of the Notice, as it appears in the **Federal Register** on the date of publication, plus a copy of the Supplemental Statement, as required, pursuant to 29 CFR 2570.43(b)(2), which will advise all interested persons of their right to comment and to request a hearing.

All written comments and/or requests for a hearing must be received by the Department from interested persons within 44 days of the publication of this proposed exemption in the **Federal Register.**

FOR FURTHER INFORMATION CONTACT: Ms. Angelena C. Le Blanc of the Department, telephone (202) 693–8540. (This is not a toll-free number.)

Chrysler Group LLC and Daimler AG, Located in Auburn Hills, Michigan and Stuttgart, Germany, Respectively

Exemption Application Number D–11603–07.

Proposed Exemption

The Department is considering granting an exemption under the

authority of section 408(a) of the Employee Retirement Income Security Act of 1974, as amended (ERISA or the Act), and section 4975(c)(2) of the Internal Revenue Code of 1986, as amended (the Code), and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).[14]

Section I—Chrysler Group Transactions

If the proposed exemption is granted, the restrictions of sections 406(a)(1)(A) and 406(b)(1) and (2) of ERISA and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) and (E) of the Code, shall not apply to the contribution (the Contribution) of notes issued by Daimler AG (the Daimler Notes) by Chrysler Group LLC (Chrysler Group) to certain employee benefit plans sponsored by the Chrysler Group (the Plans), provided that the conditions set forth in section III have been met.

Section II—Daimler AG Transactions

If the proposed exemption is granted, the restrictions of section 406(a)(1)(A) and (B) of ERISA, and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) and (B) of the Code, shall not apply to the issuance by Daimler of the Daimler Notes for purposes of the Contributions pursuant to an agreement that was previously entered into while Daimler was a party-in-interest to the Plans, provided that the condition set forth in section IV is met.

Section III—Conditions Applicable to Section I

(a) The terms of each Contribution are consistent with the terms set forth in a settlement agreement (the Settlement Agreement), effective as of June 5, 2009, between/among CG Investment Group, LLC, CG Investor, LLC, Chrysler Holding LLC, CARCO Intermediate HOLDCO I LLC, Chrysler LLC, Daimler AG, Daimler North America Finance Corporation, Daimler Investments US Corporation, and the Pension Benefit Guaranty Corporation (the PBGC). Notwithstanding the above, and also for purposes of condition (c) below, the terms of the Contributions shall not be viewed as being inconsistent with the terms of the Settlement Agreement solely because the Contributions take into account the March 1, 2010 merger (the Merger) of the Global Engineering Manufacturing Alliance UAW Pension Plan into the Pension Agreement between Chrysler Group LLC and the UAW, which occurred after the effective date of the Settlement Agreement;

(b) The fair market value of each Daimler Note will be determined as of the date of the Contributions, by a qualified independent appraiser;

(c) The fair market value of each Daimler Note contributed to a Plan will represent an amount that equates to the amount contemplated for such Plan under the Settlement Agreement;

(d) Each Daimler Note will represent not more than 20% of the total fair market value of the Plan that receives such Note at the time of its Contribution;

(e) Each Plan may immediately sell the Daimler Note it receives pursuant to a Contribution, except that neither Chrysler Group nor any of its affiliates or subsidiaries may be a party to such sale. Notwithstanding the above, restrictions may be imposed on a Plan's ability to sell its Daimler Note if such restrictions are required under State or Federal securities laws or otherwise required by the terms of such Daimler Note;

(f) The Plans do not waive any rights or claims in connection with the Contributions;

(g) The Plans do not pay any fees, costs, or other charges in connection with the Contributions; and

(h) Chrysler Group shall provide the PBGC with written evidence that Chrysler Group: (1) Contributed the Daimler Notes to the Plans; and (2) gave the Plans' trustee instructions regarding the allocation of the Daimler Notes. Such written evidence must be provided within five business days after the receipt by Chrysler Group of such Notes.

Section IV—Conditions Applicable to Section II

(a) Daimler's entering into the Daimler Notes is not part of an arrangement, agreement, or understanding designed to benefit Daimler.

Effective Date: If granted, this proposed exemption will be effective as of September 16, 2010.

Summary of Facts and Representations

1. The applicants are Chrysler Group LLC, (Chrysler Group) and Daimler AG (Daimler). Chrysler Group is the entity that acquired certain of the assets of Chrysler LLC (Chrysler LLC) on June 10, 2009 in a transaction approved by the United States Bankruptcy Court. Chrysler Group sponsors various defined benefit plans (the Plans) which cover employees of Chrysler Group and its affiliates.[15] Chrysler Group describes the Plans as: (1) The Chrysler Group LLC Pension Plan, with 38,635 participants and beneficiaries and approximately $2,712,643,000 in total assets as of April 14, 2010; (2) the JEEP Corporation-UAW Retirement Income Plan, with 8,705 participants and beneficiaries and approximately $774,824,500 in total assets as of April 14, 2010; (3) the Pension Agreement between Chrysler Group and the UAW, with 131,604 participants and beneficiaries and approximately $11,600,000,000 in total asset as of April 14, 2010; and (4) the American Motors Union Retirement Income Plan, with 10,496 participants and beneficiaries and approximately $701,639,500 in total assets as of April 14, 2010.

2. Daimler is an automotive manufacturer with its corporate headquarters located in Stuttgart, Germany. Daimler states that, at the time the arrangements described below were negotiated, agreed to, and entered into, Daimler was a "party in interest" to the Plans, as such term is defined in section 3(14) of ERISA. In this regard, during that period, Daimler had a 19.9% ownership interest in Chrysler LLC: The sponsor of the Plans.[16]

3. Chrysler Group and Daimler (collectively, the Applicants) state that, on May 13, 2007, Daimler entered into an agreement with the PBGC (the 2007 PBGC Agreement), whereby Daimler agreed to guarantee up to $1 billion of unfunded liabilities of the Plans if: (i) One or more of the Plans were terminated in an involuntary or a distress termination; and (ii) upon the occurrence of specified events, including certain "change of control" transactions. In a Binding Term Sheet dated April 27, 2009 (the Binding Term Sheet), the PBGC agreed to reduce the amount of this guarantee to $200 million and, in connection therewith, Daimler agreed to pay $600 million directly to the Plans.[17] The Binding Term Sheet provides that these payments are to be made in three equal installments of $200 million each, with the second and third installments to be made on the first and second anniversaries of the date of a final settlement agreement. The Binding Term sheet provided further that Chrysler LLC would have no right, title

[14] For purposes of this proposed exemption, references to section 406 of ERISA should be read to refer as well to the corresponding provisions of section 4975 of the Code.

[15] Hereinafter, unless expressly stated otherwise, the term "Chrysler Group" shall mean Chrysler LLC (for events that occurred prior to June 10, 2009) or Chrysler Group (for events that occur after June 9, 2009).

[16] The Applicants represent that, effective as of June 4, 2009, Daimler redeemed its interest in Chrysler LLC, and, as of that date, Daimler was no longer a party in interest to the Plans.

[17] The Applicants represent that Daimler also obtained releases for certain claims that are not relevant to the transactions described herein.

or interest in the payments, which were intended to belong exclusively and unconditionally to the Plans.

4. Chrysler Group represents that, on June 5, 2009, Chrysler LLC and various of its shareholders, Daimler and various of its affiliates, incorporated the terms of the Binding Term Sheet into a settlement agreement (the Settlement Agreement) with the Pension Benefit Guaranty Corporation (the PBGC). Chrysler Group states that the Settlement Agreement expressly supersedes the Binding Term Sheet. Under the terms of the Settlement Agreement, the PBGC agreed to release Daimler from its $1 billion guaranty and, in exchange, Daimler agreed to pay $600 million in three $200 million installments to Chrysler Group (the Installment Payments).[18] Chrysler Group represents that Daimler made the first $200 million Installment Payment to Chrysler Group, in cash, on June 15, 2009; and Chrysler Group, upon receipt of this payment, immediately contributed $200 million in cash to the Plans. Chrysler Group represents further that Daimler made a second $200 million Installment Payment to Chrysler Group, in cash, on June 7, 2010; and Chrysler Group, upon receipt of this payment, immediately contributed $200 million in cash to the Plans. Chrysler Group represents that, to date, of the $400 million in cash transferred from Chrysler Group by the Plans: (1) The JEEP Corporation-UAW Retirement Income Plan received approximately $62.8 million; (2) the Pension Agreement between Chrysler Group and the UAW received approximately $327.2 million; and (3) the American Motors Union Retirement Income Plan received approximately $9.6 million. Chrysler Group represents that these amounts were determined in accordance with the terms set forth in the Settlement Agreement (after taking into account the merging two employee benefit plans covered by the Settlement Agreement). Chrysler Group states that such apportionment reflects the terms of the Settlement Agreement, and takes into account, among other things, certain funding characteristics of the Plans.

5. The Settlement Agreement provides that the third Installment Payment may be achieved in one of two ways: (1) In the form of a $200 million cash payment by Daimler to Chrysler Group by June 7, 2011 (the Installment Due Date), after which Chrysler Group must immediately transfer $200 million in cash to the Plans; or (2) by means of four notes issued by Daimler (the Daimler Notes) and delivered to Chrysler Group, pursuant to an arrangement whereby Chrysler is obligated to immediately contribute the Notes (the Contributions) to the Plans.

6. Chrysler Group states that the Contributions could be viewed as violating sections 406(a)(1)(A) and 406(b)(1) and (b)(2) of ERISA since the Contributions would involve an in-kind contribution by Chrysler Group to the Plans, which are defined benefit plans. In addition, Daimler notes that, when the parties entered into the Binding Term Sheet and negotiated the Settlement Agreement, Daimler was a party in interest to the Plans. Daimler believes that its agreement to issue the Daimler Notes as well as the actual entering into of the Daimler Notes under an arrangement whereby the Daimler Notes will be Contributed by Chrysler Group to the Plans, as such acts are contemplated by the Binding Term Sheet and the Settlement Agreement, could therefore be viewed as an impermissible extension of credit or sale or exchange in violation of sections 406(a)(1)(A) and (B) of ERISA.

7. Chrysler Group views the deliverance of the Daimler Notes to Chrysler Group for purposes of the Contributions as being more beneficial to the Plans than the alternative, which is a cash payment by Daimler to Chrysler Group on the Installment Due Date. In this regard, Chrysler Group represents that, once a Daimler Note is transferred by the Chrysler Group to a Plan, as is required under the Settlement Agreement, the obligation under the Note would run directly from Daimler to the Plan. Chrysler Group states that this arrangement significantly reduces the ability of Chrysler Group's creditors to reach the third Installment Payment. Additionally, once a Daimler Note is transferred to a Plan, the Plan could immediately sell the Note to parties other than Chrysler Group, subject to certain restrictions required by applicable securities laws. Accordingly, a Plan may receive the proceeds from the sale of a Daimler Note prior to the Installment Due Date.

8. Chrysler Group represents that the Contributions would be structured in a manner that is protective of the Plans. In this regard, following a Contribution, a Daimler Note will represent not more than 20 percent of the total fair market value of each Plan that receives such Note. Additionally, the Plans will not pay any fees, costs, or other charges in connection with the Contributions. Chrysler Group represents further that the fair market value of each Daimler Note will be determined as of the date of the Contribution, by a qualified independent appraiser. In this regard, Chrysler Group has selected PriceWaterhouseCoopers (PWC) to determine the fair market value of the Daimler Notes. Chrysler Group represents that PWC is independent of Chrysler Group, having received less than one percent of its revenue from Chrysler Group over the last two fiscal years. In addition, Chrysler Group states that PWC anticipates receiving less than one percent of its revenue from Chrysler Group during the current fiscal year.

9. Chrysler Group states that the exemption, if granted, will be administratively feasible because it involves a finite one-time transaction, and Daimler has no ownership in or on-going relationship with Chrysler Group or any of its affiliates. According to Chrysler Group, the internal fiduciaries of the Plans would have no hesitation to enforce the claims of the Plans in the unlikely event that Daimler failed to make a payment on the Daimler Note, and the internal fiduciaries would have no conflict of interest that could cloud their judgment in this regard. Chrysler Group states also that the PBGC, as a party to the Settlement Agreement, has the full right on its own initiative to enforce the terms of the Settlement Agreement, including the obligation of Daimler to make the third $200 million Installment Payment to the Plans.

10. Chrysler Group represent that, in addition to the safeguards described above, the Plans will not waive any rights or claims in connection with the Contributions. With respect to the issuance by Daimler of the Daimler Notes pursuant to an arrangement set forth while Daimler was a party-in-interest to the Plans, Daimler states that Daimler's entering into the Daimler Note will not be part of an arrangement, agreement, or understanding designed to benefit Daimler.

11. Chrysler Group states that the proposed transactions meet the requirements set forth in section 408(a) of ERISA since, among other things:

(a) The terms of each Contribution will be consistent with the terms of the Settlement Agreement, after taking into account the Merger;

(b) The fair market value of each Daimler Note will be determined as of the date of the Contribution, by a qualified independent appraiser;

(c) The fair market value of each Daimler Note contributed to a Plan will represent an amount that equates to the amount contemplated for such Plan under the Settlement Agreement, after taking into account the Merger;

(d) Each Daimler Note will represent not more than 20% of the total fair

[18] Hereinafter, the term "Chrysler Group" shall refer also to Chrysler LLC.

market value of the Plan that receives such Note at the time of the Contribution;

(e) With only limited exceptions, each Plan may immediately sell the Daimler Note it receives pursuant to a Contribution;

(f) The Plans will not waive any rights or claims in connection with the Contributions;

(g) The Plans will not pay any fees, costs, or other charges in connection with the Contributions; and

(h) Chrysler Group will provide the PBGC with written evidence that Chrysler Group: (1) Contributed the Daimler Notes to the Plans; and (2) gave the Plans' trustee instructions regarding the allocation of the Daimler Notes. Such written evidence will be provided within five business days after the receipt by Chrysler Group of such Notes.

12. Daimler states that the issuance by Daimler of the Daimler Notes pursuant to the Settlement Agreement meets the requirements set forth in section 408(a) of ERISA since Daimler's entering into the Daimler Note will not be part of an arrangement, agreement, or understanding designed to benefit Daimler.

Notice to Interested Persons

Chrysler Group requests that notice be provided by posting a copy of the proposed exemption wherever employee notices are posted in the work places. In addition, Chrysler Group represents that it will work with the UAW, the union representing many of the participants in the Plans, to post a copy of the notice in the union halls and arrange for a copy of the proposal to be printed in the union newspapers. Chrysler Group will also arrange for a copy of the proposed exemption to be printed in the local newspapers covering the general vicinity of Chrysler Group's current and closed plants and facilities. The notices shall advise each recipient of the recipient's right to provide comments to the Department and/or to request a hearing with respect to the proposed exemption and the due date for any such comments/request.

Such notice will be completed within 60 days of the issuance of the proposed exemption. Any written comments must be received by the Department from interested persons within 75 days of the publication of this proposed exemption in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Chris Motta of the Department, telephone (202) 693–8544. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 10th of September 2010.

Ivan Strasfeld,

Director of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. 2010–23059 Filed 9–15–10; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employment and Training Administration

Renewal of the Advisory Committee on Apprenticeship (ACA), and an Open Meeting

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice

SUMMARY: Pursuant to section 10 of the Federal Advisory Committee Act (Pub. L. 92 463; 5 U.S.C. APP. 1), notice is hereby given to announce the renewal of the ACA, the new membership appointments, and an open meeting being held on October 27–28, 2010.

The Employment and Training Administration (ETA) hereby announces the renewal of the ACA and that membership appointments have been made to fill committee vacancies. The ACA is an advisory board, authorized by 29 U.S.C. 50a, which permits the Secretary of Labor to appoint a national advisory committee to serve without compensation, and complies with the requirements of the Federal Advisory Committee Act (5 U.S.C., App.). The ACA will provide advice and recommendations to the Secretary of Labor on a variety of matters facing the National Registered Apprenticeship System. The ACA membership is comprised of individuals that represent labor unions, employers, and members of the public.

All members were appointed in July 2010, for two-year terms expiring in July 2012. Pursuant to the ACA Charter, the National Association of State and Territorial Apprenticeship Directors (NASTAD) and the National Association of Governmental Labor Officials (NAGLO) are both represented by their current Presidents on the public group of the ACA. The Secretary has appointed Ms. Phaedra Ellis-Lamkins, Chief Executive Officer from Green for All as the Chairperson of the ACA.

TIME AND DATE: An open meeting of the ACA is scheduled for October 27–28, 2010, in Washington, DC. The meeting will begin at approximately 9 a.m. on Wednesday, October 27, 2010, and continue until approximately 5 p.m. The meeting will reconvene on Thursday, October 28, 2010, at approximately 9 a.m. and adjourn at approximately 5 p.m.

PLACE: U.S. Department of Labor, Frances Perkins Building, the Great Hall, 200 Constitution Avenue, NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Mr. John V. Ladd, Administrator, Office of

Apprenticeship, ETA, U.S. Department of Labor, Room N–5311, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone: (202) 693–2796, (this is not a toll-free number).

STATUS: Members of the public are invited to attend the proceedings. If individuals have special needs and/or disabilities that will require special accommodations, please contact Ms. Kenya Huckaby on (202) 693–3795 no later than Wednesday, October 20, 2010, to request for arrangements to be made. Any member of the public who wishes to file written data or comments pertaining to the agenda may do so by sending the data or comments to Mr. John V. Ladd, Administrator, Office of Apprenticeship, ETA, U.S. Department of Labor, Room N–5311, 200 Constitution Avenue NW., Washington, DC 20210. Such submissions must be sent by Monday, October 18, 2010, to be included in the record for the meeting.

The agenda is subject to change due to time constraints and priority items which may come before the ACA between the time of this publication and the scheduled date of the ACA meeting.

Matters To Be Considered

The agenda will focus on the following topics:

- Welcome and Introduction of ACA Members
- Overview of the Administration's Priorities and Expectation of the ACA
- Selection of the ACA Co-Chairs
- Regulatory Update on CFR 29.29 and CFR 29.30
- Future Opportunities and Challenges for the National Apprenticeship System
- Workgroup Formation and Discussion

SUPPLEMENTARY INFORMATION:

The following is a list of the ACA members by group:

Labor Representatives

Mr. Michael Arndt, Director of Training, United Association of Journeymen & Apprentices of the Plumbing & Pipe Fitting Industry of the U.S. & Canada, Annapolis, Maryland.

Mr. Stephen A. Brown, Director, Construction Training Department, International Union of Operating Engineers, Washington, DC.

Mr. Michael Callanan, Executive Director, National Joint Apprenticeship and Training Committee for the Electrical Industry, Upper Marlboro, Maryland.

Mr. Thomas A. Haun, IIIAFT Administrator, Heat and Frost Insulators and Allied Workers Int'l Union, Lanham, Maryland.

Mr. William K. Irwin, Jr., Executive Director, Carpenters International Training Fund, Las Vegas, Nevada.

Mr. D. Michael Langford, National President, Utility Workers Union of America, AFL–CIO, Washington, DC.

Mr. John A. Mason, Director, Paul Hall Institute, Seafarers International Union, Piney Point, Maryland.

Ms. Bernadette Oliveira-Rivera, Fund Administrator, Laborers' International Union of North America, Pomfret Center, Connecticut.

Ms. Charissa Raynor, Executive Director, Service Employees International Union Healthcare NW Training Partnership, Federal Way, Washington.

Mr. Daniel Villao, State Director, California Construction Academy, UCLA Downtown Labor Center, Los Angeles, California.

Mr. Michael L. White, Executive Director, Apprenticeship and Training International, Union of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Washington, DC.

Employer Representatives

Mr. Robert Baird, Vice President, Training and Development, Independent Electrical Contractors, Inc., Alexandria, Virginia.

Mr. Gregory A. Chambers, Director of Corporate Compliance, Oberg Industries, Inc., Freeport, Pennsylvania.

Ms. Liz Elvin, Senior Director, Workforce Development, AGC of America, Arlington, Virginia.

Mr. Frederick N. Humphreys, President and CEO, Home Builders Institute, Washington, DC.

Mr. Stephen M. Jones, Training Project Manager, Corporate Training Development, United Parcel Service, Atlanta, Georgia.

Mr. Wes Jurey, President and Chief Executive Officer, Arlington Texas Chamber of Commerce, Arlington, Texas.

Mr. Stephen C. Mandes, Executive Director, National Institute for Metalworking Skills, Inc., Fairfax, Virginia.

Mr. Todd Staub, Director of Workforce Development, Chapter Services Group, Associated Builders and Contractors, Arlington, Virginia.

Ms. Robyn Stone, Executive Director, Institute for the Future of Aging Services, American Association for Homes and Services for the Aging, Washington, DC.

Public Representatives

Ms. Connie Ashbrook, Director, Oregon Tradeswomen, Inc., Portland, Oregon.

Ms. Janet B. Bray, Executive Director, Association for Career and Technical Education, Alexandria, Virginia.

Mr. Andrew Cortés, Director of YouthBuild & Building Futures, The Providence Plan, Providence, Rhode Island.

Ms. Phaedra Ellis-Lamkins (Chairperson), Chief Executive Officer, Green for All, Oakland, California.

Ms. Emma Oppenheim, Manager, Workforce Development Policy Initiatives, National Council of La Raza, Washington, DC.

Dr. Monte Perez, President, Riverside Community College, Moreno Valley, California.

Mr. James A. Reed, Vice President, Workforce Development Division, National Urban League, New York, New York.

Mr. Martin Simon, Program Officer, Workforce Development, National Governors Association, Washington, DC.

Dr. Abel Valenzuela, Jr., Professor, UCLA's Cesar Chavez Department of Chicana and Chicano Studies, Los Angeles, California.

Ex-Officio Representatives

Ms. Jane Oates, Assistant Secretary, Employment and Training Administration (ETA), U.S. Department of Labor, Washington, DC.

Dr. Brenda Dann-Messier, Assistant Secretary, Vocational and Adult Education (OVAE), U.S. Department of Education, Washington, DC.

Mr. Barry Johnson, Senior Advisor and Director, Strategic Initiatives, Economic Development Administration (EDA), U.S. Department of Commerce, Washington, DC.

Any member of the public who wishes to speak at the meeting must indicate the nature of the intended presentation and the amount of time needed by furnishing a written statement to the Designated Federal Official, Mr. John V. Ladd, by Monday, October 18, 2010. The Chairperson will announce at the beginning of the meeting the extent to which time will permit the granting of such requests.

Signed at Washington, DC, this 7th day of September 2010.

Jane Oates,

Assistant Secretary, Employment and Training Administration.

[FR Doc. 2010–23061 Filed 9–15–10; 8:45 am]

BILLING CODE 4510–FR–P

LEGAL SERVICES CORPORATION

Sunshine Act Meeting of LSC Board of Directors and Its Finance Committee

TIME AND DATE: The Legal Services Corporation ("LSC" or "Corporation") Board of Directors ("Board") and its Finance Committee will meet consecutively on September 21, 2010, with the Finance Committee convening at 10 a.m., Eastern Time, and the Board of Directors convening promptly upon adjournment of the committee meeting.

LOCATION: Legal Services Corporation Headquarters, 3rd Floor Conference Center, 3333 K Street, NW., Washington, DC.

STATUS OF MEETING:

- *Finance Committee*—Open.
- *Board of Directors*—Open, except that a portion of the meeting of the Board of Directors may be closed to the public pursuant to a vote of the Board of Directors to consider and perhaps act on an employee benefits matter and be briefed on internal personnel matters.[1]

A *verbatim* written transcript will be made of the closed session of the Board meeting. However, the transcript of any portions of the closed session falling within the relevant provisions of the Government in the Sunshine Act, 5 U.S.C. 552b(c)(2) and the corresponding provisions of the Legal Services Corporation's implementing regulation, 45 CFR 1622.5(a), will not be made available for public inspection. A copy of the General Counsel's Certification that in his opinion the closing is authorized by law will be made available upon request.

PUBLIC OBSERVATION: For all meetings and portions thereof open to public observation, members of the public that wish to listen to the proceedings may do so by following the telephone call-in directions given below. You are asked to keep your telephone muted to eliminate background noises. From time to time the Chairman may solicit comments from the public.

CALL-IN DIRECTIONS FOR OPEN SESSION(S):

♦ *Call toll-free number:* 1–(866) 451–4981;

♦ When prompted, enter the following numeric pass code: 5907707348;

♦ When connected to the call, please "*MUTE*" your telephone immediately.

MATTERS TO BE CONSIDERED:

Finance Committee

Agenda

Open Session

1. Approval of agenda.
2. Approval of minutes of the Committee's meeting of July 31, 2010.
3. Public Comment.
—Robert Stein, on behalf of SCLAID
—Don Saunders, on behalf of NLADA
—Other Public Comments
4. Presentation on Management's Recommendation for LSC's Fiscal Year ("FY") 2012 Budget Request to Congress.
—Presentation by David Richardson, LSC's Treasurer & Comptroller
—Comments by John Constance, LSC's Director, Office of Government Relations & Public Affairs
—Comments by Jeffrey Schanz, LSC's Inspector General
5. Consider and act on recommending to the Board *Resolution 2010–016: A Resolution Adopting LSC's FY 2012 Budget Request to Congress.*
6. Other Business.
7. Consider and act on adjournment of meeting.

Board of Directors

Agenda

Open Session

1. Approval of agenda.
2. Approval of minutes of the Board's open session meeting of July 31, 2010.
3. Chairman's Report.
4. Consider and act on the *Board Committee Protocol & Self Evaluation Tool.*
—Presentation by John Constance, Director, Office of Government Relations & Public Affairs ("GRPA").
5. Consider and act on *Resolution 2010–016: A Resolution Adopting LSC's Fiscal Year 2012 Budget Request to Congress.*
—Presentation by David Richardson, LSC's Treasurer & Comptroller.
—Public Comment.
6. Other Business.
7. Consider and act on whether to authorize an executive session of the Board to address items listed below under *Closed Session.*

Closed Session

7. Consider and act on an employee benefits matter.
—Presentation by Alice Dickerson, Director of LSC's Office of Human Resources ("OHR") and Linda Mullenbach, Senior Assistant General Counsel with LSC's Office of Legal Affairs ("OLA")
8. Briefing on internal personnel matters.
—Presentation by Alice Dickerson, Director, of OHR, Linda Mullenbach, Senior Assistant General Counsel of OLA, and Laurie Tarantowicz, Assistant Inspector General & Counsel to LSC's Inspector General
9. Consider and act on adjournment of meeting.

CONTACT PERSON FOR INFORMATION: Kathleen Connors, Executive Assistant to the President, at (202) 295–1500. Questions may be sent by electronic mail to *FR_NOTICE_QUESTIONS@lsc.gov.*

SPECIAL NEEDS: Upon request, meeting notices will be made available in alternate formats to accommodate visual and hearing impairments. Individuals who have a disability and need an accommodation to attend the meeting may notify Kathleen Connors at (202) 295–1500 or *FR_NOTICE_QUESTIONS@lsc.gov.*

Dated: September 14, 2010.

Patricia D. Batie,

Corporate Secretary.

[FR Doc. 2010–23343 Filed 9–14–10; 4:15 pm]

BILLING CODE 7050–01–P

[1] Any portion of the closed session consisting solely of staff briefings does not fall within the Sunshine Act's definition of the term "meeting" and, therefore, the requirements of the Sunshine Act do not apply to such portion of the closed session. 5 U.S.C. 552b(a)(2) and (b). *See also* 45 CFR 1622.2 & 1622.3.

MILLENNIUM CHALLENGE CORPORATION

[MCC FR 10–10]

Notice of Quarterly Report (April 1, 2010–June 30, 2010)

AGENCY: Millennium Challenge Corporation.

SUMMARY: The Millennium Challenge Corporation (MCC) is reporting for the quarter April 1, 2010 through June 30, 2010, on assistance provided under section 605 of the Millennium Challenge Act of 2003 (22 U.S.C. 7701 *et seq.*), as amended (the Act), and on transfers or allocations of funds to other federal agencies under section 619(b) of the Act. The following report will be made available to the public by publication in the **Federal Register** and on the Internet Web site of the MCC (*www.mcc.gov*) in accordance with section 612(b) of the Act.

Dated: September 9, 2010.

T. Charles Cooper,

Vice President, Congressional and Public Affairs, Millennium Challenge Corporation.

ASSISTANCE PROVIDED UNDER SECTION 605

Projects	Obligated	Objectives	Cumulative disbursements	Measures
Country: Madagascar Year: 2010 Quarter 3 Total Obligation: $87,998,166 Entity to which the assistance is provided: MCA Madagascar Total Quarterly Disbursement: $0				
Land Tenure Project	$30,123,098	Increase Land Titling and Security.	$29,303,833	Area secured with land certificates or titles in the Zones. Legal and regulatory reforms adopted. Number of land documents inventoried in the Zones and Antananarivo. Number of land documents restored in the Zones and Antananarivo. Number of land documents digitized in the Zones and Antananarivo. Average time for Land Services Offices to issue a duplicate copy of a title. Average cost to a user to obtain a duplicate copy of a title from the Land Services Offices. Number of land certificates delivered in the Zones during the period. Number of new guichets fonciers operating in the Zones. The 256 Plan Local d'Occupation Foncier—Local Plan of Land Occupation (PLOFs) are completed.
Financial Sector Reform Project.	25,937,781	Increase Competition in the Financial Sector.	23,535,170	Volume of funds processed annually by the national payment system. Number of accountants and financial experts registered to become CPA. Number of Central Bank branches capable of accepting auction tenders. Outstanding value of savings accounts from CEM in the Zones. Number of MFIs participating in the Refinancing and Guarantee funds. Maximum check clearing delay. Network equipment and integrator. Real time gross settlement system (RTGS). Telecommunication facilities. Retail payment clearing system. Number of CEM branches built in the Zones. Number of savings accounts from CEM in the Zones. Percent of Micro-Finance Institution (MFI) loans recorded in the Central Bank database.
Agricultural Business Investment Project.	13,687,196	Improve Agricultural Projection Technologies and Market Capacity in Rural Areas.	13,581,751	Number of farmers receiving technical assistance. Number of marketing contracts of ABC clients. Number of farmers employing technical assistance. Value of refinancing loans and guarantees issued to participating MFIs (as a measure of value of agricultural and rural loans). Number of Mnistère de l'Agriculture, de l'Elevage et de la Pêche—Ministry of Agriculture, Livestock, and Fishing (MAEP) agents trained in marketing and investment promotion. Number of people receiving information from Agricultural Business Center (ABCs) on business opportunities.
Program Administration* and Control, Monitoring and Evaluation.	18,250,091	.....	17,577,502	
Pending subsequent reports**.	.....	.....	0	

* Program administration funds are used to pay items such as salaries, rent, and the cost of office equipment.

** These amounts represent disbursements made that will be allocated to individual projects in the subsequent quarter(s) and reported as such in subsequent quarterly report(s)

Projects	Obligated	Objectives	Cumulative disbursements	Measures
Country: Honduras Year: 2010 Quarter 3 Total Obligation: $205,000,000 Entity to which the assistance is provided: MCA Honduras Total Quarterly Disbursement: $20,070,438				
Rural Development Project.	67,762,685	Increase the productivity and business skills of farmers who operate small and medium-size farms and their employees.	57,468,393	Number of program farmers harvesting high-value horticulture crops. Number of hectares harvesting high-value horticulture crops. Number of business plans prepared by program farmers with assistance from the implementing entity. Total value of net sales. Total number of recruited farmers receiving technical assistance. Value of loans disbursed to farmers, agribusiness, and other producers and vendors in the horticulture industry, including Program Farmers, cumulative to date, Trust Fund Resources. Number of loans disbursed (disaggregated by trust fund, leveraged from trust fund, and institutions receiving technical assistance from ACDI–VOCA). Number of hectares under irrigation. Number of farmers connected to the community irrigation system.
Transportation Project	119,887,240	Reduce transportation costs between targeted production centers and national, regional and global markets.	102,606,515	Freight shipment cost from Tegucigalpa to Puerto Cortes. Average annual daily traffic volume—CA–5. International roughness index (IRI)—CA–5. Kilometers of road upgraded—CA–5. Percent of contracted road works disbursed—CA–5. Average annual daily traffic volume—secondary roads. International roughness index (IRI)—secondary roads. Kilometers of road upgraded—secondary roads. Average annual daily traffic volume—rural roads. Average speed—Cost per journey (rural roads). Kilometers of road upgraded—rural roads. Percent disbursed for contracted studies. Value of signed contracts for feasibility, design, supervision and program mgmt contracts. Kilometers (km) of roads under design. Number of Construction works and supervision contracts signed. Kilometers (km) of roads under works contracts.
Program Administration* and Control, Monitoring and Evaluation.	17,350,075	.....	10,825,354	
Pending subsequent reports**.	.....	.....	1,521,767	
Projects	Obligated	Objectives	Cumulative disbursements	Measures
Country: Cape Verde Year: 2010 Quarter 3 Total Obligation: $110,078,488 Entity to which the assistance is provided: MCA Cape Verde Total Quarterly Disbursement: $8,145,814				
Watershed and Agricultural Support Project.	12,031,549	Increase agricultural production in three targeted watershed areas on three islands.	9,635,989	Productivity: Horticulture, Paul watershed. Productivity: Horticulture, Faja watershed. Productivity: Horticulture, Mosteiros watershed. Number of farmers adopting drip irrigation: All intervention watersheds (Paul, Faja and Mosteiros) (incremental). Area irrigated with drip irrigation: All intervention watersheds (Paul, Faja and Mosteiros) (incremental). Irrigation Works: Percent contracted works disbursed. All intervention watersheds (Paul, Faja and Mosteiros) (incremental). Number of reservoirs constructed in all intervention watersheds (Paul, Faja and Mosteiros) (incremental).

Projects	Obligated	Objectives	Cumulative disbursements	Measures
Infrastructure Improvement Project.	82,630,208	Increase integration of the internal market and reduce transportation costs.	62,000,390	Number of farmers that have completed training in at least 3 of 5 core agricultural disciplines: All intervention watersheds (Paul, Faja and Mosteiros) (incremental). Travel time ratio: percentage of beneficiary population further than 30 minutes from nearest market. Kilometers of roads rehabilitated. Percent of contracted Santiago Roads works disbursed (cumulative). Percent of contracted Santo Antao Bridge works disbursed (cumulative). Port of Praia: percent of contracted port works disbursed (cumulative). Cargo village: percent of contracted works disbursed (cumulative). Quay 2 improvements: percent of contracted works disbursed (cumulative). Access road: percent of contracted works disbursed (cumulative).
Private Sector Development Project.	1,931,223	Spur private sector development on all islands through increased investment in the priority sectors and through financial sector reform.	1,406,654	MFI portfolio at risk, adjusted (level).
Program Administration* and Control, Monitoring and Evaluation.	13,485,508	.....	11,095,940	
Pending subsequent reports**.	.....	.....	480	

Projects	Obligated	Objectives	Cumulative disbursements	Measures
Country: Nicaragua Year: 2010 Quarter 3 Total Obligation: $113,599,751 Entity to which the assistance is provided: MCA Nicaragua Total Quarterly Disbursement: $4,666,842				
Property Regularization Project.	7,205,205	Increase Investment by strengthening property rights.	5,386,594	Automated database of registry and cadastre installed in the 10 municipalities of Leon. Value of land, urban. Value of land, rural. Time to conduct a land transaction. Number of additional parcels with a registered title, urban. Number of additional parcels with a registered title, rural. Area covered by cadastral mapping. Cost to conduct a land transaction.
Transportation Project	57,999,999	Reduce transportation costs between Leon and Chinandega and national, regional and global markets.	53,642,992	Annual Average daily traffic volume: N1 Section R1. Annual Average daily traffic volume: N1 Section R2. Annual Average daily traffic volume: Port Sandino (S13). Annual Average daily traffic volume: Villanueva-Guasaule Annual. Average daily traffic volume: Somotillo-Cinco Pinos (S1). Annual average daily traffic volume: León-Poneloya-Las Peñitas. International Roughness Index: N–I Section R1. International Roughness Index: N–I Section R2. International Roughness Index: Port Sandino (S13). International roughness index: Villanueva-Guasaule. International roughness index: Somotillo-Cinco Pinos. International roughness index: León-Poneloya-Las Peñitas. Kilometers of NI upgraded: R1 and R2 and S13. Kilometers of NI upgraded: Villanueva-Guasaule.

Projects	Obligated	Objectives	Cumulative disbursements	Measures
Rural Development Project.	32,897,500	Increase the value added of farms and enterprises in the region.	25,828,413	Kilometers of S1 road upgraded. Kilometers of S9 road upgraded. Number of beneficiaries with business plans. Numbers of *manzanas (1 Manzana = 1.7 hectares),* by sector, harvesting higher-value crops. Number of beneficiaries with business plans prepared with assistance of Rural Business Development Project. Number of beneficiaries implementing Forestry business plans under Improvement of Water Supplies Activity. Number of Manzanas reforested. Number of Manzanas with trees planted.
Program Administration*, Due Diligence, Monitoring and Evaluation.	15,497,047	.....	11,980,280	
Pending subsequent reports**.	.....	.....	1,509,801	

Projects	Obligated	Objectives	Cumulative disbursements	Measures
Country: Georgia Year: 2010 Quarter 3 Total Obligation: $395,300,000 Entity to which the assistance is provided: MCA Georgia Total Quarterly Disbursement: $25,160,477				
Regional Infrastructure Rehabilitation Project.	315,600,000	Key Regional Infrastructure Rehabilitated.	163,853,797	Household savings from Infrastructure Rehabilitation Activities. Savings in vehicle operating costs (VOC). International roughness index (IRI). Annual average daily traffic (AADT). Travel Time. Road paved/completed. Construction Works completed (Contract 1). Construction Works completed (Contract 2). Signed contracts for feasibility and/or design studies. Percent of contracted studies disbursed. Kilometers of roads under design. Signed contracts for road works. Kilometers of roads under works contracts. Sites rehabilitated (phases I, II, III)—pipeline. Construction works completed (phase II)—pipeline. Savings in household expenditures for all RID subprojects. Population Served by all RID subprojects. RID Subprojects completed. Value of RID Grant Agreements signed. Value of project works and goods contracts signed. RID subprojects with works initiated.
Regional Enterprise Development Project.	47,350,000	Enterprises in Regions Developed.	39,893,670	Jobs Created by Agribusiness Development Activity (ADA) and by Georgia Regional Development Fund (GRDF). Household net income—ADA and GRDF. Jobs created—ADA. Firm income—ADA. Household net income—ADA. Beneficiaries (direct and indirect)—ADA. Grant agreements signed—ADA. Increase in gross revenues of portfolio companies (PC). Increase in portfolio company employees. Increase in wages paid to the portfolio company employees. Portfolio companies (PC). Funds disbursed to the portfolio companies.
Program Administration*, Due Diligence, Monitoring and Evaluation.	32,350,000	.....	18,641,284	

Projects	Obligated	Objectives	Cumulative disbursements	Measures
Pending subsequent reports**.	.....	.....	25,160,477	

November 2008, MCC and the Georgian government signed a Compact amendment making up to $100 million of additional funds available to the Millennium Challenge Georgia Fund. These funds will be used to complete works in the Roads, Regional Infrastructure Development, and Energy Rehabilitation Projects contemplated by the original Compact. The amendment was ratified by the Georgian parliament and entered into force on January 30, 2009.

Projects	Obligated	Objectives	Cumulative disbursements	Measures
Country: Vanuatu Year: 2010 Quarter 3 Total Obligation: $65,690,000 Entity to which the assistance is provided: MCA Vanuatu Total Quarterly Disbursement: $7,281,831				
Transportation Infrastructure Project.	60,162,579	Facilitate transportation to increase tourism and business development.	50,820,986	Traffic volume (average annual daily traffic)—Efate: Ring Road. Traffic Volume (average annual daily traffic)—Santo: East Coast Road. Kilometers of road upgraded—Efate: Ring Road. Kilometers of roads upgraded—Santo: East Coast Road. Percent of contracted roads works disbursed (USD disbursed): Total (Cumulative).
Program Administration*, Due Diligence, Monitoring and Evaluation.	5,527,421	.....	3,323,066	
Pending subsequent reports**.	.....	.....	1,427,754	

Projects	Obligated	Objectives	Cumulative disbursements	Measures
Country: Armenia Year: 2010 Quarter 3 Total Obligation: $235,650,000 Entity to which the assistance is provided: MCA Armenia Total Quarterly Disbursement: $13,029,733				
Irrigated Agriculture Project (Agriculture and Water).	152,709,208	Increase agricultural productivity Improve and Quality of Irrigation.	57,588,723	Training/technical assistance provided for On-Farm Water Management. Training/technical assistance provided for Post-Harvest Processing. Loans Provided. Percent of contracted works disbursed. Value of signed contracts for irrigation works. Number of farmers using better on-farm water management. Number of enterprises using improved techniques. Value of irrigation feasibility and/or detailed design contracts signed. Additional Land irrigated under project. Percent of contracted irrigation feasibility and/or design studies disbursed.
Rural Road Rehabilitation Project.	67,100,000	Better access to economic and social infrastructure.	7,870,945	Average annual daily traffic on Pilot Roads. International roughness index for Pilot Roads. Road Sections Rehabilitated—Pilot Roads. Pilot Roads: Percent of Works Completed.
Program Administration*, Due Diligence, Monitoring and Evaluation.	15,840,792	.....	9,572,123	
Pending subsequent reports**.	.....	.....	1,094,394	

Projects	Obligated	Objectives	Cumulative disbursements	Measures
Country: Benin Year: 2010 Quarter 3 Total Obligation: $305,761,550 Entity to which the assistance is provided: MCA Benin Total Quarterly Disbursement: $21,720,603				
Access to Financial Services Project.	19,650,000	Expand Access to Financial Services.	4,203,641	Volume of credits granted by the Micro-Finance Institutions (MFI). Volume of saving collected by the Micro-Finance Institutions. Average portfolio at risk >90 days of microfinance institutions at the national level. Operational self-sufficiency of MFIs at the national level.

Projects	Obligated	Objectives	Cumulative disbursements	Measures
				Number of institutions receiving grants through the Facility.
				Number of MFIs *inspected by CSSFD*.
Access to Justice Project	34,270,000	Improved Ability of Justice System to Enforce Contracts and Reconcile Claims.	3,256,735	Average time to enforce a contract.
				Percent of firms reporting confidence in the judicial system.
				Passage of new legal codes.
				Average time required for Tribunaux de premiere instance—arbitration centers and courts of first instance (TPI) to reach a final decision on a case.
				Average time required for Court of Appeals to reach a final decision on a case.
				Percent of cases resolved in TPI per year.
				Percent of cases resolved in Court of Appeals per year.
				Number of Courthouses completed.
				Average time required to register a business (*société*).
				Average time required to register a business (sole proprietorship).
Access to Land Project	35,645,826	Strengthen property rights and increase investment in rural and urban land.	15,439,332	Total value of investment in targeted urban land parcels.
				Total value of investment in targeted rural land parcels.
				Average cost required to convert occupancy permit to land title through systematic process.
				Share of respondents perceiving land security in the PH–TF or PFR areas.
				Number of preparatory studies completed.
				Number of Legal and Regulatory Reforms Adopted.
				Amount of Equipment Purchased.
				Number of new land titles obtained by transformation of occupancy permit.
				Number of land certificates issued within MCA-Benin implementation.
				Number of PFRs established with MCA Benin implementation.
				Number of permanent stations installed.
				Number of stakeholders Trained.
				Number of communes with new cadastres.
				Number of operational land market information systems.
Access to Markets Project	170,259,549	Improve Access to Markets through Improvements to the Port of Cotonou.	44,448,945	Volume of merchandise traffic through the Port Autonome de Cotonou.
				Bulk ship carriers waiting times at the port.
				Port design-build contract awarded.
				Port crime levels (number of thefts).
				Average time to clear customs.
				Port meets—international port security standards (ISPS).
Program Administration*, Due Diligence, Monitoring and Evaluation.	45,936,175	.....	24,737,283	
Pending subsequent reports**.	.....	.....	283,062	

Projects	Obligated	Objectives	Cumulative disbursements	Measures
Country: Ghana Year: 2010 Quarter 3 Total Obligation: $537,863,123 Entity to which the assistance is provided: MCA Ghana Total Quarterly Disbursement: $42,061,572				
Agriculture Project	211,750,193	Enhance Profitability of cultivation, services to agriculture and product handling in support of the expansion of commercial agriculture among groups of smallholder farms.	88,344,318	Number of farmers trained in Commercial Agriculture. Number of agribusinesses assisted. Number of preparatory land studies completed. Legal and Regulatory land reforms adopted. Number of landholders reached by public outreach efforts. Number of hectares under production. Number of personnel trained. Number of buildings rehabilitated/constructed. Value of equipment purchased. Feeder Roads International Roughness Index. Feeder Roads Annualized Average Daily Traffic. Value of signed contracts for feasibility and/or design studies of Feeder Roads. Percent of contracted design/feasibility studies completed for Feeder Roads. Value of signed works contracts for Feeder Roads. Percent of contracted Feeder Road works disbursed. Value of loans disbursed to clients from agriculture loan fund. Value of signed contracts for feasibility and/or design studies (irrigation). Percent of contracted (design/feasibility) studies complete (irrigation). Value of signed contracts for irrigation works (irrigation). Rural hectares mapped. Percent of contracted irrigation works disbursed. Percent of people aware of their land rights in Pilot Land Registration Areas. Total number of parcels surveyed in the Pilot Land Registration Areas (PLRAs). Volume of products passing through post-harvest treatment.
Rural Development Project.	73,436,385	Strengthen the rural institutions that provide services complementary to, and supportive of, agricultural and agriculture business development.	19,912,312	Number of students enrolled in schools affected by Education Facilities Sub-Activity. Number of schools rehabilitated. Number of basic school blocks constructed to Ministry of Education (MOE) construction standards. Distance to collect water. Time to collect water. Incidence of guinea worm. Average number of days lost due to guinea worm. Number of people affected by Water and Sanitation Facilities Sub-Activity. Number of stand-alone boreholes/wells/nonconventional water systems constructed/rehabilitated. Number of small-town water systems designed and due diligence completed for construction. Number of pipe extension projects designed and due diligence completed for construction. Number of agricultural processing plants in target districts with electricity due to Rural Electrification Sub-Activity.
Transportation Project	209,766,616	Reduce the transportation costs affecting agriculture commerce at sub-regional levels.	54,707,517	Trunk Roads International roughness index. N1 International Roughness Index. N1 Annualized Average Daily Traffic. N1 Kilometers of road upgraded. Value of signed contracts for feasibility and/or design studies of the N1. Percent of contracted design/feasibility studies completed of the N1. Value of signed contracts for road works N1, Lot 1. Value of signed contracts for road works N1, Lot 2. Trunk Roads Annualized Average Daily Traffic. Trunk Roads Kilometers of roads completed. Percent of contracted design/feasibility studies completed of Trunk Roads.

Projects	Obligated	Objectives	Cumulative disbursements	Measures
				Percent of contracted Trunk Road works disbursed. Ferry Activity: annualized average daily traffic vehicles. Ferry Activity: annual average daily traffic (passengers). Landing stages rehabilitated. Ferry terminal upgraded. Rehabilitation of Akosombo Floating Dock completed. Rehabilitation of landing stages completed. Percent of contracted road works disbursed: N1, Lot 2. Percent of contracted road works disbursed: N1, Lot 2. Percent of contracted work disbursed: ferry and floating dock. Percent of contracted work disbursed: landings and terminals. Value of signed contracts for feasibility and/or design studies of Trunk Roads. Value of signed contracts for Trunk Roads.
Program Administration*, Due Diligence, Monitoring and Evaluation.	42,909,929	.....	24,009,830	
Pending subsequent reports**.	.....	.....	218,946	

Projects	Obligated	Objectives	Cumulative disbursements	Measures
Country: El Salvador Year: 2010 Quarter 3 Total Obligation: $460,940,000 Entity to which the assistance is provided: MCA El Salvador Total Quarterly Disbursement: $30,180,141				
Human Development Project.	101,753,001	Increase human and physical capital of residents of the Northern Zone to take advantage of employment and business opportunities.	21,017,837	Employment rate of graduates of middle technical schools. Graduation rates of middle technical schools. Middle technical schools remodeled and equipped. Scholarships granted to students of middle technical schools. Students of non-formal training. Cost of water. Time collecting water. Households benefiting with water solutions built. Potable water and basic sanitation systems with construction contracts signed. Cost of electricity. Households benefiting with a connection to the electricity network. Household benefiting with the installation of isolated solar systems. Kilometers of new electrical lines with construction contracts signed. Population benefiting from strategic infrastructure.
Productive Development Project.	71,824,000	Increase production and employment in the Northern Zone.	26,483,228	Number of hectares under production with MCC support. Number of beneficiaries of technical assistance and training—Agriculture. Number of beneficiaries of technical assistance and training—Agribusiness. Value of Agricultural Loans to Farmers/Agribusiness.
Connectivity Project	246,122,001	Reduce travel cost and time within the Northern Zone, with the rest of the country, and within the region.	60,724,725	Average annual daily traffic. International roughness index. Kilometers of roads rehabilitated. Kilometers of roads with Construction Initiated.
Program Administration* and Control, Monitoring and Evaluation.	41,240,998	.....	14,233,352	
Pending Subsequent Report**.	.....	.....	30,180,141	

Projects	Obligated	Objectives	Cumulative disbursements	Measures
Country: Mali Year: 2010 Quarter 3 Total Obligation: $451,611,164 Entity to which the assistance is provided: MCA Mali Total Quarterly Disbursement: $27,750,705				
Bamako Senou Airport Improvement Project.	.....	.....	.....	Employment at airport. Signature of design contract. Average number of weekly flights (arrivals). Passenger traffic (annual average). Percent works complete. Time required for passenger processing at departures and arrivals. Percent works complete. Percent of airport management and maintenance plan implemented. Airport meets Federal Aviation Administration (FAA) and International Civil Aviation Organization (ICAO) security standards. Technical assistance delivered to project.
Alatona Irrigation Project	234,884,675	Increase the agricultural production and productivity in the Alatona zone of the ON.	46,189,523	Main season rice yields. International roughness index (IRI) on the Niono-Goma Coura Route. Average daily vehicle count. Percentage works completed on Niono-Goma Coura road. Number of hectares of land irrigated in the Alatona Canal. Irrigation system efficiency on Alatona Canal during the rainy season and the dry season. Completion rate of work on the construction of the main system (B03). Percentage of contracted irrigation construction works disbursed. Number of titles registered in the land registration office of the Alatona zone. Number of market gardens allocated in Alatona zones (for PAPs) (market garden parcels allotted to PAP women). Decree transferring legal control of the project impact area is passed. Contractor implementing the "Mapping of Agricultural and Communal Land Parcels" contract is mobilized. Net school enrollment rate (in Alatona zone). Percent of Alatona population with access to drinking water. Number of schools available in Alatona. Number of health centers available in Alatona. Number of affected people who have been compensated. Resettlement Census verified. Adoption of Rate of Extension Techniques. Area planted with rice during the rainy season. Area planted with shallots during dry season. Number of farmers trained. Water management system design and capacity building strategy implemented. Amount of credit extended to Alatona farmers. Number of farmers accessing grant assistance for first loan from financial institutions. Financial institution partners identified (report on assessment of the financial institutions in the Office du Niger—Office of Niger zone (ON zone). Loan Portfolio quality of Alatona MFIs: portfolio at risk.
Program Administration* and Control, Monitoring and Evaluation.	38,005,000	.....	20,385,241	
Pending Subsequent Report**.	.....	.....	9	

Projects	Obligated	Objectives	Cumulative disbursements	Measures
Country: Mongolia Year: 2010 Quarter 3 Total Obligation: $284,902,443 Entity to which the assistance is provided: MCA Mongolia Total Quarterly Disbursement: $2,169,773				
Property Rights Project	27,201,061	Increase security and capitalization of land assets held by lower-income Mongolians, and increased peri-urban herder productivity and incomes.	1,628,930	Number of studies completed. Legal and regulatory reforms adopted. Number of landholders reached by public outreach efforts. Training to Leaseholders—Intensive and Semi-Intensive Farming. Number of Buildings rehabilitated/constructed. Value of equipment purchased. Rural hectares Mapped. Urban Parcels Mapped. Leaseholds Awarded. Hashaa Plots Directly Registered by the Property Rights Project.
Vocational Education Project.	47,355,638	Increase employment and income among unemployed and under-employed Mongolians.	2,255,071	Rate of employment of TVET Graduates. Students completing newly designed long-term programs. Percent of active teachers receiving certification training. Technical and vocational education and training (TVET) legislation passed.
Health Project	38,974,817	Increase the adoption of behaviors that reduce non-communicable diseases (NCDIs) among target populations and improved medical treatment and control of NCDIs.	2,591,403	Diabetes and hypertension controlled. Percentage of cancer cases diagnosed in early stages. Road and traffic safety activity finalized and key interventions developed.
Program Administration* and Control, Monitoring and Evaluation.	44,294,082	.....	8,509,865	
Pending subsequent reports**.	.....	.....	43,201	

In late 2009, the MCC's Board of Directors approved the allocation of a portion of the funds originally designated for the rail project to the expansion of the health, vocational education and property right projects from the rail project, and the remaining portion to the addition of a road project.

Projects	Obligated	Objectives	Cumulative disbursements	Measures
Country: Mozambique Year: 2010 Quarter 3 Total Obligation: $503,444,341 Entity to which the assistance is provided: MCA Mozambique Total Quarterly Disbursement: $6,505,733				
Water Supply and Sanitation Project.	203,585,393	Increase access to reliable and quality water and sanitation facilities.	4,836,403	Time to get to non-private water source. Percent of urban population with improved water sources. Percent of urban population with improved sanitation facilities. Percent of rural population with access to improved water sources. Number of private household water connections in urban areas. Number of rural water points constructed. Number of standpipes in urban areas. Final detailed design for 5 towns submitted. Final detailed design for 3 cities submitted.
Road Rehabilitation Project.	176,307,480	Increase access to productive resources and markets.	2,639,508	Kilometers of road rehabilitated. Percent of Namialo-Rio Lúrio Road-Metoro feasibility, design, and supervision contract disbursed. Percent of Rio Ligonha-Nampula feasibility, design, and supervision contract disbursed. Percent of Chimuara-Nicoadala feasibility, design, and supervision contract disbursed. Percent of Namialo-Rio Lúrio Road construction contract disbursed. Percent of Rio Lúrio-Metoro Road construction contract disbursed. Percent of Rio Ligonha-Nampula Road construction contract disbursed.

Projects	Obligated	Objectives	Cumulative disbursements	Measures
				Percent of Chimuara-Nicoadala Road construction contract disbursed. Average annual daily traffic volume. Average annual daily traffic volume. Average annual daily traffic volume. Average annual daily traffic volume. Change in International Roughness Index (IRI)—on Namialo-Rio Lúrio Road. Change in International Roughness Index (IRI)—on Rio Ligonha-Nampula Road. Change in International Roughness Index (IRI)—on Rio Lúrio-Metoro Road. Change in International Roughness Index (IRI)—on Chimuara-Nicoadala Road.
Land Tenure Project	39,061,959	Establish efficient, secure land access for households and investors.	4,657,219	Total number of officials and residents reached with land strategy and policy awareness and outreach messages. Time to get land usage rights (DUAT), urban. Time to get land usage rights (DUAT), rural. Number of buildings rehabilitated or built. Total value of procured equipment and materials. Number of people trained. Rural hectares mapped in Site Specific Activity. Rural hectares mapped in Community Land Fund Initiative. Urban parcels mapped. Rural hectares formalized through Site Specific Activity. Rural hectares formalized through Community Land Fund Initiative. Urban parcels formalized. Number of communities delimited. Number of households having land formalized, rural. Number of households having land formalized, urban.
Farmer Income Support Project.	18,276,217	Improve coconut productivity and diversification into cash crop.	2,893,414	Number of diseased or dead palm trees cleared. Number of coconut seedlings planted. Hectares under production. Number of farmers trained in pest and disease control. Number of farmers trained in crop diversification technologies. Income from coconuts and coconut products (estates). Income from coconuts and coconut products (households).
Program Administration* and Control, Monitoring and Evaluation.	66,213,292	.....	12,447,947	
Pending Subsequent Report**.	.....	.....	126,168	

Projects	Obligated	Objectives	Cumulative disbursements	Measures
Country: Lesotho Year: 2010 Quarter 3 Total Obligation: $354,167,605 Entity to which the assistance is provided: MCA Lesotho Total Quarterly Disbursement: $6,566,418				
Water Project	162,365,440	Improve the water supply for industrial and domestic needs, and enhance rural livelihoods through improved watershed management.	10,208,610	School days lost due to waterborne diseases. Diarrhea notification at health centers. Time saved due to access to water source. Rural household (HH) provided with access to improved water supply. Rural HH provided with access to improved ventilated latrines. Rural population with knowledge of good hygiene principles. Urban HH with access to potable water supply. Number of enterprises connected to water network. Households connected to improved water network.

Projects	Obligated	Objectives	Cumulative disbursements	Measures
				Cubic meters of treated water from metolong dam delivered through a conveyance system to Water and Sewerage Authority (WASA). Hydrological flows variability. Reclaimed area.
Health Project	121,523,962	Increase access to life-extending ART and essential health services by providing a sustainable delivery platform.	7,841,121	People with HIV still alive 12 months after initiation of treatment. TB notification (per 100,000 pop.). Percentage of PLWA receiving ARV treatment (by age and sex). Deliveries conducted in the health centers. Immunization coverage rate.
Private Sector Development Project.	35,593,055	Stimulate investment by improving access to credit, reducing transaction costs and increasing the participation of women in the economy.	3,805,180	Average time (days) required to enforce a contract. Value of commercial cases. Cases referred to ADR that are successfully completed. Portfolio of loans. Loan processing time. Performing loans. Electronic payments—salaries. Electronic payments—pensions. Debit/smart cards issued. Mortgage bonds registered. Value of registered mortgage bonds. Clearing time—Country. Clearing time—Maseru. Time to complete transfer of land rights. Land transactions recorded. Land parcels regularized and registered. People trained on gender equality and economic rights. ID cards issued. Monetary cost of a lease transaction.
Program Administration* and Control, Monitoring and Evaluation.	43,685,148	.....	13,462,757	
Pending Subsequent Report**.	.....	.....	207,297	

Projects	Obligated	Objectives	Cumulative disbursements	Measures
Country: Morocco Year: 2010 Quarter 3 Total Obligation: $693,797,181 Entity to which the assistance is provided: MCA Morocco Total Quarterly Disbursement: $18,500,633				
Fruit Tree Productivity Project.	298,622,393	Reduce volatility of agricultural production and increase volume of fruit agricultural production.	20,851,833	Number of farmers trained. Number of agribusinesses assisted. Number of hectares under production. Value of agricultural production.
Small Scale Fisheries Project.	116,168,028	Improve quality of fish moving through domestic channels and assure the sustainable use of fishing resources.	3,381,663	Landing sites and ports rehabilitated. Mobile fish vendors using new equipment. Fishing boats using new landing sites. Average price of fish at auction markets. Average price of fish at wholesale. Average price of fish at ports.
Artisan and Fez Medina Project.	111,873,858	Increase value added to tourism and artisan sectors.	809,472	Average revenue of SME pottery workshops. Construction and rehabilitation of Fez Medina Sites. Tourist receipts in Fez. Training of potters.
Enterprise Support Project	33,850,000	Improved survival rate of new SMEs and INDH-funded income generating activities; increased revenue for new SMEs and INDH-funded income generating activities.	3,399,422	Number of enterprises in pilot project receiving coaching. Value added per enterprise. Survival rate after two years.
Program Administration* and Control, Monitoring and Evaluation.	87,082,902	.....	15,148,665	
Pending Subsequent Report**.	.....	.....	3,173,509	

Projects	Obligated	Objectives	Cumulative disbursements	Measures
Country: Tanzania Year: 2010 Quarter 3 Total Obligation: $698,240,000 Entity to which the assistance is provided: MCA Tanzania Total Quarterly Disbursement: $28,800,268				
Energy Sector Project	202,934,428	Increase value added to businesses.	5,392,310	New power customers: Kigoma. New power customers: Morogoro. New power customers: Tanga. New power customers: Mbeya. New power customers: Iringa. New power customers: Dodoma. New power customers: Mwanza. New power customers: Zanzibar. Energy generation—Kigoma. Transmission capacity: Kigoma. Transmission capacity: Morogoro. Transmission capacity: Tanga. Transmission capacity: Mbeya. Transmission capacity: Iringa. Transmission capacity: Dodoma. Transmission capacity: Mwanza. Transmission capacity: Zanzibar. Percentage disbursed for design and supervision contract Consulting Engineer (CE) year 1 budgeted: Distribution Rehabilitation and extension activity. Percentage disbursed for design and supervision contract Consulting Engineer (CE) year 1 budgeted; Zanzibar Interconnector activity. Percentage disbursed for design and supervision contract Consulting Engineer (CE) year 1 budgeted; Malagarasi hydropower and Kigoma distribution activity.
Transport Sector Project ..	366,847,428	Increase cash crop revenue and aggregate visitor spending.	28,507,733	International roughness index: Tunduma Sumbawanga. International roughness index: Tanga Horohoro. International roughness index: Namtumbo Songea. International roughness index: Peramiho Mbinga. Annual average daily traffic: Tunduma Sumbawanga. Annual average daily traffic: Tanga Horohoro. Annual average daily traffic: Namtumbo Songea. Annual average daily traffic: Peramiho Mbinga. Kilometers upgraded/completed: Tunduma Sumbawanga. Kilometers upgraded/completed: Tanga Horohoro. Kilometers upgraded/completed: Namtumbo Songea. Kilometers upgraded/completed: Peramiho Mbinga. Percent disbursed on construction works: Tunduma Sumbawanga. Percent disbursed on construction works: Tanga Horohoro. Percent disbursed on construction works: Namtumbo Songea. Percent disbursed on construction works: Peramiho Mbinga. Percent disbursed for feasibility and/or design studies: Tunduma Sumbawanga. Percent disbursed for feasibility and/or design studies: Tanga Horohoro. Percent disbursed for feasibility and/or design studies: Namtumbo Songea. Percent disbursed for feasibility and/or design studies: Peramiho Mbinga. International roughness index: Pemba. Average annual daily traffic: Pemba. Kilometers upgraded/completed: Pemba. Percent disbursed on construction works: Pemba. Signed contracts for construction works (Zanzibar Rural Roads). Percent disbursed on signed contracts for feasibility and/or design studies: Pemba. Passenger arrivals: Mafia Island. Percentage of upgrade complete: Mafia Island.

Projects	Obligated	Objectives	Cumulative disbursements	Measures
Water Sector Project	62,562,144	Increase investment in human and physical capital and to reduce the prevalence of water-related disease.	1,993,722	Percent disbursed on construction works: Mafia Island. Number of households using improved source for drinking water (Dar es Salaam). Number of households using improved source for drinking water (Morogoro). Number of businesses using improved water source (Dar es Salaam). Number of businesses using improved water source (Morogoro). Volume of water produced (Lower Ruvu). Volume of water produced (Morogoro). Percent disbursed on Feasibility Design Update contract Lower Ruvu Plant Expansion.
Program Administration* and Control, Monitoring and Evaluation.	53,896,000	.....	7,339,868	
Pending Subsequent Report**.	.....	.....	206,197	

Projects	Obligated	Objectives	Cumulative disbursements	Measures
Country: Burkina Faso Year: 2010 Quarter 3 Total Obligation: $484,298,973 Entity to which the assistance is provided: MCA Burkina Faso Total Quarterly Disbursement: $5,552,469				
Roads Project	194,130,681	Enhance access to markets through investments in the road network.	404,332	To Be Determined (TBD).
Rural Land Governance Project.	60,392,771	Increase investment in land and rural productivity through improved land tenure security and land management.	2,185,845	TBD.
Agriculture Development Project.	141,934,693	Expand the productive use of land in order to increase the volume and value of agricultural production in project zones.	2,775,002	TBD.
Bright 2 Schools Project ..	26,829,669	Increase primary school completion rates.	28,745,770	TBD.
Program Administration* and Control, Monitoring and Evaluation.	61,011,159	.....	9,686,605	
Pending Subsequent Report**.	.....	.....	0	

Projects	Obligated	Objectives	Cumulative disbursements	Measures
Country: Namibia Year: 2010 Quarter 3 Total Obligation: $304,477,819 Entity to which the assistance is provided: MCA Namibia Total Quarterly Disbursement: $9,977,192				
Education Project	144,976,559	Improve the education sector's effectiveness, efficiency and quality.	6,836,450	To Be Determined (TBD).
Tourism Project	66,959,292	Increase incomes and create employment opportunities by improving the marketing, management and infrastructure of Etosha National Park.	2,207,959	TBD.
Agriculture Project	47,550,008	Sustainably improve the economic performance and profitability of the livestock sector and increase the volume of the indigenous natural products for export.	405,044	TBD.

Projects	Obligated	Objectives	Cumulative disbursements	Measures
Program Administration* and Control, Monitoring and Evaluation.	44,991,960	.....	6,708,661	
Pending Subsequent Report**.	.....	.....	113,820	
Projects	Obligated	Objectives	Cumulative disbursements	Measures
Country: Moldova (PRE–EIF) Year: 2010 Quarter 3 Total Obligation: $262,000,000 Entity to which the assistance is provided: MCA Moldova Total Quarterly Disbursement: $0				
Road Rehabilitation Project.	132,840,000	.....	0	To Be Determined (TBD).
Transition to High Value Agriculture Project.	101,773,401	.....	0	TBD.
Program Administration* and Monitoring and Evaluation**.	27,386,599	.....	0	TBD.
Projects	Obligated	Objectives	Cumulative disbursements	Measures
Country: Senegal (PRE–EIF) Year: 2010 Quarter 3 Total Obligation: $540,000,000 Entity to which the assistance is provided: MCA Moldova Total Quarterly Disbursement: $100,165				
Road Rehabilitation Project.	800,000	.....	0	To Be Determined (TBD).
Transition to High Value Agriculture Project.	6,788,251	.....	0	TBD.
Program Administration* and Monitoring and Evaluation**.	382,691	.....	0	TBD.

* Program administration funds are used to pay items such as salaries, rent, and the cost of office equipment.
** These amounts represent disbursements made that will be allocated to individual projects in the subsequent quarter(s) and reported as such in subsequent quarterly report(s)
*** Moldova and Senegal are expected to be obligated in 2010 when they enter into force (EIF).

619(b) Transfer or Allocation of Funds

U.S. Agency to which Funds were Transferred or Allocated	Amount	Description of program or project
USAID	$15,073,050	Liberia Threshold Program.

Dated: September 10, 2010.

T. Charles Cooper,

Vice President, Congressional and Public Affairs, Millennium Challenge Corporation.

[FR Doc. 2010–23064 Filed 9–15–10; 8:45 am]

BILLING CODE 9211–03–P

THE NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Meetings of Humanities Panel

AGENCY: The National Endowment for the Humanities.

ACTION: Notice of meetings.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92–463, as amended), notice is hereby given that the following meetings of Humanities Panels will be held at the Old Post Office, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT: Michael P. McDonald, Advisory Committee Management Officer, National Endowment for the Humanities, Washington, DC 20506; telephone (202) 606–8322. Hearing-impaired individuals are advised that information on this matter may be obtained by contacting the Endowment's TDD terminal on (202) 606–8282.

SUPPLEMENTARY INFORMATION: The proposed meetings are for the purpose of panel review, discussion, evaluation and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including discussion of information given in confidence to the agency by the grant applicants. Because the proposed meetings will consider information that is likely to disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential and/or information of a personal nature the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, pursuant to authority granted me by the Chairman's Delegation of Authority to Close Advisory Committee meetings, dated July 19, 1993, I have determined that these meetings will be closed to the public pursuant to subsections (c)(4), and (6) of section 552b of Title 5, United States Code.

1. *Date:* October 5, 2010.
Time: 9 a.m. to 5 p.m.
Room: 415.
Program: This meeting will review applications for History of Science, Medicine, and the Environment in Preservation and Access Humanities Collection and Reference Resources, submitted to the Division of Preservation and Access at the July 15, 2010 deadline.

2. *Date:* October 7, 2010.
Time: 9 a.m. to 5 p.m.
Room: 415.

Program: This meeting will review applications for Archaeology & Anthropology in Preservation and Access Humanities Collection and Reference Resources, submitted to the Division of Preservation and Access at the July 15, 2010 deadline.

3. *Date:* October 14, 2010.
Time: 9 a.m. to 5 p.m.
Room: 415.
Program: This meeting will review applications for U.S. History and Culture I in Preservation and Access Humanities Collection and Reference Resources, submitted to the Division of Preservation and Access at the July 15, 2010 deadline.

4. *Date:* October 18, 2010.
Time: 9 a.m. to 5 p.m.
Room: 421.
Program: This meeting will review applications for Anthropology in America's Historical and Cultural Organizations Grants Program, submitted to the Division of Public Programs at the August 18, 2010 deadline.

5. *Date:* October 19, 2010.
Time: 9 a.m. to 5 p.m.
Room: 421.
Program: This meeting will review applications for Arts, Religion, and Culture in America's Historical and Cultural Organizations Grants Program, submitted to the Division of Public Programs at the August 18, 2010 deadline.

6. *Date:* October 19, 2010.
Time: 9 a.m. to 5 p.m.
Room: 415.
Program: This meeting will review applications for World Studies I in Preservation and Access Humanities Collection and Reference Resources, submitted to the Division of Preservation and Access at the July 15, 2010 deadline.

7. *Date:* October 21, 2010.
Time: 9 a.m. to 5 p.m.
Room: 415.
Program: This meeting will review applications for World Studies II in Preservation and Access Humanities Collection and Reference Resources, submitted to the Division of Preservation and Access at the July 15, 2010 deadline.

8. *Date:* October 21, 2010.
Time: 9 a.m. to 5 p.m.
Room: 421.
Program: This meeting will review applications for United States History in America's Historical and Cultural Organizations Grants Program, submitted to the Division of Public Programs at the August 18, 2010 deadline.

9. *Date:* October 22, 2010.
Time: 9 a.m. to 5 p.m.
Room: 421.
Program: This meeting will review applications for Art History in America's Historical and Cultural Organizations Grants Program, submitted to the Division of Public Programs at the August 18, 2010 deadline.

10. *Date:* October 25, 2010.
Time: 9 a.m. to 5 p.m.
Room: 421.
Program: This meeting will review applications for American Studies in America's Media Makers Grants Program, submitted to the Division of Public Programs at the August 18, 2010 deadline.

11. *Date:* October 26, 2010.
Time: 9 a.m. to 5 p.m.
Room: 415.
Program: This meeting will review applications for Literature in Preservation and Access Humanities Collection and Reference Resources, submitted to the Division of Preservation and Access at the July 15, 2010 deadline.

12. *Date:* October 26, 2010.
Time: 9 a.m. to 5 p.m.
Room: 421.
Program: This meeting will review applications for African-American & Civil Rights History in America's Historical and Cultural Organizations Grants Program, submitted to the Division of Public Programs at the August 18, 2010 deadline.

13. *Date:* October 27, 2010.
Time: 9 a.m. to 5 p.m.
Room: 421.
Program: This meeting will review applications for United States History in America's Historical and Cultural Organizations Grants Program, submitted to the Division of Public Programs at the August 18, 2010 deadline.

14. *Date:* October 28, 2010.
Time: 9 a.m. to 5 p.m.
Room: 421.
Program: This meeting will review applications for United States History in America's Media Makers Grants Program, submitted to the Division of Public Programs at the August 18, 2010 deadline.

15. *Date:* October 28, 2010.
Time: 9 a.m. to 5 p.m.
Room: 415.
Program: This meeting will review applications for U.S. History and Culture II in Preservation and Access Humanities Collection and Reference Resources, submitted to the Division of Preservation and Access at the July 15, 2010 deadline.

Michael P. McDonald,
Advisory Committee Management Officer.

[FR Doc. 2010–23034 Filed 9–15–10; 8:45 am]
BILLING CODE 7536–01–P

NATIONAL SCIENCE FOUNDATION

Agency Information Collection Activities: Comment Request

AGENCY: National Science Foundation.

ACTION: Notice; Submission for OMB Review; Comment Request.

SUMMARY: The National Science Foundation (NSF) has submitted the following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. This is the second notice for public comment; the first was published in the **Federal Register** at 75 FR 36697, and no substantial comments were received. NSF is forwarding the proposed renewal submission to the Office of Management and Budget (OMB) for clearance simultaneously with the publication of this second notice. The full submission may be found at: *http://www.reginfo.gov/public/do/PRAMain.* 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: Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for National Science Foundation, 725—17th Street, NW. Room 10235, Washington, DC 20503, and to Suzanne Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Boulevard, Room 295, Arlington, VA 22230, or by e-mail to *splimpton@nsf.gov.* 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 703–292–7556.

NSF 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.

Under OMB regulations, the agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB.

ADDRESSES: Submit written comments to Suzanne Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Boulevard, Room 295, Arlington, VA 22230, or by e-mail to *splimpton@nsf.gov*.

FOR FURTHER INFORMATION CONTACT: Call or write, Suzanne Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Boulevard, Room 295, Arlington, VA 22230, or by e-mail to *splimpton@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: Graduate Research Fellowship Program Evaluation.

OMB Approval Number: 3145–NEW.

Abstract: The purpose of this study is to provide evidence on the impact of the GRPF on individuals' educational decision, career preparations, aspirations and progress, as well as professional productivity. This includes the study design and data collection as well as subsequent analysis and report writing. As part of NSF's commitment to graduate student education in the U.S., the GRFP seeks to promote and maintain advanced training in science, technology, engineering, and mathematics (STEM) field by annually awarding roughly 1,000 fellowships to graduate student in research-based programs. As the first program evaluation since 2002, the GRFP evaluation comes on the heels of increased funding by NSF to supporting additional fellowship awards.

NSF contracts with the National Opinion Research Center (NORC) at the University of Chicago to design, implement, and assess a study that will address relevant procedures and components of the GRFP in regards to the application and award process and support for Fellows and sponsoring institutions with an aim towards measuring and increasing the program's effectiveness.

There are four goals of the GRFP evaluation. The first goal is to maintain a high quality evaluation through consultation with an advisory group of national experts. The second goal is to assess impacts of the GRFP on graduate school experiences through a follow-up study of GRFP award recipients and other applicants. The third goal is to assess impacts of the GRFP on career and professional outcomes through analysis of GRFP participants and comparable national populations. The fourth goal is to assess the benefits of the GRFP on institutions that enroll GRFP Fellows. The evaluation is designed to address research questions that explore the influences of the GRFP on the following broad sets of variables:

- Educational decisions, experiences, and graduate degree attainment of STEM graduate students;
- Career preparation and aspirations;
- Career activities, progress, and job characteristics following graduate school;
- Professional productivity;
- Workforce participation and career outcomes;
- Graduate school institutions and student recruitment at GRFP-sponsoring institutions;
- Faculty attitudes at GRFP-sponsoring institutions;
- Diversity of students participating in STEM fields at GRFP-sponsoring institutions.

This survey would address two separate components of the planned GRPF evaluation. First, this component will assess the influence of GRFP awards on recipients' graduate school experience and outcomes, which includes program of study and institution attended, professional productivity (*e.g.,* publishes papers, conference presentations, *etc.*) during graduate schools and career aspirations. Second, the survey will evaluate the impact of participation in the GRPF on subsequent career options, progress and contributions to respondents' professional fields. This will be conducted as a web-based survey.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 30 minutes for current graduate students and 40 minutes per graduates.

Respondents: Individuals.

Estimated Number of Responses per Form: 2,826 graduate students; 6,429 graduates.

Estimated Total Annual Burden on Respondents: 5,699 hours (2,826 graduate student respondents at 30 minutes per response = 1,413 hours + 6,429 graduate respondents at 40 minutes per response = 4,286 hours).

Frequency of Response: One time.

Comments: Comments are invited on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the NSF, including whether the information shall have practical utility; (b) the accuracy of the NSF's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information on respondents, including through the use of automated collection techniques or other forms of information technology; (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.

Dated: September 13, 2010.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2010–23170 Filed 9–15–10; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–156; NRC–2010–0203]

University of Wisconsin; University of Wisconsin Nuclear Reactor Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (NRC or the Commission) is considering issuance of a renewed Facility Operating License No. R–74, to be held by the University of Wisconsin (the licensee), which would authorize continued operation of the University of Wisconsin Nuclear Reactor (UWNR), located in Madison, Dane County, Wisconsin. Therefore, as required by Title 10 of the Code of Federal Regulations (10 CFR) Section 51.21, the NRC is issuing this Environmental Assessment and Finding of No Significant Impact.

Environmental Assessment

Identification of the Proposed Action

The proposed action would renew Facility Operating License No. R–74 for a period of 20 years from the date of issuance of the renewed license. The proposed action is in accordance with the licensee's application dated May 9, 2000, as supplemented by letter dated October 17, 2008. In accordance with 10

CFR 2.109, the existing license remains in effect until the NRC takes final action on the renewal application.

Need for the Proposed Action

The proposed action is needed to allow the continued operation of the UWNR to routinely provide teaching, research, and services to numerous institutions for a period of 20 years.

Environmental Impacts of the Proposed Action

The NRC has completed its safety evaluation of the proposed action to issue a renewed Facility Operating License No. R–74 to allow continued operation of the UWNR for a period of 20 years and concludes there is reasonable assurance that the UWNR will continue to operate safely for the additional period of time. The details of the NRC staff's safety evaluation will be provided with the renewed license that will be issued as part of the letter to the licensee approving its license renewal application. This document contains the environmental assessment of the proposed action.

The UWNR is located in the Mechanical Engineering Building on the main campus of the University of Wisconsin. The UWNR is housed in the Reactor Laboratory, a 13 meter (43 feet) by 22 meter (70 feet) room of conventional construction within the Mechanical Engineering Building. Throughout most of the Reactor Laboratory, the ceiling height is approximately 11 meters (36 feet) with a portion of the ceiling above the console area a height of only 7 meters (22 feet). The floor of the room is concrete. There is no basement or crawl space below the Reactor Laboratory floor. The walls are concrete and brick. The ceiling is a 2.25 centimeter (1½ inch) steel deck with 5 centimeters (2 inches) of rigid insulation and a 4-ply, built-up surface roof. The Mechanical Engineering Building also contains classrooms, laboratories, shops, and staff offices for the Departments of Mechanical Engineering, Industrial Engineering, and Engineering Physics. The Mechanical Engineering Building is near the southwestern border of the University of Wisconsin campus. The nearest property not owned by the University of Wisconsin is 130 meters (425 feet) from the reactor site. The reactor site is 700 meters (2,300 feet) south of the shore of Lake Mendota. The nearest permanent residence is approximately 150 meters (485 feet) west of the reactor site and the nearest dormitory is approximately 400 meters (1,300 feet) away. There are no nearby industrial, transportation, or military facilities that pose a threat to the UWNR.

The UWNR is a heterogeneous pool-type nuclear reactor currently fueled with low-enriched uranium TRIGA (Training, Research, Isotope Production, General Atomics) fuel which is cooled by natural convection. The aluminum-lined concrete pool is 2.5 meters (8 feet) wide, 3.7 meters (12 feet) long, and 8.5 meters (27.5 feet) deep. Light water acts as the coolant and the moderator as well as being a biological shield. The reinforced concrete pool walls also serve as a biological shield. The core is reflected on two sides by graphite and on two sides by water. The water-reflected areas are being utilized as irradiation facility locations. The reactor is shielded by concrete and water. The core is normally covered by 6 meters (20 feet) of water. Maximum steady-state power level is 1,000 kilowatts. Reactivity is controlled by three shim safety blades, a regulating blade, and a transient control rod. All control elements move vertically. The top and bottom reflector region is partially graphite and partially water. A detailed description of the reactor can be found in the licensee's Safety Analysis Report.

On June 11, 2009, the NRC issued an order for UWNR to convert from high-enriched uranium fuel to low-enriched uranium fuel (Agencywide Documents Access and Management System (ADAMS) Accession No. ML091390802). The conversion to low-enriched uranium fuel was completed and normal operations resumed on January 22, 2010. As part of the analysis for the conversion, the staff determined that the changes involved no significant hazards consideration, no significant increase in the amount of effluents, no significant change in the type of effluents that may be released off site, and no significant increase in individual or cumulative occupational radiation exposure.

The licensee has not requested any further changes to the facility design or operating conditions as part of the application for license renewal. No significant changes have been made in the types or quantities of effluents that may be released offsite.

The licensee has systems in place for controlling the release of radiological effluents and implements a radiation protection program to monitor personnel exposures and releases of radioactive effluents. The design of the experimental facilities, the reactor pool, and the reactor shield includes protective measures and devices which limit radiation exposures and limit releases of radioactive material to the environment. The systems and radiation protection program are appropriate for the types and quantities of effluents expected to be generated by continued operation of the reactor. Accordingly, there would be no increase in routine occupational or public radiation exposure as a result of license renewal. The proposed action will not significantly increase the probability or consequences of accidents. Therefore, license renewal would not change the environmental impact of facility operation. The NRC staff evaluated information contained in the licensee's application and data reported to the NRC by the licensee for the last five years of operation to determine the projected radiological impact of the facility on the environment during the period of the renewed license. The NRC staff finds that releases of radioactive material and personnel exposures were all well within applicable regulatory limits. Based on this evaluation, the NRC staff concluded that continued operation of the reactor would not have a significant environmental impact.

I. Radiological Impact

Environmental Effects of Reactor Operations

The radiation protection program at the reactor facility is similar to the campus radiation safety program but the reactor program has some specific aspects that apply only to the reactor facility. These protective measures and devices are discussed more thoroughly in the UWNR Safety Analysis Report.

The ventilation system is designed to prevent the spread of airborne particulate radioactive material into occupied areas outside the Reactor Laboratory. It removes particulates with high efficiency filtration and assures that all releases of both gaseous and particulate activity are monitored and discharged at an elevated release point. Calculations and measurements have been performed by the licensee to determine production and release rates of the various activities that might be discharged due to normal operation. Argon-41 is the only activity released in significant quantities during normal operations. The maximum release rate for Argon-41 activity is 13.3 microCuries per second (μCi/sec). Using the ventilation system rated flow-rate of 9,600 standard cubic feet per minute, this activity is diluted to 2.94E–6 microCuries per milliliter (μCi/ml) at the stack outlet. The resulting maximum concentration downwind is calculated to be 1.25E–9 μCi/ml. The maximum release rate of Argon-41 would occur with the reactor operating continuously at 1,000 kilowatts and all four beam

ports and the thermal column open. Such operation is not reasonable, but it does establish an upper limit to the activity that might be discharged. Using the Environmental Protection Agency's (EPA) COMPLY program, it was calculated that the maximally exposed receptor, in the above-mentioned worst case, would receive a dose of 0.6 millirem/year if all activity generated was discharged continuously. Total gaseous radioactive releases reported to the NRC in the licensee's annual reports were less than the air effluent concentration limits set by 10 CFR Part 20, Appendix B.

The only activity produced in liquid form in amounts sufficient to present a personnel exposure hazard is Nitrogen-16, which is produced in the reactor coolant as it passes through the reactor core when operating at power levels above 100 kilowatts. Nitrogen-16 is controlled by use of the diffuser system, which reduces the dose rate at the pool surface to 2 to 3 millirem/hour during full power operation. If the diffuser system fails during full power operation, the dose rate at the pool surface is less than 100 millirem/hour. Small quantities of liquid radioactive waste are generated by regeneration of the demineralizer and from liquids irradiated as part of sample irradiation. The radiation level from such liquids is extremely low and does not produce radiation exposure hazards. Liquid wastes can be transferred to the campus University Safety Department, Radiation Safety Office, but most are placed into the holdup tank. The Reactor Laboratory occasionally discharges liquid waste from the holdup tank to the sewer system. Before discharging liquid waste into the sanitary sewer, the discharges are filtered so that no particulate activity above 0.5 micron size is discharged. Sampling, analysis, and release of the holdup tank contents are governed by a written procedure that assures releases are within 10 CFR Part 20 Appendix B Table 3 limits, and that the pH of the aqueous liquid is within local limits for discharge to the sewer. Annual liquid releases have ranged from 0 to 10,000 gallons, with 3,000 gallons being typical. The licensee maintains a pool leak surveillance program. The pool water leak surveillance program continues to monitor the pool water evaporation rate, the pool water make-up volume, and pool water radioactivity. The pool leak surveillance program indicated that approximately 2,449 gallons of water have been released to the environment in 2008–2009 and 736 gallons in 2007–2008. The annual reports for 2006–2007 and 2005–2006 indicate there was no water released to the environment associated with pool surveillance; however, the 2004–2005 annual report indicates that water had been released. The radionuclide of concern associated with pool water leakage would be hydrogen-3 (tritium). Annual reports indicate that the maximum concentrations and maximum quantity released from the facility would have no significant impact.

Annual reports reviewed from the last five years indicate that when solid waste is generated from use of the UWNR, it is transferred to the University of Wisconsin broad scope license for ultimate disposal in accordance with regulations set forth under that license. In the years that solid waste was generated, less than 400 milliCuries of solid waste was transferred for disposal.

Dosimeters are used for monitoring operating personnel and individuals that frequently conduct experiments. Electronic dosimeters are used for visitors and for tour groups. Doses received by visitors and tour groups are so low that they are often unmeasurable. The maximum dose rate permitted during any tour is 0.5 millirem/hour. The maximum dose rate permitted for non-radiation workers is 2.0 millirem/hour. Visitors who are radiation workers but not part of the campus dosimetry program, such as visiting researchers, are allowed access to higher dose rates; however, rarely does the dose rate exceed 2.0 millirem/hour. No student dosimeter has ever received a measurable radiation exposure from reactor operation. Occupational exposures received by operations and maintenance personnel have historically been very low, seldom exceeding 0.5 rem total effective dose equivalent in a year and usually below 100 millirem/year. The occupational exposure limit for total effective dose equivalent from 10 CFR 20.1201(a)(1)(i) is 5 rem per year. No changes that would lead to an increase in occupational dose are expected as a result of the proposed action.

The licensee has in place an environmental monitoring program that uses area monitors placed in most volume occupied areas around the reactor laboratory. The area monitors are changed out quarterly. The exposure reading would indicate the maximum exposure an individual would receive if continuously present in that area. Presently, there are 26 monitoring points. Effluents are also monitored at the point of release. According to the licensee's annual reports, the dose a person would receive if continuously present in any of the monitored areas would be less than limits set forth in 10 CFR Part 20 for dose to the general public.

The licensee conducts an environmental monitoring program to record and track the radiological impact of UWNR operation on the surrounding unrestricted area. The program consists of quarterly exposure measurements at four locations on the site boundary and at two control locations away from any direct influence from the reactor. Review of the last five annual reports submitted by the licensee indicates that radiation exposure at the monitoring locations were not significantly higher than those measured at the control locations. Based on the NRC staff's review of the past five years of data, the NRC staff concludes that operation of the UWNR does not have any significant radiological impact on the surrounding environment. No changes in reactor operation that would affect off-site radiation levels are expected as a result of the license renewal.

Environmental Effects of Accidents

Accident analyses are discussed in Chapter 13 of the UWNR Safety Analysis Report and updated in the low-enriched uranium conversion report dated August 25, 2008 (ADAMS Accession No. ML090760776). The maximum hypothetical accident for UWNR is postulated as damage to a fuel element resulting in failure of the fuel cladding. The likelihood of a major fuel element cladding failure is considered small. The elements must meet rigid quality control standards; pool water quality is carefully controlled; and care is taken in handling fuel. Though the likelihood is small, such a cladding failure is possible. In the event of such an accident, the amount of volatiles released to the room would be 11.28 Curies. If this activity is distributed uniformly in the laboratory volume, the resulting concentration would be 5.18E–3 Ci/m^3. The maximum dose to a worker in confinement for 5 minutes would be 1.35 rem total effective dose equivalent, 35.8 rem committed dose equivalent to the thyroid gland, and 278 millirem effective dose equivalent. The proposed action will not result in any changes that will increase the probability or consequences of accidents.

II. Non-Radiological Impacts

The UWNR is cooled by a system that contains three loops: The closed loop primary system; the closed loop intermediate coolant system; and the closed loop campus chilled water system. Heat from the primary coolant system is transferred to the intermediate

coolant system through the primary heat exchanger. Heat from the intermediate cooling system is then transferred to the campus chilled water system through the intermediate heat exchanger. The system is designed to maintain a pressure gradient towards the pool in order to prevent the inadvertent loss of pool water. A 5 centimeter (2 inch) diameter line whose rupture could have caused loss of pool water has been permanently plugged inside the concrete shield and is presently sealed off outside the shield. A pool drain line and valve have been eliminated. There are no valves in the system that, if opened, can drain the pool. The proposed action would not make any changes that would increase the non-radiological consequences of accidents.

National Environmental Policy Act (NEPA) Considerations

The NRC has responsibilities that are derived from NEPA and from other environmental laws, which include the Endangered Species Act (ESA), Coastal Zone Management Act (CZMA), National Historic Preservation Act (NHPA), Fish and Wildlife Coordination Act (FWCA), and the Executive Order on Environmental Justice. The following presents a brief discussion of impacts associated with these laws and other requirements.

I. Endangered Species Act

No effects on the aquatic or terrestrial habitat in the vicinity of the facility, or to threatened, endangered, or protected species under the Endangered Species Act, would be expected.

II. Coastal Zone Management Act

The site occupied by the UWNR is not located within any managed coastal zones, nor do the UWNR effluents impact any managed coastal zones.

III. National Historic Preservation Act

The NHPA requires Federal agencies to consider the effects of their undertakings on historic properties. There are a few historic sites located on the UW campus within 0.5 miles of the site but the closest to the site of the UWNR is the old U. S. Forest Products Laboratory. The location of the old U. S. Products Laboratory is approximately 31 meters (100 feet) from the Mechanical Engineering Building where the UWNR is located. Continued operation of the UWNR will not affect this historic designation. It is unlikely that there would be any potential impacts of license renewal that would have an adverse effect on historic and archaeological resources at UWNR.

IV. Fish and Wildlife Coordination Act

The licensee is not planning any water resource development projects, including any of the modifications relating to impounding a body of water, damming, diverting a stream or river, deepening a channel, irrigation, or altering a body of water for navigation or drainage.

V. Executive Order 12898—Environmental Justice

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 the relicensing and the continued operation of the UWNR. Such effects may include human health, biological, cultural, economic, or social impacts. Minority and low-income populations are subsets of the general public residing around the UWNR, and all are exposed to the same health and environmental effects generated from activities at the UWNR.

Minority Populations in the Vicinity of the UWNR—According to 2000 census data, 9 percent of the population (approximately 1,014,000 individuals) residing within a 50-mile radius of UWNR identified themselves as minority individuals. The largest minority groups were Black or African American and Hispanic or Latino (32,000 persons or 3.2 percent), followed by Asian (21,000 or 2.0 percent). According to the U.S. Census Bureau, about 12.7 percent of the Dane County population identified themselves as minorities, with persons of Black or African American origin comprising the largest minority group (6.1 percent). According to the census data 3-year average estimates for 2006–2008, the minority population of Dane County, as a percent of the total population, had increased to 15.5 percent.

Low-income Populations in the Vicinity of the UWNR—According to 2000 Census data, approximately 10,500 families and 75,000 individuals (approximately 4.1 and 7.4 percent, respectively) residing within a 50-mile radius of the UWNR 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, while 7.0 percent of families and 10.7 percent of the state population were determined to be living below the Federal poverty threshold. Dane County had a higher median household income average ($61,818) and a lower percent of families (4.6 percent) and similar percentage of individuals (10.9 percent) living below the poverty level, respectively.

Impact Analysis—Potential impacts to minority and low-income populations would mostly consist of radiological effects; however, radiation doses from continued operations associated with this license renewal are expected to continue at current levels, and would be well below regulatory limits.

Based on this information and the analysis of human health and environmental impacts presented in this environmental assessment, the proposed relicensing would not have disproportionately high and adverse human health and environmental effects on minority and low-income populations residing in the vicinity of UWNR.

Environmental Impacts of the Alternatives to the Proposed Action

As an alternative to license renewal, the NRC considered denying the proposed action. If the NRC denied the request for license renewal, reactor operations would cease and decommissioning would be required. The NRC notes that, even with a renewed license, the UWNR will eventually be decommissioned, at which time the environmental effects of decommissioning would occur. Decommissioning would be conducted in accordance with an NRC-approved decommissioning plan, which would require a separate environmental review under 10 CFR 51.21. Cessation of facility operations would reduce or eliminate radioactive effluents and emissions. However, as previously discussed in this environmental assessment, radioactive effluents and emissions from reactor operations constitute a small fraction of the applicable regulatory limits. Therefore, the environmental impacts of license renewal and the denial of the request for license renewal would be similar. In addition, denying the request for license renewal would eliminate the benefits of teaching, research, and services provided by the UWNR.

Agencies and Persons Consulted

In accordance with the agency's stated policy, on July 1, 2010, the staff consulted with the State Liaison Officer regarding the environmental impact of the proposed action. In an electronic mail message dated July 2, 2010, the State Liaison Officer indicated that the State had no comments with respect to

the environmental assessment and for the Finding of No Significant Impact.

In a communication dated July 9, 2010, the Wisconsin State Historic Preservation Office agreed that no historic properties would be affected as a result of continued operation of the UWNR.

Finding of No Significant Impact

On the basis of the environmental assessment, the NRC concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed action.

For further details with respect to the proposed action, see the licensee's letter dated May 9, 2000 (ADAMS Accession No. ML093570404), as supplemented by letter dated October 17, 2008 (ADAMS Accession No. ML100740573). 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. 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@nrc.gov.*

Dated at Rockville, Maryland, this 10th day of September 2010.

For the Nuclear Regulatory Commission.

Linh Tran,

Senior Project Manager, Research and Test Reactors Licensing Branch, Division of Policy and Rulemaking, Office of Nuclear Reactor Regulation.

[FR Doc. 2010–23114 Filed 9–15–10; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Privacy Act of 1974: New System of Records

AGENCY: U.S. Office of Personnel Management (OPM).

ACTION: Notice of a new system of records.

SUMMARY: The Patient Protection and Affordable Care Act (the Affordable Care Act), Public Law 111–148, was enacted on March 23, 2010; the Health Care and Education Reconciliation Act (the Reconciliation Act), Public Law 111–152, was enacted on March 30, 2010. The Affordable Care Act and implementing regulations (codified in HHS interim final rules (IFR) at 45 CFR Part 147) require that non-grandfathered health insurance plans and issuers offering group and individual coverage have effective internal claims and appeals and external review processes. The effective date for these requirements is plan or policy years beginning on or after September 23, 2010. Regarding external review, the statute requires that health plans and issuers must comply with either a state external review process or a process meeting standards issued by the Secretary of Health and Human Services (HHS) that is "similar to" a state process meeting requirements in section 2719 (a "federal external review process"). The IFR includes a transition period prior to July 1, 2011, during which time HHS will work with states to assist in making any necessary changes so that the state process will meet the minimum consumer protections identified in 45 CFR 147.136 that must be met in order for the state process to apply. During this interim period, health insurance issuers in states with external review laws in effect prior to September 23, 2010 will follow that state's external review law to the extent applicable. In states that have not passed an external review law that is in effect on September 23, 2010, a health insurance issuer must follow an interim federal external review process that will be administered by the Office of Personnel Management (OPM). The system of records will be created as OPM assists HHS by providing external reviews of adverse benefit determinations and final internal adverse benefit determinations as requested by eligible claimants and their authorized representatives ("claimants"). The system of records will include any data relevant to these external reviews, and OPM proposes to add this new system of records to its inventory of records systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended. This action is necessary to meet the requirements of the Privacy Act to publish in the **Federal Register** notice of the existence and character of records maintained by the agency (5 U.S.C. 552a(e)(4)).

DATES: This action will be effective without further notice on October 18, 2010, unless comments are received that would result in a contrary determination.

ADDRESSES: Send written comments to the Office of Personnel Management, ATTN: Christopher Layton, Health Claims Disputes External Review Services, 1900 E Street, NW., Rm. 3415, Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT: Christopher Layton, 202–606–0004.

SUPPLEMENTARY INFORMATION: The program associated with this system of records is part of a broader initiative directed by HHS's Office of Consumer Information and Insurance Oversight (OCIIO) to implement Section 2719 of the Affordable Care Act. HHS has discretion under the Act in the manner in which it implements the external appeals process, OPM administers a health insurance appeals program as part of its Federal Employees Health Benefits Program, and OPM has offered to permit HHS/OCIIO to utilize its existing appeals processes and frameworks to administer the interim federal appeals process (as modified by an interagency agreement). HHS/OCIIO has accepted that offer. Consequently, OPM has authority to administer the program, using an arrangement under the Economy Act, 31 U.S.C. 1535.

U.S. Office of Personnel Management.

John Berry,

Director.

SYSTEM NAME:

Health Claims Disputes External Review Services

SYSTEM LOCATION:

Office of Personnel Management, 1900 E Street, NW., Washington, DC 20415.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

This system will contain records on adverse benefit determinations and final internal adverse benefit determinations for claimants who qualify for external review according to the IFR and choose to appeal to OPM. Individuals may only appeal to OPM (1) if they are in a state that did not have an external review law in place on September 23, 2010, (2) if they purchase a health insurance policy or a group health plan from a health insurance issuer, (3) if they are in a non-grandfathered plan, and (4) if the plan or policy year begins on or after September 23, 2010. Health insurance issuers must notify claimants upon notice of an adverse benefit determination or final internal adverse benefit determination as to how to initiate an external review by OPM if they choose to do so. This notice must meet the requirements of 45 CFR Part 147(b)(2)(ii)(E).

CATEGORIES OF RECORDS IN THE SYSTEM:

In order to adjudicate an appeal, OPM requires claimants to submit a form with

their name, insurance ID number, phone number and mailing address as well as insurer name and the claim number. In addition, claimants may choose to submit the following additional information:

a. A statement about why the claimant believes their health insurance issuer's decision was wrong, based on specific benefit provisions in the plan brochure or contract;

b. Copies of documents that support the claim, such as physicians' letters, operative reports, bills, medical records, and explanation of benefits (EOB) forms;

c. Copies of all letters the claimant sent to their insurance plan about the claim;

d. Copies of all letters the health insurance issuer sent to the claimant about the claim;

e. The claimant's daytime phone number and the best time to call; and

f. The claimant's email address if they would like to receive OPM's decision via email.

However, health insurance issuers will provide additional information and documentation. Consequently, the records in the system may include all of the following information:

a. Personal Identifying Information (Name, Social Security Number, Date of Birth, Gender, Phone number etc).

b. Address (Current, Mailing).

c. Dependent Information (Spouse, Dependents and their addresses).

d. Employment information.

e. Health care provider information.

f. Health care coverage information.

g. Health care procedure information.

h. Health care diagnosis information.

i. Provider charges and reimbursement information on coverage, procedures and diagnoses.

j. Any other letters or other documents submitted in connection with adverse benefit determinations or final internal adverse benefit determinations by claimants, healthcare providers, or health insurance issuers.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

HHS has authority to administer the program under Sections 2701 through 2763, 2791, and 2792 of the Public Health Service Act (42 U.S.C. 300gg through 300gg–63, 300gg–91, and 300gg–92), as amended. HHS has discretion under the Act in the manner in which it implements the external appeals process, and it has entered an agreement with OPM under the Economy Act, 31 U.S.C. 1535, to provide such services.

PURPOSE:

The primary purpose of this system of records is to aid in the administration of external review of adverse benefit determinations and final internal adverse benefit determinations. OPM must have the capacity to collect, manage, and access health insurance benefits appeals information and documents on an ongoing basis in order for OPM to:

a. Determine eligibility for OPM's review process.

b. Review the adverse benefit determinations and final internal adverse benefit determinations to provide effective external review.

c. Track the progress of individual appeals and ensure that claimants do not submit duplicative appeals.

d. Make information available for any subsequent litigation related to a disputed external review decision.

e. Monitor whether health insurance issuers are providing benefits to which covered individuals are entitled.

f. Maintain records for parties to the dispute so that the covered individual and the insurance issuer can obtain a record of past appeals in which they were involved.

g. Track and report to HHS on the administration of the program.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed to authorized entities, as is determined to be relevant and necessary, including disclosures outside of OPM as a routine use under 5 U.S.C. 552a(b)(3) as follows:

a. For emergency and specialized claims adjudication—To disclose to medical consultants under contract with OPM information needed to adjudicate an appeal.

b. For law enforcement purposes—To disclose pertinent information to the appropriate Federal, State, or local agency responsible for investigating, prosecuting, enforcing, or implementing a statute, rule, regulation, or order, where OPM becomes aware of an indication of a violation or potential violation of civil or criminal law or regulation.

c. For congressional inquiries—To provide information to a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of that individual.

d. For judicial/administrative proceedings—To disclose information to another Federal agency, to a court, or a party in litigation before a court or in an administrative proceeding being conducted by a Federal agency, when the Government is a party to the judicial or administrative proceeding. In those cases where the government is not a party to the processing, records may be disclosed if a subpoena has been signed by a judge.

e. For litigation purposes—To disclose to the Department of Justice or in a proceeding before a court, adjudicative body, or other administrative body before which OPM or HHS is authorized to appear, when:

1. OPM, HHS, or any component thereof; or

2. Any employee of OPM or HHS in his or her official capacity; or

3. Any employee of OPM or HHS in his or her individual capacity where the Department of Justice or OPM or HHS has agreed to represent the employee; or

4. The United States, when OPM or HHS determines that litigation is likely to affect OPM or HHS or any of their components; is a party to litigation or has an interest in such litigation, and the use of such records by the Department of Justice or OPM of HHS is deemed by OPM to be relevant and necessary to the litigation provided, however, that the disclosure is compatible with the purpose for which records were collected.

f. In the event of data breach—To conduct investigations of the breach and for purposes of mitigation response.

g. For National Archives and Records Administration or the General Services Administration—For use in records management inspections conducted pursuant to 44 U.S.C. 2904 and 2906.

h. Within OPM for statistical/analytical studies by OPM in the production of summary descriptive statistics and analytical studies in support of the function for which the records are collected and maintained, or for related program performance studies.

i. By program and policy staff at OPM to compile and analyze de-identified claims utilization data to identify sources of benefit and utilization costs and other information and to formulate health care program changes and enhancements to reduce cost increases, improve outcomes, improve efficiency in program administration and for other purposes.

j. Researchers in and outside the federal government for the purpose of conducting research on health care and health insurance trends and topical issues. Only de-identified data will be shared.

POLICIES AND PRACTICES OF STORING, RETRIEVING, SAFEGUARDING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None

STORAGE:

Paper records will be stored in a locked file cabinet within OPM. Any electronic records will be maintained in electronic systems and will be backed-up according to common convention.

RETRIEVABILITY:

Records will primarily be manipulated, managed and summarized using a unique number assigned to each appeal. However, information may also be accessible by name or social security number.

SAFEGUARDS:

Paper records will be delivered to a locked P.O. Box and kept in a locked file cabinet. Electronic records will be maintained on password protected computers and systems. All individuals with access to these records will receive a background check and privacy training before accessing any of the records. OPM also restricts access to the records on the databases to employees who have the appropriate clearance.

RETENTION AND DISPOSAL:

OPM will maintain the records for 6 years. Computer records will be destroyed by electronic erasure. Any hard copies of records will be destroyed by shredding. A records retention schedule will be established with NARA.

SYSTEM MANAGER AND ADDRESS:

Christopher Layton, U.S. Office of Personnel Management, 1900 E Street, NW., Room 3415, Washington, DC 20415.

NOTIFICATION PROCEDURE:

Individuals wishing to determine whether this system of records contains information about them may do so by writing to the U.S. Office of Personnel Management, FOIA Requester Service Center, 1900 E Street, NW., Room 5415, Washington, DC 20415–7900 or by emailing *foia@opm.gov.*

Individuals must furnish the following information for their records to be located:

a. Full name.
b. Date and place of birth.
c. Social Security Number.
d. Signature.
e. Available information regarding the type of information requested, including the name of the insurance plan involved in any appeal and the approximate date of the appeal.
f. The reason why the individual believes this system contains information about him/her.
g. The address to which the information should be sent.

Individuals requesting access must also comply with OPM's Privacy Act regulations regarding verification of identity and access to records (5 CFR part 297).

In addition, the requester must provide a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

- If executed outside the United States: 'I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on [date]. [Signature].'
- If executed within the United States, its territories, possessions, or commonwealths: 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on [date]. [Signature].'

CONTESTING RECORD PROCEDURE:

Individuals wishing to obtain a copy of their records or to request amendment of records about them should write to the Office of Personnel Management, ATTN: Lynelle Frye, Policy Analyst, Planning and Policy Analysis, Room 3415, Washington, DC 20415, and furnish the following information for their records to be located:

a. Full name.
b. Date and place of birth.
c. Social Security Number.
d. Signature.
e. Available information regarding the type of information that the individual seeks to have amended, including the name of the insurance plan involved in any appeal and the approximate date of the appeal.

Individuals requesting amendment must also follow OPM's Privacy Act regulations regarding verification of identity and amendment to records (5 CFR part 297).

In addition, the requester must provide a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

- If executed outside the United States: 'I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on [date]. [Signature].'
- If executed within the United States, its territories, possessions, or commonwealths: 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on [date]. [Signature].'

RECORD SOURCE CATEGORIES:

Information in this system of records is obtained from:

a. Individuals who request OPM review.
b. Authorized representatives of covered individuals.
c. Health care providers.
d. Health insurance plans.
e. Medical professionals providing expert medical review under contract with OPM.

SYSTEM EXEMPTIONS:

None.

[FR Doc. 2010–23208 Filed 9–15–10; 8:45 am]

BILLING CODE 6325–39–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 29415; File No. 812–13465]

Tri-Continental Corporation, et al.; Notice of Application

September 10, 2010.

AGENCY: Securities and Exchange Commission ("Commission").

ACTION: Notice of application under section 6(c) of the Investment Company Act of 1940 ("Act") for an exemption from section 19(b) of the Act and rule 19b–1 under the Act.

SUMMARY: *Summary of Application:* Applicants request an order to permit certain registered closed-end investment companies to make periodic distributions of long-term capital gains with respect to their common shares as often as monthly in any one taxable year, and as frequently as distributions are specified by or in accordance with the terms of any preferred shares.

Applicants: Tri-Continental Corporation ("Tri-Continental"), RiverSource LaSalle International Real Estate Fund, Inc. ("RLIREF"), Seligman Premium Technology Growth Fund, Inc. ("SPTGF," together with Tri-Continental and RLIREF, the "Funds"), and Columbia Management Investment Advisers, LLC (the "Investment Adviser").

DATES: *Filing Dates:* The application was filed on December 26, 2007, and amended on September 1, 2009, and May 13, 2010. Applicants have agreed to file an amendment during the notice period, the substance of which is reflected in this notice.

Hearing or Notification of Hearing: An order granting the application will be

issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on October 4, 2010, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090; Applicants: Tri-Continental, RLIREF, and SPTGF, 50605 Ameriprise Financial Center, Minneapolis, MN 55474; the Investment Adviser, 100 Federal Street, Boston, MA 02110.

FOR FURTHER INFORMATION CONTACT: Christine Y. Greenlees, Senior Counsel, at (202) 551–6879, or Mary Kay Frech, Branch Chief, at (202) 551–6821 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm,* or by calling (202) 551–8090.

Applicants' Representations

1. Each of the Funds is a closed-end management investment company registered under the Act and incorporated in the State of Maryland.[1] Tri-Continental's investment objective is future growth of both capital and income while providing reasonable current income. Tri-Continental's common shares are listed on the New York Stock Exchange ("NYSE"). Tri-Continental has also issued preferred shares. RLIREF's primary investment objective is long-term capital appreciation and its secondary objective is current income. RLIREF's common shares are listed on the NYSE. To date, RLIREF has not issued preferred shares. SPTGF's primary investment objective is growth of capital and current income. SPTGF's common shares are listed on the NYSE. To date, SPTGF has not issued preferred shares. Applicants believe that the shareholders of each Fund are generally conservative, dividend-sensitive investors who desire current income periodically and may favor a fixed distribution policy.

2. The Investment Adviser, a wholly-owned subsidiary of Ameriprise Financial, Inc., is registered under the Investment Advisers Act of 1940 ("Advisers Act"). The Investment Adviser acts as investment adviser to the Funds. Each Fund will be advised by investment advisers that are registered under the Advisers Act.

3. Applicants state that prior to implementing a distribution plan, the board of directors (the "Board") of each Fund, including a majority of the members of the Board who are not "interested persons" of the Fund as defined in section 2(a)(19) of the Act (the "Independent Directors"), will review information regarding the purpose and terms of a proposed distribution policy, the likely effects of such policy on the Fund's long-term total return (in relation to market price and net asset value ("NAV") per common share) and the relationship between such Fund's distribution rate on its common shares under the policy and such Fund's total return (in relation to NAV per share). Applicants state that the Independent Directors also will consider what conflicts of interest the Investment Adviser and the affiliated persons of the Investment Adviser and each such Fund might have with respect to the adoption or implementation of such policy. Applicants further state that after considering such information, the Board, including the Independent Directors, of each Fund will approve a distribution policy with respect to such Fund's common shares (the "Plan") and will determine that such Plan is consistent with the Fund's investment objective(s) and in the best interests of the Fund's common shareholders.

4. Applicants state that the purpose of each Fund's Plan is to permit the Fund to distribute over the course of each year, through periodic distributions as nearly equal as practicable and any required special distributions, an amount closely approximating the total taxable income of such Fund during such year and, if so determined by its Board, all or a portion of the return of capital paid by portfolio companies to such Fund during such year. Applicants note that under the Plan, each Fund would distribute to its respective common shareholders a fixed monthly percentage of the market price of such Fund's common shares at a particular point in time or a fixed monthly percentage of NAV at a particular time or a fixed monthly amount, any of which may be adjusted from time to time. Applicants further state that the minimum annual distribution rate would be independent of each Fund's performance during any particular period, but would be expected to correlate with such Fund's performance over time. Applicants explain that except for extraordinary distributions and potential increases or decreases in the final dividend periods in light of the Fund's performance for the entire calendar year and to enable the Fund to comply with the distribution requirements of subchapter M of the Internal Revenue Code of 1986 ("Code") for the calendar year, each distribution on the common shares would be at the stated rate then in effect.

5. Applicants state that the Board of each of Tri-Continental and RLIREF has adopted policies and procedures under rule 38a–1 under the Act that are reasonably designed to ensure that all notices required to be sent to the Fund's shareholders pursuant to section 19(a) of the Act, rule 19a–1 under the Act, and condition 4 below (each a "19(a) Notice") comply with condition 2.a. below, and that all other written communications by the Fund or its agents regarding distributions under the Plan include the disclosure required by condition 3.a. below. Applicants state that the Board of each of Tri-Continental and RLIREF also has adopted policies and procedures that require each of the Funds to keep records that demonstrate its compliance with all of the conditions of the requested order and that are necessary for such Fund to form the basis for, or demonstrate the calculation of, the amounts disclosed in its 19(a) Notices. SPTGF and any future Fund would adopt similar policies and procedures before relying on the requested relief.

Applicants' Legal Analysis

1. Section 19(b) of the Act generally makes it unlawful for any registered investment company to make long-term capital gains distributions more than once every twelve months. Rule 19b–1 under the Act limits the number of capital gains dividends, as defined in section 852(b)(3)(C) of the Code ("distributions"), that a fund may make

[1] All registered closed-end investment companies that currently intend to rely on the order are named as applicants. Applicants request that the order also apply to each registered closed-end investment company that in the future: (a) Is advised by the Investment Adviser (including any successor in interest) or by an entity controlling, controlled by, or under common control (within the meaning of section 2(a)(9) of the Act) with the Investment Adviser; and (b) complies with the terms and conditions of the application (included in the term "Funds"). A successor in interest is limited to entities that result from a reorganization into another jurisdiction or a change in the type of business organization.

with respect to any one taxable year to one, plus a supplemental "clean up" distribution made pursuant to section 855 of the Code not exceeding 10% of the total amount distributed for the year, plus one additional capital gain dividend made in whole or in part to avoid the excise tax under section 4982 of the Code.

2. Section 6(c) provides that the Commission may, by order upon application, conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provision of the Act, if and to the extent that the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

3. Applicants state that one of the concerns underlying section 19(b) and rule 19b–1 is that shareholders might be unable to differentiate between frequent distributions of capital gains and dividends from investment income. Applicants state, however, that rule 19a–1 effectively addresses this concern by requiring that a separate statement showing the sources of a distribution (*e.g.,* net investment income, net short-term capital gains, net long-term capital gains and/or return of capital) accompany any distributions (or the confirmation of the reinvestment of distributions) estimated to be sourced in part from capital gains or capital. Applicants also state that the same information is included in each Fund's annual reports to shareholders and similar information is included on its IRS Form 1099–DIV, which is sent to each common and preferred shareholder who received distributions during a particular year (including shareholders who have sold shares during the year).

4. Applicants further state that each Fund will make the additional disclosures required by the conditions set forth below, and each of them has adopted, or will adopt, compliance policies and procedures in accordance with rule 38a–1 under the Act to ensure that all required 19(a) Notices and disclosures are sent to shareholders. Applicants argue that by providing the information required by section 19(a) and rule 19a–1, and by complying with the procedures adopted under the Plan and the conditions listed below, each Fund's shareholders would be provided sufficient information to understand that their periodic distributions are not tied to the Fund's net investment income (which for this purpose is each Fund's taxable income other than from capital gains) and realized capital gains to date, and may not represent yield or investment return. Applicants also state that compliance with the Fund's compliance procedures and condition 3 set forth below will ensure that prospective shareholders and third parties are provided with the same information. Accordingly, applicants assert that continuing to subject the Funds to section 19(b) and rule 19b–1 would afford shareholders no extra protection.

5. Applicants note that section 19(b) and rule 19b–1 also were intended to prevent certain improper sales practices, including, in particular, the practice of urging an investor to purchase shares of a fund on the basis of an upcoming capital gains dividend ("selling the dividend"), where the dividend would result in an immediate corresponding reduction in NAV and would be in effect a taxable return of the investor's capital. Applicants submit that the "selling the dividend" concern should not apply to closed-end investment companies, such as the Funds, that do not continuously distribute shares.[2] According to applicants, if the underlying concern extends to secondary market purchases of shares of closed-end funds that are subject to a large upcoming capital gains dividend, adoption of a periodic distribution plan actually helps minimize the concern by avoiding, through periodic distributions, any buildup of large end-of-the-year distributions.

6. Applicants also note that common shares of closed-end funds often trade in the marketplace at a discount to the funds' NAV. Applicants believe that this discount may be reduced if the Funds are permitted to pay relatively frequent dividends on their common shares at a consistent rate, whether or not those dividends contain an element of capital gain.

7. Applicants assert that the application of rule 19b–1 to a Plan actually could have an undesirable influence on portfolio management decisions. Applicants state that, in the absence of an exemption from rule 19b–1, the implementation of a periodic distribution plan imposes pressure on management (a) not to realize any net long-term capital gains until the point in the year that the fund can pay all of its remaining distributions in accordance with rule 19b–1, and (b) not to realize any long-term capital gains during any particular year in excess of the amount of the aggregate pay-out for the year (since as a practical matter excess gains must be distributed and accordingly would not be available to satisfy pay-out requirements in following years), notwithstanding that purely investment considerations might favor realization of long-term gains at different times or in different amounts. Applicants thus assert that by limiting the number of capital gain distributions that a fund may make with respect to any one year, rule 19b–1 may prevent the efficient operation of a periodic distribution plan whenever that fund's realized net long-term capital gains in any year exceed the total of the periodic distributions that may include such capital gains under the rule.

8. Applicants also assert that rule 19b–1 may cause fixed regular periodic distributions under a periodic distribution plan to be funded with returns of capital[3] (to the extent net investment income and realized short-term capital gains are insufficient to fund the distribution), even though realized net long-term capital gains otherwise could be available. To distribute all of a fund's long-term capital gains within the limits in rule 19b–1, a fund may be required to make total distributions in excess of the annual amount called for by its periodic distribution plan, or to retain and pay taxes on the excess amount. Applicants thus assert that the requested order would minimize these effects of rule 19b–1 by enabling the Funds to realize long-term capital gains as often as investment considerations dictate without fear of violating rule 19b–1.

9. Applicants state that Revenue Ruling 89–81 under the Code requires that a fund that has both common stock and preferred stock outstanding designate the types of income, *e.g.,* investment income and capital gains, in the same proportion as the total distributions distributed to each class for the tax year. To satisfy the proportionate designation requirements of Revenue Ruling 89–81, whenever a fund has realized a long-term capital gain with respect to a given tax year, the fund must designate the required proportionate share of such capital gain to be included in common and preferred stock dividends. Applicants state that although rule 19b–1 allows a fund some flexibility with respect to the frequency

[2] Applicants note that Tri-Continental is technically continuously distributing its common shares because it has outstanding warrants to purchase common stock, which were either issued prior to 1940 or in connection with a series of corporate acquisitions in the 1950s. In addition, Tri-Continental has a cash purchase plan that is part of a dividend reinvestment plan, which is described in its current prospectus and recently has accounted for less than .6% of the average issued and outstanding shares of common stock.

[3] Returns of capital as used in the application means return of capital for financial accounting purposes and not for tax accounting purposes.

of capital gains distributions, a fund might use all of the exceptions available under the rule for a tax year and still need to distribute additional capital gains allocated to the preferred stock to comply with Revenue Ruling 89–81.

10. Applicants assert that the potential abuses addressed by section 19(b) and rule 19b–1 do not arise with respect to preferred stock issued by a closed-end fund. Applicants assert that such distributions are fixed or determined in periodic auctions by reference to short-term interest rates rather than by reference to performance of the issuer, and Revenue Ruling 89–81 determines the proportion of such distributions that are comprised of the long-term capital gains.

11. Applicants also submit that the "selling the dividend" concern is not applicable to preferred stock, which entitles a holder to no more than a periodic dividend at a fixed rate or the rate determined by the market, and, like a debt security, is priced based upon its liquidation value, dividend rate, credit quality, and frequency of payment. Applicants state that investors buy preferred shares for the purpose of receiving payments at the frequency bargained for, and do not expect the liquidation value of their shares to change.

12. Applicants request an order under section 6(c) granting an exemption from section 19(b) and rule 19b–1 to permit each Fund to distribute periodic capital gain dividends (as defined in section 852(b)(3)(C) of the Code) as often as monthly in any one taxable year in respect of its common shares and as often as specified by or determined in accordance with the terms thereof in respect of its preferred.

Applicants' Conditions

Applicants agree that any order of the Commission granting the requested relief will be subject to the following conditions:

1. *Compliance Review and Reporting.* Each Fund's chief compliance officer will: (a) Report to the Fund's Board, no less frequently than once every three months or at the next quarterly scheduled regular Board meeting, whether (i) the Fund and its Investment Adviser have complied with the conditions of the order, and (ii) a material compliance matter (as defined in rule 38a–1(e)(2) under the Act) has occurred with respect to such conditions; and (b) review the adequacy of the policies and procedures adopted by the Board no less frequently than annually.

2. Disclosures to Fund Shareholders

a. Each 19(a) Notice disseminated to the holders of the Fund's common shares, in addition to the information required by section 19(a) and rule 19a–1:

i. Will provide, in a tabular or graphical format:

(1) The amount of the distribution, on a per share basis, together with the amounts of such distribution amount, on a per share basis and as a percentage of such distribution amount, from estimated: (A) Net investment income; (B) net realized short-term capital gains; (C) net realized long-term capital gains; and (D) return of capital or other capital source;

(2) The fiscal year-to-date cumulative amount of distributions, on a per share basis, together with the amounts of such cumulative amount, on a per share basis and as a percentage of such cumulative amount of distributions, from estimated: (A) Net investment income; (B) net realized short-term capital gains; (C) net realized long-term capital gains; and (D) return of capital or other capital source;

(3) The average annual total return in relation to the change in NAV for the 5-year period (or, if the Fund's history of operations is less than five years, the time period commencing immediately following the Fund's first public offering) ending on the last day of the month ended immediately prior to the most recent distribution record date compared to the current fiscal period's annualized distribution rate expressed as a percentage of NAV as of the last day of the month prior to the most recent distribution record date; and

(4) The cumulative total return in relation to the change in NAV from the last completed fiscal year to the last day of the month prior to the most recent distribution record date compared to the fiscal year-to-date cumulative distribution rate expressed as a percentage of NAV as of the last day of the month prior to the most recent distribution record date. Such disclosure shall be made in a type size at least as large and as prominent as the estimate of the sources of the current distribution; and

ii. Will include the following disclosure:

(1) "You should not draw any conclusions about the Fund's investment performance from the amount of this distribution or from the terms of the Fund's Plan";

(2) "The Fund estimates that it has distributed more than its income and net realized capital gains; therefore, a portion of your distribution may be a return of capital. A return of capital may occur, for example, when some or all of the money that you invested in the Fund is paid back to you. A return of capital distribution does not necessarily reflect the Fund's investment performance and should not be confused with 'yield' or 'income'";[4] and

(3) "The amounts and sources of distributions reported in this 19(a) Notice are only estimates and are not being provided for tax reporting purposes. The actual amounts and sources of the amounts for tax reporting purposes will depend upon the Fund's investment experience during the remainder of its fiscal year and may be subject to changes based on tax regulations. The Fund will send you a Form 1099–DIV for the calendar year that will tell you how to report these distributions for Federal income tax purposes."

Such disclosure shall be made in a type size at least as large as and as prominent as any other information in the 19(a) Notice and placed on the same page in close proximity to the amount and the sources of the distribution.

b. On the inside front cover of each report to shareholders under rule 30e–1 under the Act, the Fund will:

i. Describe the terms of the Plan (including the fixed amount or fixed percentage of the distributions and the frequency of the distributions);

ii. Include the disclosure required by condition 2.a.ii.(1) above;

iii. State, if applicable, that the Plan provides that the Board may amend or terminate the Plan at any time without prior notice to Fund shareholders; and

iv. Describe any reasonably foreseeable circumstances that might cause the Fund to terminate the Plan and any reasonably foreseeable consequences of such termination.

c. Each report provided to shareholders under rule 30e–1 under the Act and each prospectus filed with the Commission on Form N–2 under the Act, will provide the Fund's total return in relation to changes in NAV in the financial highlights table and in any discussion about the Fund's total return.

3. Disclosure to Shareholders, Prospective Shareholders and Third Parties

a. Each Fund will include the information contained in the relevant 19(a) Notice, including the disclosure required by condition 2.a.ii. above, in any written communication (other than a communication on Form 1099) about

[4] The disclosure in this condition 2.a.ii.(2) will be included only if the current distribution or the fiscal year-to-date cumulative distributions are estimated to include a return of capital.

the Plan or distributions under the Plan by the Fund, or agents that the Fund has authorized to make such communication on the Fund's behalf, to any Fund's common shareholder, prospective common shareholder or third-party information provider;

b. Each Fund will issue, contemporaneously with the issuance of any 19(a) Notice, a press release containing the information in the 19(a) Notice and file with the Commission the information contained in such 19(a) Notice, including the disclosure required by condition 2.a.ii. above, as an exhibit to its next filed Form N–CSR; and

c. Each Fund will post prominently a statement on its (or the Investment Adviser's) Web site containing the information in each 19(a) Notice, including the disclosure required by condition 2.a.ii. above, and will maintain such information on such Web site for at least 24 months.

4. Delivery of 19(a) Notices to Beneficial Owners

If a broker, dealer, bank or other person ("financial intermediary") holds common stock issued by a Fund in nominee name, or otherwise, on behalf of a beneficial owner, the Fund: (a) Will request that the financial intermediary, or its agent, forward the 19(a) Notice to all beneficial owners of the Fund's shares held through such financial intermediary; (b) will provide, in a timely manner, to the financial intermediary, or its agent, enough copies of the 19(a) Notice assembled in the form and at the place that the financial intermediary, or its agent, reasonably requests to facilitate the financial intermediary's sending of the 19(a) Notice to each beneficial owner of the Fund's shares; and (c) upon the request of any financial intermediary, or its agent, that receives copies of the 19(a) Notice, will pay the financial intermediary, or its agent, the reasonable expenses of sending the 19(a) Notice to such beneficial owners.

5. Additional Board Determinations for Funds Whose Shares Trade at a Premium

If:

a. A Fund's common shares have traded on the stock exchange that they primarily trade on at the time in question at an average premium to NAV equal to or greater than 10%, as determined on the basis of the average of the discount or premium to NAV of the Fund's common shares as of the close of each trading day over a 12-week rolling period (each such 12-week rolling period ending on the last trading day of each week); and

b. The Fund's annualized distribution rate for such 12-week rolling period, expressed as a percentage of NAV as of the ending date of such 12-week rolling period, is greater than the Fund's average annual total return in relation to the change in NAV over the 2-year period ending on the last day of such 12-week rolling period; then:

i. At the earlier of the next regularly scheduled meeting or within four months of the last day of such 12-week rolling period, the Board, including a majority of the Independent Directors:

(1) Will request and evaluate, and the Fund's Investment Adviser will furnish, such information as may be reasonably necessary to make an informed determination of whether the Plan should be continued or continued after amendment;

(2) Will determine whether continuation, or continuation after amendment, of the Plan is consistent with the Fund's investment objective(s) and policies and is in the best interests of the Fund and its shareholders, after considering the information in condition 5.b.i.(1) above; including, without limitation:

(A) Whether the Plan is accomplishing its purpose(s);

(B) The reasonably foreseeable material effects of the Plan on the Fund's long-term total return in relation to the market price and NAV of the Fund's common shares; and

(C) The Fund's current distribution rate, as described in condition 5.b. above, compared with the Fund's average annual taxable income or total return over the 2-year period, as described in condition 5.b., or such longer period as the Board deems appropriate; and

(3) Based upon that determination, will approve or disapprove the continuation, or continuation after amendment, of the Plan; and

ii. The Board will record the information considered by it, including its consideration of the factors listed in condition 5.b.i.(2) above, and the basis for its approval or disapproval of the continuation, or continuation after amendment, of the Plan in its meeting minutes, which must be made and preserved for a period of not less than six years from the date of such meeting, the first two years in an easily accessible place.

6. Public Offerings

A Fund will not make a public offering of the Fund's common shares other than:

a. A rights offering below NAV to holders of the Fund's common shares;

b. An offering in connection with a dividend reinvestment and cash purchase plan, merger, consolidation, acquisition, spin-off or reorganization of the Fund or, in the case of Tri-Continental, in connection with its outstanding warrants (9,491 of which were outstanding on February 26, 2010); or

c. An offering other than an offering described in conditions 6.a. and 6.b. above, provided that, with respect to such other offering:

i. The Fund's annualized distribution rate for the six months ending on the last day of the month ended immediately prior to the most recent distribution record date,[5] expressed as a percentage of NAV per share as of such date, is no more than 1 percentage point greater than the Fund's average annual total return for the 5-year period ending on such date;[6] and

ii. The transmittal letter accompanying any registration statement filed with the Commission in connection with such offering discloses that the Fund has received an order under section 19(b) to permit it to make periodic distributions of long-term capital gains with respect to its common stock as frequently as twelve times each year, and as frequently as distributions are specified by or determined in accordance with the terms of any outstanding preferred stock as such Fund may issue.

7. Amendments to Rule 19b–1

The requested order will expire on the effective date of any amendment to rule 19b–1 that provides relief permitting certain closed-end investment companies to make periodic distributions of long-term capital gains with respect to their outstanding common stock as frequently as twelve times each year.

For the Commission, by the Division of Investment Management, under delegated authority.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–23113 Filed 9–15–10; 8:45 am]

BILLING CODE 8010–01–P

[5] If the Fund has been in operation fewer than six months, the measured period will begin immediately following the Fund's first public offering.

[6] If the Fund has been in operation fewer than five years, the measured period will begin immediately following the Fund's first public offering.

SECURITIES AND EXCHANGE COMMISSION

Agency Meeting

Federal Register Citation of Previous Announcement: [To be published]

Status: Open Meeting.

Place: 100 F. Street, NE., Washington, DC.

Date and Time of Previously Announced Meeting: September 15, 2010.

Change In the Meeting: Room Change.

The Joint Public Roundtable on Swap Execution Facilities and Security-Based Swap Execution scheduled for Wednesday, September 15, 2010 at 9 a.m. will be held in the Multi-Purpose Room (Room L–006).

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 551–5400.

Dated: September 13, 2010.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–23169 Filed 9–15–10; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62883; File No. SR–FINRA–2010–033]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change Relating To Expanding the Pilot Rule for Trading Pauses Due to Extraordinary Market Volatility to the Russell 1000® Index and Specified Exchange Traded Products

September 10, 2010.

I. Introduction

On June 30, 2010, the Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 ("Act"),[2] and Rule 19b–4 thereunder,[3] a proposed rule change to amend its rules to expand the trading pause pilot in individual stocks comprising the S&P 500® Index ("S&P 500") when the price moves ten percent or more in the preceding five minute period to securities included in the Russell 1000® Index ("Russell 1000") and specified Exchange Traded Products ("ETPs").[4] The proposed rule change was published for comment in the **Federal Register** on July 7, 2010.[5] The Commission received 19 comments on the proposal and on broader issues relating to the effectiveness of the circuit breaker pilot program to date.[6]

The Commission finds that the proposals are consistent with Section 15A(b)(6) of the Act,[7] as it believes that expanding the uniform, market-wide trading pauses will serve to prevent potentially destabilizing price volatility and will thereby help promote the goals of investor protection and just and equitable principles of trade. This order approves the proposed rule change.

II. Description of the Proposals

On May 6, 2010, the U.S. equity markets experienced a severe disruption.[8] Among other things, the prices of a large number of individual securities suddenly declined by significant amounts in a very short time

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[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] For purposes of Phase II, ETPs consist of exchange-traded funds (including widely traded broad-based funds like SPY), exchange-traded vehicles (which track the performance of an asset or index, providing investors with exposure to futures contracts, currencies and commodities without actually trading futures or taking physical delivery of the asset), and exchange-traded notes.

[5] *See* Securities Exchange Act Release No. 62416 (June 30, 2010), 75 FR 39069 (July 7, 2010) (SR–FINRA–2010–033).

Also on June 30, 2010, each of BATS Exchange, Inc. ("BATS"), NASDAQ OMX BX, Inc. ("BX"), Chicago Board Options Exchange, Incorporated ("CBOE"), Chicago Stock Exchange, Inc. ("CHX"), EDGA Exchange, Inc ("EDGA"), EDGX Exchange, Inc. ("EDGX"), International Securities Exchange LLC ("ISE"), The NASDAQ Stock Market LLC ("NASDAQ"), New York Stock Exchange LLC ("NYSE"), NYSE Amex LLC ("NYSE Amex"), NYSE Arca, Inc. ("NYSE Arca"), and National Stock Exchange, Inc. ("NSX") securities exchanges filed proposed rule changes to expand the pilot program. *See* Securities Exchange Act Release Nos. 62407 (June 30, 2010), 75 FR 39060 (July 7, 2010); 62415 (June 30, 2010), 75 FR 39086 (July 7, 2010); 62409 (June 30, 2010), 75 FR 39078 (July 7, 2010); 62408 (June 30, 2010), 75 FR 39065 (July 7, 2010); 62417 (June 30, 2010), 75 FR 39074 (July 7, 2010); 62418 (June 30, 2010), 75 FR 39084 (July 7, 2010); 62419 (June 30, 2010), 75 FR 39070 (July 7, 2010); 62414 (June 30, 2010), 75 FR 39081 (July 7, 2010); 62411 (June 30, 2010), 75 FR 39067 (July 7, 2010); 62412 (June 30, 2010), 75 FR 39073 (July 7, 2010); 62413 (June 30, 2010), 75 FR 39076 (July 7, 2010); and 62410 (June 30, 2010), 75 FR 39063 (July 7, 2010). Those rule changes were approved today. *See* Securities Exchange Act Release No. 62884 (September 10, 2010).

In this order, the term "Exchanges" refers collectively to all of the exchanges. The term "Listing Markets" refers collectively to NYSE, NYSE Amex, NYSE Arca, and NASDAQ. The term "Nonlisting Markets" refers collectively to the remaining national securities exchanges. The term "SROs" refers to the Exchanges and the Financial Industry Regulatory Authority ("FINRA").

[6] The Commission considered letters received as of August 25 discussing the concept of the effectiveness of the individual stock circuit breaker pilot to date as well as formal letters citing the rule filings. *See* Letter from Paul Schott Stevens, President & CEO, Investment Company Institute to Chairman Schapiro, Commission, dated June 22, 2010 ("ICI Letter"); Letter from Craig S. Donohue, CEO, CME Group, Inc. to Chairman Schapiro, Commission, dated June 23, 2010 ("CME Letter"); Letter from Ann L. Vlcek, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association to Elizabeth M. Murphy, Secretary, Commission, dated June 25, 2010 ("SIFMA Letter"); Letter from Peter Skopp, President, Molinete Trading Inc. to Elizabeth M. Murphy, Secretary, Commission, dated July 8, 2010 ("Molinete Letter"); Letter from Sal L. Arnuk, Co-Head, and Joseph Saluzzi, Co-Head, Themis Trading to Elizabeth M. Murphy, Secretary, Commission, dated July 8, 2010 ("Themis Letter"); Letter from Peter A. Ianello, Partner, CSS, LLC to Elizabeth M. Murphy, Secretary, Commission, dated July 15, 2010 ("CSS Letter"); Letter from Julie S. Sweet, General Counsel, Secretary, Chief Compliance Officer, Accenture plc to Elizabeth M. Murphy, Secretary, Commission, dated July 15, 2010 ("Accenture Letter"); Letter from Patrick J. Healy, CEO, Issuer Advisory Group, LLC, Washington, District of Columbia to Elizabeth M. Murphy, Secretary, Commission, dated July 18, 2010 ("Issuer Advisory Group Letter"); Letter from Alexander M. Cutler, Chair, Business Roundtable Corporate Leadership Initiative, Business Roundtable, to Elizabeth M. Murphy, Secretary, Commission, dated July 19, 2010 ("Business Roundtable Letter"); Letter from Geva Patz, Android Alpha Fund to Elizabeth M. Murphy, Secretary, Commission, dated July 19, 2010 ("Android Alpha Fund Letter"); Letter from David C. Cushing, Director of Global Equity Trading, Wellington Management Company, LLP to Elizabeth M. Murphy, Secretary, Commission, dated July 19, 2010 ("Wellington Letter"); Letter from Karrie McMillan, General Counsel, Investment Company Institute to Elizabeth M. Murphy, Secretary, Commission, dated July 19, 2010 ("ICI 2 Letter"); Letter from Ira P. Shapiro, Managing Director, BlackRock, Inc., San Francisco, California to Elizabeth M. Murphy, Secretary, Commission, dated July 19, 2010 ("BlackRock Letter"); Letter from Tom Quaadman, Vice President, Center for Capital Markets Competitiveness, Washington, District of Columbia to Elizabeth M. Murphy, Secretary, Commission, dated July 19, 2010 ("CCMC Letter"); Letter from James J. Angel, Associate Professor of Finance, Georgetown University, dated June 19, 2010 [sic] ("Angel Letter"); Letter from John A. McCarthy, General Counsel, GETCO to Elizabeth M. Murphy, Secretary, Commission, dated July 20, 2010 ("GETCO Letter"); Letter from Jose Marques, Managing Director, Deutsche Bank Securities Inc. to Elizabeth M. Murphy, Secretary, Commission, dated July 21, 2010 ("Deutsche Bank Letter"); Letter from Paul Schott Stevens, President & CEO, Investment Company Institute to Chairman Schapiro, Commission, dated July 27, 2010 ("ICI 3 Letter"); Letter from Craig S. Donohue, Chief Executive Officer, CME Group to Elizabeth M. Murphy, Secretary, Commission, dated July 30, 2010 (CME 2 Letter").

[7] 15 U.S.C. 78*o*–3(b)(6). That section, among other things, requires that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade and in general, to protect investors and the public interest.

[8] The events of May 6 are described more fully in the report of the staffs of the Commodity Futures Trading Commission ("CFTC") and the Commission, titled *Report of the CFTC and SEC to the Joint Advisory Committee on Emerging Regulatory Issues,* "Preliminary Findings Regarding the Market Events of May 6, 2010," dated May 18, 2010 ("Joint Report").

period, before suddenly reversing to prices consistent with their pre-decline levels. This severe price volatility led to a large number of trades being executed at temporarily depressed prices, including many that were more than 60% away from pre-decline prices and were broken by the national securities exchanges. The Commission is concerned that events such as those that occurred on May 6 can seriously undermine the integrity of the U.S. securities markets. Accordingly, it is working on a variety of fronts to assess the causes and contributing factors of the May 6 market disruption and to fashion policy responses that will help prevent a recurrence.

The Commission also recognizes the importance of moving quickly to implement appropriate steps that could help limit potential harm from extreme price volatility. In this regard, it is pleased that the SROs began consulting soon after May 6 in an effort to develop consistent circuit breaker rules that could be implemented on an expedited basis. The SROs were able to reach agreement on a consistent approach and, on May 18 and 19, 2010, all of the SROs filed proposed rule changes with the Commission.

On June 10, 2010, the Commission granted accelerated approval, for a pilot period to end December 10, 2010, for a proposed rule change by FINRA to pause trading during periods of extraordinary market volatility in S&P 500 stocks (the "Phase I Circuit Breaker Pilot").[9] That rule requires FINRA, once a Listing Market issues a trading pause, to halt trading otherwise than on an exchange in that security until trading has resumed on the primary listing market.[10] The Listing Markets are required to notify the other exchanges, market participants and FINRA of the imposition of a trading pause by immediately disseminating a special indicator over the consolidated tape. Under the rules, once the Listing Market issues a trading pause, FINRA is required to pause trading in the security otherwise than on an exchange.

At the end of the five-minute pause, the Listing Market reopens trading in the security in accordance with its procedures for doing so. Trading resumes on other exchanges and in the over-the-counter (OTC) market once trading has resumed on the Listing Market. In the event of a significant imbalance on the Listing Market at the end of the trading pause, the Listing Market may delay reopening. If the Listing Market has not reopened within ten minutes from the initiation of the trading pause, however, FINRA will halt trading otherwise than on an exchange in that security until trading has resumed on the primary Listing Market. FINRA may permit the resumption of trading if trading has commenced on at least one other national securities exchange.[11]

Several commenters on the proposal for the Phase I Circuit Breaker Pilot expressed the view that the circuit breaker pilot should be expanded beyond S&P 500 stocks, particularly to exchange traded funds ("ETFs") and the securities of other companies that were most severely affected by the market disruption on May 6, 2010.[12] In the approval order for the Phase I Circuit Breaker Pilot, the Commission agreed that consideration should be given by the exchanges and FINRA to whether the circuit breakers should be expanded to cover additional securities, but did not believe that there was a reason to delay implementation of the Phase I Circuit Breaker Pilot as a reasonable first step to address potential market volatility.

Under the current proposal, FINRA proposes to add securities included in the Russell 1000, as well as specified ETPs, to the pilot (the "Phase II Circuit Breaker Pilot") shortly after the Commission approves the proposed rule changes. FINRA believes that adding these securities to the pilot would have the beneficial effect of applying the circuit breakers' protections against excessive volatility to a larger group of securities, while at the same time allowing the opportunity, during the pilot period, for continued review of the operation of the circuit breakers and an assessment of whether the pilot should be further expanded or modified.

FINRA believes that the securities in the Russell 1000 have similar trading characteristics to securities included in the S&P 500, and therefore the 10% price movement that triggers a trading pause in the Phase I Circuit Breaker Pilot is appropriate for Russell 1000 securities.

In addition, FINRA proposed to include in the Phase II Circuit Breaker Pilot more liquid ETPs—specifically, those with a minimum average daily volume of $2,000,000—that tend to have similar trading characteristics as securities in the S&P 500 and Russell 1000 and for which they believe a 10% circuit breaker trigger is appropriate. To assure related ETPs are subject to comparable circuit breakers, any ETPs that did not meet the $2,000,000 average daily volume threshold, but tracked similar stocks and indices as ETPs meeting this criterion and included in the pilot, were proposed for inclusion. ETPs with average-daily-volumes of less than $2,000,000, and for which there were no high-volume counterparts were not included. Also excluded were leveraged ETFs since those products by design are more volatile than the underlying stocks they track, and the current proposal only contemplates adding securities for which a 10% trigger is appropriate.

As proposed, the list of ETPs includes those that track broad-based equity indices, which FINRA recognizes has caused some debate. For example, as described in Section III, concerns have been raised about the effect that halting trading in an index-based ETP may have on a related index-based option or future. However, FINRA believes that including broad-based index ETPs is appropriate so that ETP investors are protected should the component securities experience such volatility that trading in the broad-based ETP is affected. Because the proposal is for a pilot period, FINRA will continue to assess, among other things, whether it is appropriate to have a trading pause in broad-based index ETPs when there is not a similar trading pause in related index-based options or futures.

In addition, during the pilot period, FINRA will continue to assess whether specific stocks or ETPs should be added to, or removed from, the list of securities subject to the circuit breakers. FINRA will also continue to assess whether the parameters for invoking a trading pause continue to be appropriate or should be modified.[13]

[9] *See* Securities Exchange Act Release No. 62251 (June 10, 2010), 75 FR 34183 (June 16, 2010) (SR–FINRA–2010–025) ("Phase I Approval Order").

[10] The rules of the Exchanges require the Listing Markets to issue five-minute trading pauses for individual securities for which they are the primary Listing Market if the transaction price of the security moves ten percent or more from a price in the preceding five-minute period.

[11] For more details on the operation of FINRA's rule, *see* Securities Exchange Act Release No. 62251.

[12] *See, e.g.,* Letter from Jeffrey W. Rubin, American Bar Association Business Law Section to Elizabeth M. Murphy, Secretary, Commission, dated June 3, 2010; Letter from Julie Sweet, Accenture plc to Elizabeth M. Murphy, Secretary, Commission, dated June 3, 2010; and Letter from Karrie McMillan, Investment Company Institute to Elizabeth M. Murphy, Secretary, Commission, dated June 3, 2010 (expressing particular concern that if circuit breakers exist for individual securities contained in ETFs' baskets, but not for the ETFs themselves, ETFs could again suffer disproportionately during a market event such as that of May 6).

[13] *See* Securities Exchange Act Release No. 62416 (June 30, 2010), 75 FR 39069 (July 7, 2010) (SR–FINRA–2010–033).

III. Discussion of Comments and Commission Findings

As of August 25, 2010, the Commission received 19 comment letters regarding the proposed rule changes. Many commenters supported the Phase II Circuit Breaker Pilot and its expansion to the Russell 1000 and the specified ETPs.[14] For example, one commenter encouraged the Commission to act expeditiously to expand the scope of the trading halt rules to securities other than the S&P 500, particularly to ETFs, and noted that ETFs experienced significant volatility on May 6, 2010 and would benefit from uniform pauses in trading.[15] Another commenter urged the Commission to approve the Phase II Circuit Breaker Pilot as quickly as possible, arguing that many of the securities that experienced the most extreme trading jolts on May 6, 2010 were not included in the Phase I Circuit Breaker Pilot, and that expansion of the pilot was appropriate both to protect additional companies from potential aberrational price movements and liquidity events affecting their securities, and to provide investors with greater certainty about the availability of the circuit breakers.[16] Yet another commenter noted that expanding the trading halt pilot to securities in the Russell 1000 would protect investors in publicly traded companies not in the S&P 500 that experienced severely aberrational trading on May 6.[17]

Some commenters raised concerns about the proposed rule changes. The two main areas of concern were: (1) The ability of erroneous trades to trigger a trading pause; and (2) whether ETPs—particularly broad-based index products—should be included in the pilot.

1. Erroneous Trades Triggering the Trading Pause

Several commenters pointed out that, under the circuit breaker pilot, erroneous trades can trigger—and have triggered—trading pauses, when there otherwise is no extraordinary market volatility.[18] One commenter asserted that under the current circuit breaker logic, erroneous trades would have triggered a trading halt at least 238 times in the past 18 months.[19] This same commenter pointed out that, as of the date of its letter, three stocks had been halted under the Phase I Circuit Breaker Pilot, two of which were triggered on markets with prices that were far away from the current national best bid or offer ("NBBO") and prevailing prices at other markets.[20]

Other commenters expressed concern that any trader in the world, ill-intentioned[21] or not, has the power to halt trading in a stock simply by printing a trade outside the circuit breaker range on a trade reporting facility for the OTC market.[22] One of these commenters suggested that either a minimum number of trades outside the circuit breaker range occur before trading is halted, or that the trade first be checked for consistency with the NBBO before trading is halted.[23]

Several commenters concerned with erroneous trades triggering the circuit breakers offered alternatives to the "trading pause" mechanism used in the current pilot. A number of commenters suggested that the Commission consider moving to a "limit up/limit down" approach to moderate market volatility, similar to that utilized in the futures markets.[24] Some commenters also encouraged the Commission to consider adopting collars on market orders and eliminating stub quotes.[25] One commenter suggested that the markets trigger the single stock circuit breakers off of changes to the NBBO rather than to changes in the last trade price.[26]

The Commission believes that the ability of an erroneous trade to trigger a trading pause is a concern that FINRA should seek to address promptly. The Commission understands that FINRA is working on a variety of measures to reduce the instances of erroneous trades and to assure that, when they occur, they are resolved promptly through a clear and transparent process.[27] The Commission also notes that, under the pilot rules, the Listing Market can exclude a transaction price that results from an erroneous execution from triggering a circuit breaker. In this regard, the Commission notes that the Listing Markets, pursuant to this authority, intend to implement automated processes to help prevent trades that may be erroneous—specifically, those outside the NBBO—from triggering a circuit breaker.[28] In addition, the Commission understands FINRA is developing more effective ways to prevent erroneous OTC trades from being printed on a trade reporting facility, and it encourages those efforts as well.[29] Various exchanges have taken steps to "collar" market orders, which are intended to prevent executions that occur a specified percentage away from the last sale,[30] and Commission staff has been working with FINRA on an initiative to prevent stub quotes. The Commission, in conjunction with FINRA, will continue to evaluate what further steps need to be taken to reduce the likelihood of erroneous trades and to improve the efficiency of the pilot. However, the Commission does not believe it is appropriate to delay implementation of the Phase II Circuit Breaker Pilot pending the conclusion of those efforts.

2. Inclusion of ETPs

Many commenters addressed the inclusion of ETPs in the pilot program.[31] Several supported the proposed expansion of the Phase II

[14] *See* Accenture Letter, Business Roundtable Letter; CCMC Letter; ICI Letter; ICI 2 Letter; ICI 3 Letter; Issuer Advisory Group Letter; Wellington Letter; Deutsche Bank Letter; SIFMA Letter; and BlackRock Letter.

[15] *See* SIFMA Letter.

[16] *See* Business Roundtable Letter.

[17] *See* Accenture Letter.

[18] *See, e.g.,* Themis Letter; Accenture Letter; Molinete Letter; SIFMA Letter; and Angel Letter.

[19] *See* Molinete Letter.

[20] *Id.* (referring to the trading pauses in Citigroup on June 29, 2010 and in Anadarko Petroleum on July 6, 2010). As of August 25, stock-specific circuit breakers have been triggered seven times in six stocks.

[21] The Commission notes that anyone reporting a trade with the intention of triggering a trading pause could be charged with manipulation, fraud or other violations of the federal securities laws.

[22] *See* Themis Letter and Angel Letter.

[23] *Id.*

[24] *See* SIFMA Letter; Accenture Letter; Wellington Letter; and CME 2 Letter. Under this approach, trades could occur within the established price bands, so that erroneous trades would largely be eliminated. In addition, there would not be a complete trading halt—trading would be prevented outside the applicable price band, but could continue within it.

[25] *See* SIFMA Letter and CME 2 Letter.

[26] *See* Molinete Letter. As an alternative, this commenter suggested requiring at least two consecutive trades outside the NBBO to trigger the circuit breaker, and the exclusion of manually-entered trades from being potential triggers.

[27] *See* SR–BATS–2010–016; SR–BX–2010–040; SR–CBOE–2010–056; SR–CHX–2010–13; SR–EDGA–2010–03; SR–EDGX–2010–03; SR–FINRA–2010–032; SR–ISE–2010–62; SR–NASDAQ–2010–076; SR–NSX–2010–07; SR–NYSE–2010–47; SR–NYSEAmex–2010–60; SR–NYSEArca–2010–58 (proposed rule changes to amend certain SRO rules to set forth clearer standards and curtail SRO discretion with respect to breaking erroneous trades).

[28] *See* Letter from Janet M. Kissane, Senior Vice President—Legal & Corporate Secretary, NYSE Euronext to Elizabeth M. Murphy, Secretary, Commission, dated August 25, 2010; Letter from Thomas P. Moran, Associate General Counsel, The NASDAQ Stock Market LLC to Elizabeth M. Murphy, Secretary, Commission, dated August 26, 2010. The Listing Markets may roll out these new automated processes on a staggered basis.

[29] *See, e.g.,* FINRA Trade Reporting Notice, dated August 19, 2010 (issuing new guidance on the use of the weighted-average price/special pricing formula (.W) trade modifier for reporting certain types of OTC trades in NMS stocks to FINRA).

[30] *See, e.g.,* Securities Exchange Act Release Nos. 62485 (July 13, 2010), 75 FR 41914 (July 19, 2010) (SR–NYSEArca–2010–67); 60371 (July 23, 2009), 74 FR 38075 (July 30, 2009) (SR–NASDAQ–2009–70).

[31] *See* Accenture Letter; Android Alpha Fund Letter; BlackRock Letter; Business Roundtable Letter; CME Letter; CME 2 Letter; CCMC Letter; ICI Letter; ICI 2 Letter; ICI 3 Letter; Molinete Letter; SIFMA Letter.

Circuit Breaker Pilot to include ETPs.[32] One of these commenters stated that ETFs experienced significant volatility on May 6, and would benefit from a uniform trading pause.[33] Another commenter noted that the price of an ETF is typically highly correlated to the market price of its basket of component securities.[34] Under normal circumstances, when trading has been halted for one or two component securities, an ETF may experience a slight deviation from the price of its basket because of the challenge of pricing the non-trading security, and may trade with a wider spread to account for the associated risk. When multiple underlying securities are affected, however, the correlation between the prices of an ETF and its underlying basket may break down and the ETF may experience more severe price dislocation.[35] While this commenter thought that a different circuit breaker trigger may be appropriate for ETFs, it nonetheless encouraged the Commission to include all ETFs in the pilot where a substantial number of the component securities are subject to the circuit breakers.[36] Doing otherwise, in its view, creates risks that ETFs could again suffer disproportionately during a market event similar to that of May 6.[37]

One commenter supported the inclusion of ETFs in the pilot program, in part because halting trading in the underlying component securities, but not in the ETF, would hinder the arbitrage mechanism that is critical to the ability of ETFs to track the performance of their underlying basket or benchmark index.[38] According to this commenter, if an ETF were allowed to continue to trade while trading in the majority of its underlying securities were halted, the arbitrage mechanism would not work effectively, with the result that liquidity for the ETF would diminish greatly, and perhaps lead to a collapse in price similar to that which occurred on May 6.[39]

Other commenters criticized various aspects of the application of the proposed rule change to ETPs. One commenter described certain ETFs—such as the S&P 500 SPDR (SPY)—as "systemically important," and expressed concern that halting trading in these ETFs, especially as a result of erroneous trades, might destabilize markets. Because the SPY, for example, is used as a hedging vehicle in many trading strategies, halting trading in it could cause liquidity providers broadly to withdraw from the market, increasing volatility and perhaps leading to a chain reaction like that witnessed on May 6.[40] This commenter did not believe that allowing ETFs to continue to trade while some of the underlying component securities were halted would be detrimental, because market participants would determine their own fair value of the halted component securities.[41]

Another commenter expressed significant concern with the proposed expansion of the pilot to broad-based equity index ETFs, as it believed there could be potentially significant disruptions to trading across related markets.[42] This commenter noted that the indices underlying the most active ETFs are the same as those underlying the most active cash index options, index futures, and options on ETFs.[43] If a different circuit breaker mechanism applied to broad-based equity index ETFs and ETF options than applied to index futures and index options, or differed from the overall market-wide circuit breakers, the commenter feared this could lead to further market stress during periods of turbulence, perhaps impeding liquidity and exacerbating risk management challenges.[44] In addition, the commenter thought that the inability of market makers to hedge using equity index ETFs during a trading pause could lead to their withdrawing liquidity across all markets, including in the E-mini index futures.[45] Accordingly, the commenter believed that the circuit breakers applicable to equity index-based ETFs (as well as index futures, index options, options on ETFs, and swaps) should be consistent with both the methodology and levels of the market-wide circuit breakers.[46] Specifically, the commenter recommended the adoption of uniform price limits across all broad-based index products based upon the S&P 500, the DJIA, and the NASDAQ 100, which would preclude trading beyond the enumerated limit but not within it.[47] This commenter also recommended that automated risk and volatility mitigation mechanisms be implemented in place of trading halts in individual securities.[48]

The Commission believes that, on balance, the inclusion of ETPs, including broad-based index equity ETFs, in the Phase II Circuit Breaker Pilot is warranted and consistent with the Act. The Commission notes that there are a number of scenarios in which the application of a circuit breaker to trading in an ETF would promote market stability. For example, if an ETF triggers a circuit breaker when none of its component stocks is

[32] *See* Accenture Letter; BlackRock Letter; Business Roundtable Letter; CCMC Letter; ICI Letter; ICI 2 Letter; ICI 3 Letter; SIFMA Letter.

[33] *See* SIFMA Letter at 2.

[34] *See* ICI Letter and ICI 2 Letter.

[35] *Id.*

[36] *See* ICI Letter. In a subsequent letter, that commenter supported examining the connection between price discovery in the equities and the futures markets, and potentially making rules consistent across markets. *See* ICI 2 Letter. According to this commenter, however, such an examination should not prevent including broad-based index ETFs in the pilot program. *Id.*

[37] *See* ICI 2 Letter.

[38] *See* BlackRock Letter. According to the commenter, this arbitrage mechanism generally requires liquidity providers to sell a basket of stocks equivalent to an ETF's underlying portfolio (or a correlated derivative) as a hedge when purchasing ETF shares.

[39] *Id.* This commenter did, however, question the exclusion of lower-volume ETFs from the Phase II Circuit Breaker Pilot, and urged that these ETFs be included in the pilot at the earliest opportunity. *See* discussion on pages 6–7 describing the rationale for selecting the list of ETPs for inclusion in the pilot program.

[40] *See* Molinete Letter at 4.

[41] *Id.* at 4–5.

[42] *See* CME Letter and CME 2 Letter. This commenter expressed further concerns with the prospect of multiple constituent stocks in an index being halted without the market-wide circuit breaker being triggered. The commenter thought this would create complexity and confusion in understanding the index calculation. In addition, the commenter was of the view that the halting of high capitalization, highly-liquid index components would be disruptive because it could affect whether the index triggers a market-wide circuit breaker, the intra-day index values circulated for risk management purposes may not be reflective of the true value of the underlying market, and large liquidity providers in index futures and ETFs may have difficulty hedging with the result that they withdraw from the market.

[43] *Id.* The commenter also noted that these markets are very closely linked and the absence of effective coordination across comparable markets was one factor cited by many as having contributed to certain market issues experienced on May 6. The Commission addresses issues of cross-market linkage in its discussion *infra.*

[44] *Id.*

[45] CME Letter.

[46] CME Letter. This commenter also noted that, while approximately 70% of the trades broken on May 6, 2010 were in ETFs, they were not in the most liquid domestic, large cap index products.

[47] CME 2 Letter. These price limits would be established at the 5%, 10% and 20% levels, and would be implemented for a 10 minute period, after which trading would continue to the next applicable limit.

[48] *Id.* Specifically, the commenter recommended that all markets adopt: (1) automated means—similar to the commenter's stop logic functionality—to briefly pause the market in the event that cascading sell orders precipitate a material market decline because of a transitory dearth of liquidity; (2) functionality—similar to the commenter's protection point functionality—to automatically apply limit prices to all orders, including market and stop orders; and (3) automated price banding functionality and maximum order size restrictions to help prevent erroneous trades. For as long as single stock circuit breakers continue to be employed, however, the commenter believed regulators and the markets should establish uniform policies and procedures to address situations where the computation of the market-wide circuit breaker index value is negatively affected due to the triggering of stock specific circuit breakers on the component securities.

experiencing abnormal moves, then it is likely that the ETF is suffering from a temporary liquidity imbalance. In that case, the ETF would no longer be suitable for use as a hedging instrument since its price would no longer reflect an accurate consensus market value of the ETF or its underlying stocks. By pausing the ETF under these circumstances, the Exchanges would allow liquidity to rebuild and provide time for the market to self-correct without allowing the aberrant price of the ETF to adversely affect the trading and pricing of the underlying stocks, other ETFs or other related products.

In another scenario, an ETF might trigger a circuit breaker, even though its component stocks have not, because the ETF is leading its underlying stocks in price discovery. In that case, the prices of many of the underlying stocks may follow, triggering their own circuit breakers shortly after the ETF does. In a broad market event such as this, the net result would be that trading in the ETF and individual stocks have each been paused, providing time for the market as a whole to re-evaluate prices.

In yet another scenario, a number of individual component stocks might trigger their circuit breakers even though the related ETF has not yet done so. In that case, different market participants may very well have differing opinions on the market value for the ETF because they will be required to estimate the value of those component stocks that have been paused. If only a small number of component stocks is paused (perhaps due to some temporary liquidity imbalances in those stocks) then there likely would be minimal effect on the ETF, and the ETF circuit breakers appropriately would not be triggered. But if a large number of component stocks trigger halts, the market likely is experiencing a broad-based move, either for fundamental reasons, or because of a large-scale liquidity imbalance similar to that of May 6. As noted above, if many component stocks of an ETF are paused, but the ETF itself continues to trade, the arbitrage relationship between the ETF and its component stocks likely will break down as market participants find they cannot hedge their exposures and, as a consequence, cease to provide liquidity. Without a circuit breaker mechanism that also applies to ETFs, the ETF could experience excessive volatility that is not necessarily driven by the prices of its underlying stocks. By pausing the ETF, market participants would be given time to re-evaluate prices and replenish liquidity as needed.

The Commission acknowledges that a variety of ETFs do indeed trade without incident when most, and sometimes all, of their underlying components are not trading (*e.g.,* ETFs on international stocks). However, market makers and other participants trading these ETFs account for this known and permanent structural difference by building alternative methods for hedging and pricing into their trading models. Market participants trading ETFs for which the component stocks normally trade at the same time would not necessarily have the opportunity to implement new hedging and pricing strategies in real time if underlying component stocks were suddenly paused. Rather, they would most likely withdraw from the market leaving the ETF with little liquidity and even further need for a trading pause.[49]

The above arguments demonstrating the need to couple pauses in ETFs with pauses in underlying stocks are equally applicable to the futures market, and the Commission acknowledges the comments and concerns of the CME for consistent treatment across instrument types. However, the Commission notes that the CME's markets already have mechanisms for limiting or pausing trading, and thus some inconsistency exists today between the two markets. Maintaining the status quo, moreover, would leave ETFs without a trading pause mechanism. In addition, the Commission notes that there will need to be substantial work to determine how best to make the volatility constraints in the futures markets and the securities markets consistent.

Commenters have also raised related concerns that a pause in a broad-based ETF (such as the SPY) could lead to significant liquidity pressures on other index-based products in the futures market (such as the E-mini).[50] Although this is a potential point of concern, as noted above, the futures markets already have in place volatility mechanisms that should help mitigate the effect of such an event. Moreover, it should be noted that currently there could be a pause on the futures market (*e.g.,* in the E-mini) which could create liquidity pressure for corresponding ETFs—but there is currently no mechanism to protect the ETF against aberrant prices as a result of such liquidity pressures.

In response to the comment that the Commission instead implement automated risk and volatility mitigation mechanisms—such as price banding or stop logic functionality—the Commission notes that, even as the circuit breaker pilot is being expanded, the Commission is simultaneously exploring possible alternatives to a circuit breaker approach that may include price limit bands or other mechanisms described by the commenters.

One commenter noted that the proposal would exclude many ETFs with trading volumes below the criteria set by FINRA, although such ETFs were significantly affected in the cancelled trades of May 6.[51] The Commission acknowledges that fact, but notes that, as FINRA has indicated, the potential application of the circuit breakers to less liquid securities is more complex, as different triggering thresholds may be appropriate for them. As the pilot progresses, the Commission will work with FINRA to consider expanding the circuit breakers to cover additional securities in an appropriate manner.

The Commission acknowledges the point made by commenters that broad-based index products were not significantly implicated in the cancelled trades on May 6.[52] However, the Commission notes that broad-based index products did experience substantial volatility on May 6[53] and, like other securities, could benefit from the protections of a circuit breaker. In addition, a sudden change in price, due to a loss of liquidity or otherwise, to a widely traded ETF could have an adverse market-wide effect even more far-reaching than that of May 6. It is important that the use of circuit breakers not be limited to only those ETFs that happened to have experienced severe dislocations on May 6, since there is no fundamental reason why broad-based ETFs could not experience a similar liquidity crisis. In addition, there were no circuit breakers in effect for underlying stocks on May 6. If a similar event occurred when many underlying stocks in an index were halted by circuit breakers, broad-based ETFs could experience greater volatility than occurred on May 6.

3. Other Areas of Comment

Other areas of comment included potential ways to expand or modify the circuit breaker pilot going forward,[54] the

[49] The Commission notes that a pause in the ETF could also affect trading in underlying component stocks that were not otherwise halted to the extent that the ETF was no longer available as a hedging mechanism.

[50] *See* CME Letter.

[51] *See* BlackRock Letter.

[52] *See* CME Letter.

[53] *See* Joint Report, *supra* note 8, at 39 (noting that many ETFs "experienced extreme daily lows" on May 6, and that a "significant number of ETFs" experienced extreme daily highs on May 6).

[54] *See* Angel Letter (recommending that the trading pause be expanded to cover the open, close, and after-hours trading); ICI Letter (recommending

need to carefully study the effect of the pilot,[55] the effect and continued advisability of individual market volatility moderators in addition to the uniform single-stock circuit breakers,[56] and possible modifications to the market-wide circuit breakers.[57]

With regard to expanding or modifying the circuit breaker pilot, as noted above, the Commission intends to continue working with FINRA to consider expanding the pilot to include additional securities, or modifying the circuit breaker mechanism or pursuing other approaches to moderating market volatility, in the coming months. In addition, as noted in the Joint Report, the Commission currently is evaluating the extent to which individual market volatility moderators exacerbated the market instability that occurred on May 6, 2010, and expects to develop appropriate policy recommendations based on the outcome of that analysis. Finally, as noted in the Joint Report, the Commission intends to work with the CFTC to consider whether modifications to the existing market-wide circuit breakers are warranted in light of the events of May 6. While all of these issues warrant further study in the coming months, the Commission does not believe they provide a basis for not approving the Phase II Circuit Breaker Pilot at this time. The fact that better alternatives to address inordinate market volatility ultimately may be developed does not provide a basis for the Commission not to approve FINRA's proposal if, as the Commission believes, the proposed rule change is consistent with Section 15A(b)(6) of the Act.

4. Findings

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association. In particular, the Commission finds that the proposal is consistent with the provisions of Section 15A(b)(6) of the Act,[58] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade and, in general, to protect investors and the public interest.[59]

The proposed rule changes will expand the trading pause pilot to include the securities in the Russell 1000 and specified ETPs. The Commission believes that expanding the uniform, market-wide trading pauses will serve to prevent potentially destabilizing price volatility and will thereby help promote the goals of investor protection and fair and orderly markets.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[60] that the proposed rule change (SR–FINRA–2010–033) be, and hereby is, approved.

By the Commission.

Elizabeth M. Murphy,

Secretary.

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examining whether a different circuit breaker trigger is appropriate for ETFs); Wellington Letter (recommending that the Commission require the Exchanges to continuously disclose the high/low trigger of a security and its maximum remaining life).

[55] *See* Android Alpha Fund Letter.

[56] *See* Deutsche Bank Letter.

[57] *See* CME 2 Letter; SIFMA Letter.

[58] 15 U.S.C. 78*o*–3(b)(6).

[59] In approving the proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[60] 15 U.S.C. 78s(b)(2).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62886; File Nos. SR–BATS–2010–016; SR–BX–2010–040; SR–CBOE–2010–056; SR–CHX–2010–13; SR–EDGA–2010–03; SR–EDGX–2010–03; SR–ISE–2010–62; SR–NASDAQ–2010–076; SR–NSX–2010–07; SR–NYSE–2010–47; SR–NYSEAmex-2010–60; SR–NYSEArca–2010–58]

Self-Regulatory Organizations; BATS Exchange, Inc.; NASDAQ OMX BX, Inc.; Chicago Board Options Exchange, Incorporated; Chicago Stock Exchange, Inc.; EDGA Exchange, Inc.; EDGX Exchange, Inc.; International Securities Exchange LLC; The NASDAQ Stock Market LLC; National Stock Exchange, Inc.; New York Stock Exchange LLC; NYSE Amex LLC; NYSE Arca, Inc.; Order Granting Approval of Proposed Rule Changes Relating to Clearly Erroneous Transactions

September 10, 2010.

I. Introduction

On June 17, 2010, each of BATS Exchange, Inc. ("BATS"), NASDAQ OMX BX, Inc. ("BX"), Chicago Board Options Exchange, Incorporated ("CBOE"), Chicago Stock Exchange, Inc. ("CHX"), EDGA Exchange, Inc. ("EDGA"), EDGX Exchange, Inc. ("EDGX"), International Securities Exchange LLC ("ISE"), The NASDAQ Stock Market LLC ("Nasdaq"), National Stock Exchange, Inc. ("NSX"), New York Stock Exchange LLC ("NYSE"), NYSE Amex LLC ("NYSE Amex"), and NYSE Arca, Inc. ("NYSE Arca") (collectively, the "Exchanges") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), and Rule 19b–4 thereunder, proposed rule changes to amend certain of their respective rules to set forth clearer standards and curtail their discretion with respect to breaking erroneous trades.[1] On June 18, 2010, BX, EDGA, EDGX, ISE, Nasdaq, NSX, and NYSE Arca submitted amendments to their respective proposed rule changes. On June 21, 2010, CHX submitted an amendment to its proposed rule change. The proposed rule changes, as amended, submitted by BATS, BX, CBOE, CHX, EDGA, EDGX, ISE, Nasdaq, NYSE, and NYSE Amex, were published for comment in the **Federal Register** on June 28, 2010.[2] The proposed rule change, as amended, submitted by NYSE Arca was published for public comment in the **Federal Register** on June 29, 2010.[3] On June 30, 2010, CHX submitted an additional amendment to its proposed rule changes.[4] The Commission received nine comment letters on the proposals.[5]

[1] Also, on June 17, 2010, Financial Industry Regulatory Authority, Inc. ("FINRA") filed a similar proposed rule change with respect to breaking erroneous trades. *See* Securities Exchange Act Release No. 62341 (June 21, 2010), 75 FR 36756 (June 28, 2010). The FINRA proposal also was approved today. *See* Securities Exchange Act Release No. 62885 (Sept. 10, 2010).

[2] *See* Securities Exchange Act Release Nos. 62330 (June 21, 2010), 75 FR 36725; 62331 (June 21, 2010), 75 FR 36746; 62332 (June 21, 2010), 75 FR 36749; 62333 (June 21, 2010), 75 FR 36759; 62334 (June 21, 2010), 75 FR 36732; 62336 (June 21, 2010), 75 FR 36743; 62337 (June 21, 2010), 75 FR 36739; 62338 (June 21, 2010), 75 FR 36762; 62339 (June 21, 2010), 75 FR 36765; 62340 (June 21, 2010), 75 FR 36768; and 62342 (June 21, 2010), 75 FR 36752.

[3] *See* Securities Exchange Act Release No. 62335 (June 21, 2010), 75 FR 37494.

[4] In Amendment No. 2, CHX amended its proposed rule change to conform defined terms in its proposed rule text to defined terms used in the remainder of its rule. This is a technical amendment.

[5] *See* letter from Peter Ianello, Partner, CSS, LLC, to Elizabeth Murphy, Secretary, Commission, dated July 15, 2010 ("CSS Letter"); letter from Gary DeWaal, Senior Managing Director and Group General Counsel, Newedge USA, LLC, to Elizabeth M. Murphy, Secretary, Commission, dated July 19, 2010 ("Newedge Letter"); letter from Karrie McMillan, General Counsel, Investment Company Institute, to Elizabeth M. Murphy, Secretary, Commission, dated July 19, 2010 ("ICI Letter"); David C. Cushing, Director of Global Equity Trading, Wellington Management Company, LLP, to Elizabeth M. Murphy, Secretary, Commission, dated July 19, 2010 ("Wellington Letter"); letter from John A. McCarthy, General Counsel, GETCO, to Elizabeth Murphy, Secretary, Commission, dated July 20,

Continued

BATS responded to the comments in a letter dated August 16, 2010.[6] This order approves the proposed rule changes, as amended.

II. Background and Description of the Proposals

On May 6, 2010, the U.S. equity markets experienced a severe disruption.[7] Among other things, the prices of a large number of individual securities suddenly declined by significant amounts in a very short time period, before suddenly reversing to prices consistent with their pre-decline levels. This severe price volatility led to a large number of trades being executed at temporarily depressed prices, including many that occurred at prices dramatically away from pre-decline levels. In response, the Exchanges and FINRA exercised their authority under their clearly erroneous execution rules to break trades that were effected at prices 60% or more away from pre-decline prices, using a process that was not sufficiently clear or transparent to market participants. There are reports that the lack of clear guidelines for dealing with clearly erroneous transactions under circumstances such as occurred on May 6, and the lack of transparency surrounding the Exchanges' and FINRA's decision to break only trades at least 60% away from the market, added to the confusion and uncertainty faced by investors on May 6.[8]

The Commission is concerned that events such as those that occurred on May 6 can undermine the integrity of the U.S. securities markets. Accordingly, it is working on a variety of fronts to assess the causes and contributing factors of the May 6 market disruption and to fashion policy responses that will help prevent a recurrence. The Commission also recognizes the importance of moving quickly to implement steps that could help limit potential harm from extreme price volatility. On June 10, 2010, the Commission approved rules, on a pilot basis, that require the Exchanges to pause trading in securities included in the S&P 500 Index if the price moves 10% or more in a five-minute period.[9] By establishing circuit breakers that uniformly pause trading in these securities across all markets, the new rules are designed to facilitate coordinated price discovery and provide time for investors to trade at rational prices. In addition to the individual stock trading pause rules, the Exchanges and FINRA worked together to develop proposed amendments to their clearly erroneous execution rules to provide greater transparency and certainty to the process of breaking trades.

The current clearly erroneous execution rules set forth procedures the Exchanges must use to break trades. Specifically, the current rules provide that the Exchanges will break trades in Exchange-listed stocks only if the price of the trades exceeds a specified "Reference Price"—usually the consolidated last sale—by an amount that equals or exceeds specified "Numerical Guidelines." The Numerical Guidelines vary depending on the price of the stock and during the regular trading session are 10% if the consolidated last sale is $25.00 or less, 5% if the consolidated last sale is more than $25 and up to and including $50, and 3% if the consolidated last sale is more than $50. These percentages double during pre-open and post-close trading sessions. For events involving five or more securities, the Numerical Guidelines currently are 10% during pre-open, regular, and post-close trading sessions.

While the current rules do not give the Exchanges discretion to break trades that do not exceed the Numerical Guidelines, they do permit the Exchanges discretion to select a percentage threshold at which trades will be broken that is higher than the Numerical Guidelines. As noted above, on May 6 the Exchanges selected 60% as the threshold for breaking trades in a process that, from the perspective of market participants, was not clear or transparent, and led to further uncertainty and confusion in the market. Thus, the events of May 6 highlight the need to clarify the clearly erroneous execution review process across all markets, and reduce the discretion of the Exchanges to deviate from the objective standards in their respective rules when dealing with clearly erroneous transactions.

Under the proposed rule changes, the Exchanges will no longer have the discretion to deviate from the specified percentage threshold at which trades will be broken in many situations, including those where the single-stock circuit breakers are applicable and in other larger "Multi-Stock Events" involving five or more securities. Under the proposed rules, a Multi-Stock Event is determined by looking at the number of securities with potentially erroneous executions occurring within a period of five minutes or less.

When an individual stock trading pause is triggered, transactions could occur before the trading pause is fully implemented on all of the Exchanges and in the over-the-counter (OTC) market. In such event, the Exchanges propose to review, on their own motion, all transactions triggering an individual stock trading pause and subsequent transactions that may occur before the trading pause is in effect.[10] The Exchanges would use the price that triggered the trading pause (the "Trading Pause Trigger Price")[11] as the Reference Price and break trades that are 10% or more away from the Reference Price for stocks priced $25 or less, 5% or more away from the Reference Price for stocks priced from $25 to $50, and 3% or more away from the Reference Price for stocks priced more than $50. If the security is a leveraged exchange-traded fund (ETF) or exchange-traded note (ETN), these percentage thresholds would be multiplied by the leverage multiplier.

2010 ("GETCO Letter"); letter from Ira P. Shapiro, Managing Director, BlackRock, Inc., to Elizabeth M. Murphy, Secretary, Commission, dated July 20, 2010 ("BlackRock Letter"); and letter from Manisha Kimmel, Executive Director, Financial Information Forum, On behalf of the FIF Front Office Committee, to Elizabeth M. Murphy, Secretary, Commission, dated July 21, 2010 ("FIF Letter"); letter from Ann Vlcek, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, to Elizabeth M. Murphy, Secretary, Commission, dated July 26, 2010 ("SIFMA Letter"); and letter from Leonard J. Amoruso, General Counsel, Knight Capital Group, Inc., to Elizabeth M. Murphy, Secretary, Commission, dated July 27, 2010 ("Knight Letter").

[6] *See* letter from Eric J. Swanson, SVP and General Counsel, BATS, to Elizabeth M. Murphy, Secretary, Commission, dated August 16, 2010 ("BATS Letter").

[7] The events of May 6 are described more fully in the report of the staffs of the Commodity Futures Trading Commission ("CFTC") and the Commission, titled *Report of the CFTC and SEC to the Joint Advisory Committee on Emerging Regulatory Issues,* "Preliminary Findings Regarding the Market Events of May 6, 2010," dated May 18, 2010.

[8] *See, e.g.,* Written Statement of Leonard J. Amoruso, Senior Managing Director and General Counsel, Knight Capital Group, Inc., Submitted before the CFTC–SEC Advisory Committee on Emerging Regulatory Issues, Panel Discussion, "The events of May 6—views and observations regarding liquidity, trading and the apparent breakdown of an orderly market," dated June 22, 2010.

[9] *See* Securities Exchange Act Release Nos. 62251; 75 FR 34183 (June 10, 2010); and 62252, 75 FR 34186 (June 16, 2010).

[10] Such reviews would be limited to transactions that executed at a price lower than the Trading Pause Trigger Price in the event of a price decline and higher than the Trading Pause Trigger Price in the event of a price rise.

[11] The Exchanges propose to use the Trading Pause Trigger Price as the Reference Price for such clearly erroneous execution reviews of a transaction triggering a trading pause and the transactions that occur immediately after such transactions but before the trading pause is in effect. The Trading Pause Trigger Price reflects a price calculated by the primary listing market over a rolling five-minute period and may differ from the execution price of a transaction that triggered a trading pause. The primary listing market that issued an individual stock trading pause will determine and communicate to the Exchanges the Trading Pause Trigger Price for such stock.

For situations in which a stock is not subject to an individual stock trading pause (*e.g.,* because the stock is not in the circuit breaker pilot program, or when the stock is part of the pilot program but the circuit breaker does not apply because it is the beginning or end of the day), the trade break rules will differ based on the number of stocks involved. In the event of Multi-Stock Events involving 20 or more securities, the Exchanges propose to review on their own motion and break all transactions at prices equal to or greater than 30% away from the Reference Price in each affected security during the review period selected. In such event, the Exchanges may use a Reference Price other than the consolidated last sale. To ensure consistent application across markets, the Exchanges will consult to determine the appropriate review period, which may be greater than the period (of five minutes or less) that triggered the application of this provision, as well as select one or more specific points in time prior to the transactions in question and use transaction prices at or immediately prior to the time(s) selected as the Reference Price(s).

Similarly, in the event of Multi-Stock Events involving five or more, but less than twenty, securities, the Exchanges propose to review on their own motion and break all transactions at prices equal to or greater than 10% away from the Reference Price. In such event, the Reference Price will generally be the consolidated last sale immediately prior to the execution(s) under review. However, if there is relevant news impacting a security, periods of extreme volatility, sustained illiquidity, or widespread systems issues, the Exchanges may use a different Reference Price, where necessary for the maintenance of a fair and orderly market and the protection of investors, and where it is in the public interest.

The current rules provide that the Exchanges may consider "Additional Factors" [12] in determining whether to break trades. The proposed rule changes limit the circumstances during which the Exchanges may consider those Additional Factors. Specifically, under the proposed rules, the Exchanges would only be permitted to consider Additional Factors in the context of clearly erroneous reviews that do not involve Multi-Stock Events involving five or more securities or individual stock trading pauses, as described above. In such event, the Exchanges would consider the Additional Factors with a view toward maintaining a fair and orderly market and the protection of investors and the public interest.

Finally, the proposed rule changes limit the discretion of the Exchanges to deviate from the Numerical Guidelines in the event of system disruptions or malfunctions. The proposed rules make clear that this provision only applies to a disruption or malfunction of an Exchange system, not to that of a user of an Exchange system. The proposed rules also remove the language "extraordinary market conditions or other circumstances" as a basis for nullifying trades outside of the Numerical Guidelines, further limiting the discretion of the Exchanges. The proposed rules also retain the current requirement that, absent extraordinary circumstances, an action taken in connection with a review of a potentially erroneous transaction must be taken in a timely fashion, generally within thirty (30) minutes of detection of the erroneous transaction.

The Exchanges have proposed that these rule changes be implemented as a pilot that would end on December 10, 2010.

III. Discussion of Comment Letters and Commission Findings

The Commission received nine comment letters on the proposed rule changes filed by the Exchanges and FINRA. Five commenters were generally supportive of the principles underlying the proposed rule changes, to provide greater transparency and certainty to investors, market participants, and the public regarding the handling of clearly erroneous transactions.[13] However, these commenters also believed that the proposed rule changes should go further, and offered a number of suggestions as discussed below. Two commenters generally did not oppose the proposed rule changes, but believed they were "overly complex and opaque" [14] and "do not adequately address the most significant flaws in the current rules." [15] One commenter believed that trades should only be cancelled in extraordinary circumstances, stating that the Commission and the SROs should instead consider alternatives that would prevent the execution of erroneous trades rather than canceling them after the fact.[16] Another commenter supported a "principles-based approach" to handling clearly erroneous trades instead of numerical thresholds, particularly with respect to transactions involving illiquid stocks and the dissemination of news or a fundamental change that requires a significant reevaluation of underlying business conditions.[17] Additionally, BATS responded to the comments.[18] These comments are discussed in greater detail below.

A. Comments Recommending Other Comprehensive Approaches

Some commenters believed that the Exchanges' rules relating to clearly erroneous trades should be more definitive, and expressed the view that the proposed rule changes were not sufficiently clear in all cases when trades would actually be cancelled.[19] For example, one commenter noted that the Exchanges "appear to be able to cancel trades for many reasons other than significant price discrepancies—including, for example, systems malfunctions, news released regarding a security, whether a security was subject to a stock split or reorganization." [20] This commenter believed the Exchanges should adopt "no-bust" zones for transactions executed within specified price ranges, and cancel trades outside of the "no-bust" zones absent a compelling public interest to the contrary.[21]

Two commenters questioned whether the proposed rule changes would achieve their stated goals of making the erroneous trade execution review process more transparent and less arbitrary.[22] Specifically, these

[12] Additional Factors that the Exchanges may consider include but are not limited to: system malfunctions or disruptions, volume and volatility for the security, derivative securities products that correspond to greater than 100% in the direction of a tracking index, news released for the security, whether trading in the security was recently halted or resumed, whether the security is an IPO, whether the security was subject to a stock split, reorganization, or other corporate action, overall market conditions, pre-opening and post-closing session executions, validity of consolidated tapes trades and quotes, consideration of primary market indications, and executions inconsistent with the trading pattern in the stock.

[13] *See* ICI Letter, at 1, FIF Letter, at 1, Newedge Letter, at 1–2, GETCO Letter, at 2, and SIFMA Letter, at 1–2 (also stating its belief that it is "critical for the options markets to achieve consistency in their existing clearly erroneous execution rules before additional rule changes are implemented * * *"). *See also* BlackRock Letter at 1 (supporting amendments to rules that contribute to market volatility).

[14] *See* CSS Letter, at 1.

[15] *See* BlackRock Letter, at 1.

[16] *See* Wellington Letter, at 3–4. *See also* FIF Letter, at 1–2 (supporting trade validation and rejection mechanisms) and GETCO Letter, at 3 (supporting protections designed to reject clearly erroneous orders that reach market centers).

[17] *See* Knight Letter, at 3.

[18] *See* BATS Letter.

[19] *See* Newedge Letter, at 4–5, and BlackRock Letter, at 2.

[20] *See* Newedge Letter, at 4.

[21] *Id.*

[22] *See* BlackRock Letter, at 2, and CSS Letter, at 1–2.

commenters were concerned that the proposed rule changes did not clearly establish a reference price upon which the Numerical Guidelines would be based.[23] They noted that the Exchanges retain the flexibility in certain circumstances to use a Reference Price other than the consolidated last sale, as well as to determine the review period for Multi-Stock Events involving twenty or more securities.[24] These commenters believed that if the Exchanges retained discretion in these areas, the proposed rule changes may not achieve the goal of making the trade break process more transparent and less arbitrary,[25] or could create mass confusion.[26]

In response, BATS acknowledged that the proposals do not "in all circumstances provide 100% advanced certainty with respect to whether a particular execution will be deemed to be clearly erroneous," but stated its belief that "its proposal reflects a significant improvement * * * over its existing rule."[27] Specifically, BATS noted that its discretion to utilize "additional factors" would now be limited to instances involving less than five securities under review and further limited to securities that are not subject to a single stock circuit breaker.[28] BATS believed its limited discretion in this regard is necessary and appropriate for maintaining fair and orderly markets.[29]

With respect to the concern expressed by some commenters that the proposed rule changes do not clearly establish a reference price upon which the Numerical Guidelines would be based, BATS stated that it is "critical" for it to retain some limited discretion to use a different reference price when applying the clearly erroneous thresholds because "there are circumstances under which last sale would be an inappropriate reference price * * * ."[30] BATS noted, however, that this discretion is limited because its "rule is designed to generally guide BATS to look at the last sale as the reference price" for those securities not subject to a circuit breaker and its proposal tries to be "abundantly clear and objective that if a security is subject to a single stock circuit breaker, the reference price will be the circuit breaker trigger price."[31] BATS also noted that the determination of the point in time from which to derive the reference price on May 6 had "nothing to do" with the delay in announcing which trades would be broken on May 6; rather, the delay was attributable to the time it took the Exchanges to determine the appropriate percentage at which trades would be broken.[32]

The Commission appreciates the suggestions and responses offered by these commenters to make the process by which the Exchanges address clearly erroneous executions more certain and transparent by reducing their discretion. The Commission intends to continue working with the Exchanges to further clarify, as appropriate, their processes for breaking erroneous trades that arise in contexts not covered by the proposed rule changes, as well as to continue to evaluate the operations of and potential refinements to such processes in contexts covered by the proposed rule changes. Nevertheless, the Commission believes that the proposed rule changes represent a productive first step by the Exchanges in bringing greater clarity and transparency to the process for breaking clearly erroneous trades, and that these improvements should not be delayed pending consideration of further changes.

B. Comments Recommending Alternative Approaches

Four commenters were of the view that, rather than breaking erroneous trades, the Exchanges should allow the trades to stand and adjust the price in line with the market.[33] These commenters were particularly concerned about the risk, when trades are broken, that market participants suddenly may find themselves exposed on one side of the market when they thought they had a hedged position.[34] As one commenter stated, "[t]his uncertainty is even more problematic during periods of heightened volatility in the markets, when liquidity may be reduced as some market participants limit their trading until they are able to determine their positions, or volatility may increase further because of speculative hedging in an attempt to protect unknown positions."[35] These commenters believed that a price adjustment process would substantially reduce the uncertainty created by the potential for broken trades, and thus would be a better way to address erroneous executions.[36]

Other commenters urged alternatives to clearly erroneous execution rules. For example, one commenter believed that the proposed rules would "provide market participants more certainty as to whether or not their trades will stand in the event of market volatility," but urged the Commission to move to a "futures-style limit up/down functionality" as a better alternative to the circuit breaker trading halt approach.[37] This commenter argued that the limit up/limit down approach "would virtually eliminate clearly erroneous trades."[38] Another commenter also believed that the Commission should consider a "limit up/limit down approach or hybrid approach."[39] Other commenters suggested alternative procedures, systems or rules to prevent erroneous trades from occurring, such as by rejecting orders that are materially away from the market.[40]

The Commission appreciates the suggestions offered by these commenters to make more fundamental changes to the way in which the Exchanges address clearly erroneous executions. In the coming months, the Commission expects to continue to work with the markets and market participants on ways to reduce the occurrence of erroneous trades and improve the method by which they are resolved, as well as on enhancements to the mechanisms for addressing excessive market volatility, such as those that currently are reflected in the single-stock circuit breaker pilot. As noted above, however, the Commission believes that the proposed rule changes represent a productive first step by the Exchanges in bringing greater clarity and transparency to the process for breaking clearly erroneous trades, and that these improvements should not be delayed pending consideration of more far-reaching initiatives.

C. Other Comments

One commenter was concerned that the proposed rule changes were not clear as to how news or information regarding the review and cancellation of clearly erroneous trades would be disseminated to the markets.[41] This commenter believed that the proposed rules should require the Exchanges to disseminate this information quickly and in a non-discriminatory fashion to

[23] *Id.*

[24] *Id.*

[25] *See* BlackRock Letter, at 2.

[26] *See* CSS Letter, at 1–2.

[27] *See* BATS Letter, at 1.

[28] *Id.* at 5.

[29] *Id.*

[30] *Id.* at 3–4.

[31] *Id.*

[32] *Id.*

[33] *See* GETCO Letter, at 3, Newedge Letter, at 5, BlackRock Letter, at 2, and Knight Letter, at 2.

[34] *Id.*

[35] *See* GETCO Letter, at 3.

[36] *See* GETCO Letter, at 3, Newedge Letter, at 5, BlackRock Letter, at 2, and Knight Letter, at 2.

[37] *See* GETCO Letter, at 2–3.

[38] *See* GETCO Letter, at 3.

[39] *See* SIFMA Letter, at 2.

[40] *See* FIF Letter, at 2, Wellington Letter, at 2–4, and SIFMA Letter, at 2. *See also* CSS Letter, at 2 (suggesting that circuit breakers for individual stocks based off of a percentage change from the previous day's closing price (or the opening price to allow for the dissemination of overnight news) would eliminate the need for erroneous trade rules).

[41] *See* Newedge Letter, at 6.

market participants in order to minimize the market impact and not favor any one group of market participants over another.[42] In its response letter, BATS stated that it e-mails members with respect to clearly erroneous reviews and determinations according to a consistent and well established protocol that, according to BATS, strikes an appropriate balance between notifying members of significant market events and avoiding notifications every time a transaction is reviewed as potentially clearly erroneous.[43] In addition, BATS believes that the existing requirement that an SRO promptly notify affected members of clearly erroneous reviews and determinations is sufficient.[44] BATS also stated that communication between the exchanges and members should remain flexible as such methods are constantly changing.[45] BATS indicated that it is not aware of discrimination amongst participants with respect to the dissemination of information in relation to clearly erroneous reviews and believes that the "anti-discrimination requirements of the Act would sufficiently restrain" discrimination.[46]

Another commenter believed that the Commission should require the Exchanges to clarify the application of the clearly erroneous execution rules when an event causes the price to cross to a different specified percentage threshold for breaking trades. Specifically, the commenter asked, "if a market decline triggers the CEE rules intra-day with respect to a stock that was priced at $25.01, so the CEE price is below $25, the proposed amendments do not explain at what price trading would be calculated for the next application of the CEE rules. Would it be at 5 percent for stocks between $25 and $50 or 10 percent for stocks priced less than $25?"[47] That commenter also expressed concern that the proposed rule changes might provide an opportunity for market participants to manipulate events involving multiple stocks that are not subject to the single-stock circuit breakers. This might occur, for example, when an event subject to a 10% threshold (*e.g.,* involving 20 securities) could be forced into the 30% threshold category (*e.g.,* by manipulating the 21st security and causing an erroneous trade), by a market participant seeking the flexibility to trade at wider spreads with respect to all impacted securities.[48]

Another commenter noted that, when an individual stock trading pause is triggered, trades will be broken at specified percentages away from the Trading Pause Trigger Price.[49] According to this commenter, this calculation "has the practical effect of doubling the clearly erroneous price window for most U.S. equity securities and is a significant expansion of the window for certain securities."[50] This commenter suggested using more conservative parameters such as the greater of 2% or $0.05 from the Trading Pause Trigger Price or, alternatively, using the Trading Pause Trigger Price, in addition to a comparison to the last sale, as part of an analysis for clearly erroneous trades."[51] This commenter also favored providing the Exchanges discretion to break trades after the deadlines specified in their rules in extraordinary circumstances.[52]

With respect to the dissemination of information regarding the review and resolution of clearly erroneous trades, the Commission understands that the practice of the Exchanges is to promptly notify participants that specified trades are under review and, once that review is complete, to describe the resolution thereof. Although the Commission believes prompt communication by e-mail, phone, Web site or otherwise concerning erroneous trade reviews should generally assure dissemination in a non-discriminatory fashion, as noted above, it intends to continue to work with the Exchanges on additional ways to improve the transparency of this process.

With respect to an event that causes the price to cross to a different specified percentage threshold for breaking trades, the Commission believes that the proposals are sufficiently clear regarding the applicability of the new rules. As to the specific example provided by the commenter, under the proposed rules, if a stock triggers a trading pause, the Trading Pause Trigger Price would be used as the Reference Price. The Trading Pause Trigger Price is calculated by the listing market over a rolling five-minute period. If the Trading Pause Trigger Price is calculated at a level below $25.00, as identified in the example, then the 10% threshold would apply to clearly erroneous execution reviews of the Trigger Trade and other transactions that occur immediately after a Trigger Trade but before the trading pause is fully implemented across markets. If another series of transactions trigger a second trading pause, the review process set forth in the rules would be repeated and a new Reference Price would be calculated to determine the appropriate percentage threshold.

With respect to the potential for market participants to engage in manipulation in order to achieve a higher trade break percentage threshold, the Commission emphasizes that it will vigorously pursue instances of illegal market manipulation. In addition, during the pilot period, the Commission will work with the Exchanges to review the operation of the amended rules, and make improvements as warranted, including if it appears the selected percentage thresholds create distortions or incent improper or illegal behavior.

With respect to the chosen parameters, the Commission notes that the parameters that were selected were the product of a coordinated and deliberate effort by the Exchanges and FINRA to improve the handling of clearly erroneous trades. Regarding the specific comment expressing concern that breaking trades only when they are 10%, 5% or 3% away from the Trading Pause Trigger Price has the practical effect of doubling the trading pause parameters, the Commission notes that, as an initial matter, implementation of the individual stock trading pause should prevent most trades from occurring at prices outside of the Trading Pause Trigger Price. To the extent trades occur outside of such price before the trading pause is fully applied across all markets, the Commission believes that it is appropriate to break these "leakage" trades only when they are a meaningful percentage away from the Trading Pause Trigger Price. This is consistent with the traditional approach of the Exchanges and FINRA to take the more extreme step of breaking a trade only in cases where it occurs at a price sufficiently away from the current market price that the parties should have been on notice it may be "clearly erroneous." Of course, the pilot program may indicate that different parameters are better to accomplish the stated goals. If so, the parameters could be changed as part of the overall initiative. The Commission will further study and consider the examples and suggestions offered by the commenters during the pilot period.

D. Commission Findings

The Commission finds that the proposed rule changes are consistent with the requirements of the Act and the

[42] *Id.*

[43] *See* BATS Letter, at 2.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *See* ICI Letter, at 3.

[48] *Id.*

[49] *See* SIFMA Letter, at 2–3.

[50] *Id.*

[51] *Id.*

[52] *Id.*

rules and regulations thereunder applicable to national securities exchanges. In particular, the Commission finds that the proposed rule changes submitted by the Exchanges are consistent with the requirements of Section 6(b) of the Act[53] and with Section 6(b)(5) of the Act[54] which, among other things, requires that the rules of national securities exchanges be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and in general, to protect investors and the public interest.

In the Commission's view, the proposed rule changes will help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed rule changes also should help assure consistent results in handling erroneous trades across the U.S. markets, thus furthering fair and orderly markets, the protection of investors and the public interest. Finally, the Commission notes that the proposed rule changes are being implemented on a pilot basis so that the Commission and the Exchanges can monitor the effects of the pilot on the markets and investors, and consider appropriate adjustments, as necessary.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[55] that the proposed rule changes (SR–BATS–2010–016; SR–BX–2010–040; SR–CBOE–2010–056; SR–CHX–2010–13; SR–EDGA–2010–03; SR–EDGX–2010–03; SR–ISE–2010–62; SR–NASDAQ–2010–076; SR–NSX–2010–07; SR–NYSE–2010–47; SR–NYSEAmex–2010–60; SR–NYSEArca–2010–58), be, and hereby are, approved.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–23076 Filed 9–15–10; 8:45 am]

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[53] 15 U.S.C. 78f(b).

[54] 15 U.S.C. 78f(b)(5).

[55] 15 U.S.C. 78s(b)(2).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62884; File Nos. SR–BATS–2010–018; SR–BX–2010–044; SR–CBOE–2010–065; SR–CHX–2010–14; SR–EDGA–2010–05; SR–EDGX–2010–05; SR–ISE–2010–66; SR–NASDAQ–2010–079; SR–NYSE–2010–49; SR–NYSEAmex–2010–63; SR–NYSEArca–2010–61; SR–NSX–2010–08]

Self-Regulatory Organizations; BATS Exchange, Inc.; NASDAQ OMX BX, Inc.; Chicago Board Options Exchange, Incorporated; Chicago Stock Exchange, Inc.; EDGA Exchange, Inc.; EDGX Exchange, Inc.; International Securities Exchange LLC; The NASDAQ Stock Market LLC; New York Stock Exchange LLC; NYSE Amex LLC; NYSE Arca, Inc.; National Stock Exchange, Inc.; Order Approving Proposed Rule Changes Relating to Expanding the Pilot Rule for Trading Pauses Due to Extraordinary Market Volatility to the Russell 1000® Index and Specified Exchange Traded Products

September 10, 2010.

I. Introduction

On June 30, 2010, each of BATS Exchange, Inc. ("BATS"), NASDAQ OMX BX, Inc. ("BX"), Chicago Board Options Exchange, Incorporated ("CBOE"), Chicago Stock Exchange, Inc. ("CHX"), EDGA Exchange, Inc ("EDGA"), EDGX Exchange, Inc. ("EDGX"), International Securities Exchange LLC ("ISE"), The NASDAQ Stock Market LLC ("NASDAQ"), New York Stock Exchange LLC ("NYSE"), NYSE Amex LLC ("NYSE Amex"), NYSE Arca, Inc. ("NYSE Arca"), and National Stock Exchange, Inc. ("NSX") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 ("Act"),[2] and Rule 19b–4 thereunder,[3] proposed rule changes to amend certain of their respective rules to expand the trading pause pilot in individual stocks comprising the S&P 500® Index ("S&P 500") when the price moves ten percent or more in the preceding five minute period to securities included in the Russell 1000® Index ("Russell 1000") and specified Exchange Traded Products ("ETPs").[4] The proposed rule changes were published for comment in the **Federal Register** on July 7, 2010.[5] The Commission received 19 comments on the proposal and on broader issues relating to the effectiveness of the circuit breaker pilot program to date.[6]

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The term "Exchanges" shall refer collectively to all of the exchanges in this order. The term "Listing Markets" refers collectively to NYSE, NYSE Amex, NYSE Arca, and NASDAQ. The term "Nonlisting Markets" refers collectively to the remaining national securities exchanges.

The Commission notes that NYSE and NYSE Amex do not currently trade ETPs. Therefore, the expansion of the pilot to the select list of ETPs does not apply to these two markets.

For purposes of Phase II, ETPs consist of exchange-traded funds (including widely traded broad-based funds like SPY), exchange-traded vehicles (which track the performance of an asset or index, providing investors with exposure to futures contracts, currencies and commodities without actually trading futures or taking physical delivery of the asset), and exchange-traded notes.

[5] *See* Securities Exchange Act Release Nos. 62407 (June 30, 2010), 75 FR 39060 (July 7, 2010); 62415 (June 30, 2010), 75 FR 39086 (July 7, 2010); 62409 (June 30, 2010), 75 FR 39078 (July 7, 2010); 62408 (June 30, 2010), 75 FR 39065 (July 7, 2010); 62417 (June 30, 2010), 75 FR 39074 (July 7, 2010); 62418 (June 30, 2010), 75 FR 39084 (July 7, 2010); 62419 (June 30, 2010), 75 FR 39070 (July 7, 2010); 62414 (June 30, 2010), 75 FR 39081 (July 7, 2010); 62411 (June 30, 2010), 75 FR 39067 (July 7, 2010); 62412 (June 30, 2010), 75 FR 39073 (July 7, 2010); 62413 (June 30, 2010), 75 FR 39076 (July 7, 2010); and 62410 (June 30, 2010), 75 FR 39063 (July 7, 2010) ("Phase II Circuit Breaker Pilot Notices").

On June 30, 2010, FINRA filed a proposed rule change, which was approved today. *See* Securities Exchange Act Release No. 62416 (June 30, 2010), 75 FR 39069 (July 7, 2010); Securities Exchange Act Release No. 62883 (September 10, 2010) (SR–FINRA–2010–033).

[6] The Commission considered letters received as of August 25 discussing the concept of the effectiveness of the individual stock circuit breaker pilot to date as well as formal letters citing the rule filings. *See* Letter from Paul Schott Stevens, President & CEO, Investment Company Institute to Chairman Schapiro, Commission, dated June 22, 2010 ("ICI Letter"); Letter from Craig S. Donohue, CEO, CME Group, Inc. to Chairman Schapiro, Commission, dated June 23, 2010 ("CME Letter"); Letter from Ann L. Vlcek, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association to Elizabeth M. Murphy, Secretary, Commission, dated June 25, 2010 ("SIFMA Letter"); Letter from Peter Skopp, President, Molinete Trading Inc. to Elizabeth M. Murphy, Secretary, Commission, dated July 8, 2010 ("Molinete Letter"); Letter from Sal L. Arnuk, Co-Head, and Joseph Saluzzi, Co-Head, Themis Trading to Elizabeth M. Murphy, Secretary, Commission, dated July 8, 2010 ("Themis Letter"); Letter from Peter A. Ianello, Partner, CSS, LLC to Elizabeth M. Murphy, Secretary, Commission, dated July 15, 2010 ("CSS Letter"); Letter from Julie S. Sweet, General Counsel, Secretary, Chief Compliance Officer, Accenture plc to Elizabeth M. Murphy, Secretary, Commission, dated July 15, 2010 ("Accenture Letter"); Letter from Patrick J. Healy, CEO, Issuer Advisory Group, LLC, Washington, District of Columbia to Elizabeth M. Murphy, Secretary, Commission, dated July 18, 2010 ("Issuer Advisory Group Letter"); Letter from Alexander M. Cutler, Chair, Business Roundtable Corporate Leadership Initiative, Business Roundtable, to Elizabeth M. Murphy, Secretary, Commission, dated July 19, 2010 ("Business Roundtable Letter"); Letter from Geva Patz, Android Alpha Fund to Elizabeth M. Murphy, Secretary, Commission, dated July 19, 2010 ("Android Alpha Fund Letter"); Letter from David C. Cushing, Director of Global Equity Trading, Wellington Management Company, LLP to Elizabeth M. Murphy, Secretary, Commission, dated July 19, 2010 ("Wellington Letter"); Letter from Karrie McMillan, General Counsel, Investment Company Institute to Elizabeth M. Murphy, Secretary,

The NYSE responded to the comments in a letter dated July 23, 2010,[7] and in a letter dated August 25, 2010.[8] Nasdaq submitted a response on August 26, 2010.[9]

The Commission finds that the proposals are consistent with Section 6(b)(5) of the Act,[10] as it believes that expanding the uniform, market-wide trading pauses will serve to prevent potentially destabilizing price volatility and will thereby help promote the goals of investor protection and fair and orderly markets. This order approves the proposed rule changes.

II. Description of the Proposals

On May 6, 2010, the U.S. equity markets experienced a severe disruption.[11] Among other things, the prices of a large number of individual securities suddenly declined by significant amounts in a very short time period, before suddenly reversing to prices consistent with their pre-decline levels. This severe price volatility led to a large number of trades being executed at temporarily depressed prices, including many that were more than 60% away from pre-decline prices and were broken by the Exchanges. The Commission is concerned that events such as those that occurred on May 6 can seriously undermine the integrity of the U.S. securities markets. Accordingly, it is working on a variety of fronts to assess the causes and contributing factors of the May 6 market disruption and to fashion policy responses that will help prevent a recurrence.

The Commission also recognizes the importance of moving quickly to implement appropriate steps that could help limit potential harm from extreme price volatility. In this regard, it is pleased that the SROs began consulting soon after May 6 in an effort to develop consistent circuit breaker rules that could be implemented on an expedited basis. The SROs were able to reach agreement on a consistent approach and, on May 18 and 19, 2010, all of the SROs filed proposed rule changes with the Commission.

On June 10, 2010, the Commission granted accelerated approval, for a pilot period to end December 10, 2010, for proposed rule changes by the Exchanges to pause trading during periods of extraordinary market volatility in S&P 500 stocks (the "Phase I Circuit Breaker Pilot").[12] The rules require the Listing Markets to issue five-minute trading pauses for individual securities for which they are the primary Listing Market if the transaction price of the security moves ten percent or more from a price in the preceding five-minute period. The Listing Markets are required to notify the other Exchanges and market participants of the imposition of a trading pause by immediately disseminating a special indicator over the consolidated tape. Under the rules, once the Listing Market issues a trading pause, the other Exchanges are required to pause trading in the security on their markets.

At the end of the five-minute pause, the Listing Market reopens trading in the security in accordance with its procedures for doing so. Trading resumes on other Exchanges and in the over-the-counter (OTC) market once trading has resumed on the Listing Market. In the event of a significant imbalance on the Listing Market at the end of the trading pause, the Listing Market may delay reopening. If the Listing Market has not reopened within ten minutes from the initiation of the trading pause, however, the other Exchanges may resume trading.[13]

Several commenters on the proposal for the Phase I Circuit Breaker Pilot expressed the view that the circuit breaker pilot should be expanded beyond S&P 500 stocks, particularly to exchange traded funds ("ETFs") and the securities of other companies that were most severely affected by the market disruption on May 6, 2010.[14] In the approval order for the Phase I Circuit Breaker Pilot, the Commission agreed that consideration should be given by the Exchanges to whether the circuit breakers should be expanded to cover additional securities, but did not believe that there was a reason to delay implementation of the Phase I Circuit Breaker Pilot as a reasonable first step to address potential market volatility.

Under the current proposal, the Exchanges propose to add securities included in the Russell 1000, as well as specified ETPs, to the pilot (the "Phase II Circuit Breaker Pilot") shortly after the Commission approves the proposed rule changes. The Exchanges believe that adding these securities to the pilot would have the beneficial effect of applying the circuit breakers' protections against excessive volatility to a larger group of securities, while at the same time allowing the opportunity, during the pilot period, for continued review of the operation of the circuit breakers and an assessment of whether the pilot should be further expanded or modified.

The Exchanges believe that the securities in the Russell 1000 have similar trading characteristics to securities included in the S&P 500, and therefore the 10% price movement that triggers a trading pause in the Phase I Circuit Breaker Pilot is appropriate for Russell 1000 securities. Based on the analyses of certain of the Exchanges, the number of times that the trading pause would be triggered for Russell 1000

Commission, dated July 19, 2010 ("ICI 2 Letter"); Letter from Ira P. Shapiro, Managing Director, BlackRock, Inc., San Francisco, California to Elizabeth M. Murphy, Secretary, Commission, dated July 19, 2010 ("BlackRock Letter"); Letter from Tom Quaadman, Vice President, Center for Capital Markets Competitiveness, Washington, District of Columbia to Elizabeth M. Murphy, Secretary, Commission, dated July 19, 2010 ("CCMC Letter"); Letter from James J. Angel, Associate Professor of Finance, Georgetown University, dated June 19, 2010 [sic] ("Angel Letter"); Letter from John A. McCarthy, General Counsel, GETCO to Elizabeth M. Murphy, Secretary, Commission, dated July 20, 2010 ("GETCO Letter"); Letter from Jose Marques, Managing Director, Deutsche Bank Securities Inc. to Elizabeth M. Murphy, Secretary, Commission, dated July 21, 2010 ("Deutsche Bank Letter"); Letter from Paul Schott Stevens, President & CEO, Investment Company Institute to Chairman Schapiro, Commission, dated July 27, 2010 ("ICI 3 Letter"); Letter from Craig S. Donohue, Chief Executive Officer, CME Group to Elizabeth M. Murphy, Secretary, Commission, dated July 30, 2010 (CME 2 Letter").

[7] *See* Letter from Janet M. Kissane, Senior Vice President—Legal & Corporate Secretary, NYSE Euronext to Elizabeth M. Murphy, Secretary, Commission, dated July 23, 2010 ("Response Letter").

[8] *See* Letter from Janet M. Kissane, Senior Vice President—Legal & Corporate Secretary, NYSE Euronext to Elizabeth M. Murphy, Secretary, Commission, dated August 25, 2010.

[9] *See* Letter from Thomas P. Moran, Associate General Counsel, The NASDAQ Stock Market LLC to Elizabeth M. Murphy, Secretary, Commission, dated August 26, 2010.

[10] 15 U.S.C. 78f(b)(5). That section, among other things, requires that the rules of national securities exchanges be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and in general, to protect investors and the public interest.

[11] The events of May 6 are described more fully in the report of the staffs of the Commodity Futures Trading Commission ("CFTC") and the Commission, titled *Report of the CFTC and SEC to the Joint Advisory Committee on Emerging Regulatory Issues*, "Preliminary Findings Regarding the Market Events of May 6, 2010," dated May 18, 2010 ("Joint Report").

[12] *See* Securities Exchange Act Release No. 62252 (June 10, 2010), 75 FR 34186 (June 16, 2010) ("Phase I Approval Order").

[13] For more details on the operation of the Exchanges' rule, *see* Securities Exchange Act Release No. 62252.

[14] *See, e.g.*, Letter from Jeffrey W. Rubin, American Bar Association Business Law Section to Elizabeth M. Murphy, Secretary, Commission, dated June 3, 2010; Letter from Julie Sweet, Accenture plc to Elizabeth M. Murphy, Secretary, Commission, dated June 3, 2010; and Letter from Karrie McMillan, Investment Company Institute to Elizabeth M. Murphy, Secretary, Commission, dated June 3, 2010 (expressing particular concern that if circuit breakers exist for individual securities contained in ETFs' baskets, but not for the ETFs themselves, ETFs could again suffer disproportionately during a market event such as that of May 6).

securities would be similar to the number of instances for S&P 500 securities.

In addition, the Exchanges proposed to include in the Phase II Circuit Breaker Pilot the more liquid ETPs—specifically, those with a minimum average daily volume of $2,000,000—that tend to have similar trading characteristics as securities in the S&P 500 and Russell 1000 and for which they believe a 10% circuit breaker trigger is appropriate.[15] In addition, to assure related ETPs are subject to comparable circuit breakers, the Exchanges proposed to include any ETP that did not meet the $2,000,000 average daily volume threshold, but tracked similar stocks and indices as ETPs meeting this criterion and proposed to be included in the pilot. ETPs with average-daily-volumes of less than $2,000,000, and for which there were no high-volume counterparts were not included. Also excluded were leveraged ETFs since those products by design are more volatile than the underlying stocks they track, and the current proposal only contemplates adding securities for which a 10% trigger is appropriate.[16]

As proposed, the list of ETPs includes those that track broad-based equity indices, which the Exchanges recognize has caused some debate. For example, as described in Section III, concerns have been raised about the effect that halting trading in an index-based ETP may have on a related index-based option or future. However, the Exchanges believe that including broad-based index ETPs is appropriate so that ETP investors are protected should the component securities experience such volatility that trading in the broad-based ETP is affected. Because the proposal is for a pilot period, the Exchanges will continue to assess, among other things, whether it is appropriate to have a trading pause in broad-based index ETPs when there is not a similar trading pause in related index-based options or futures.

In addition, during the pilot period, the Exchanges will continue to assess whether specific stocks or ETPs should be added to, or removed from, the list of securities subject to the circuit breakers. The Exchanges will also continue to assess whether the parameters for invoking a trading pause continue to be appropriate or should be modified.[17]

III. Discussion of Comments and Commission Findings

As of August 25, 2010, the Commission received 19 comment letters regarding the proposed rule changes. Many commenters supported the Phase II Circuit Breaker Pilot and its expansion to the Russell 1000 and the specified ETPs.[18] For example, one commenter encouraged the Commission to act expeditiously to expand the scope of the trading halt rules to securities other than the S&P 500, particularly to ETFs, and noted that ETFs experienced significant volatility on May 6, 2010 and would benefit from uniform pauses in trading.[19] Another commenter urged the Commission to approve the Phase II Circuit Breaker Pilot as quickly as possible, arguing that many of the securities that experienced the most extreme trading jolts on May 6, 2010 were not included in the Phase I Circuit Breaker Pilot, and that expansion of the pilot was appropriate both to protect additional companies from potential aberrational price movements and liquidity events affecting their securities, and to provide investors with greater certainty about the availability of the circuit breakers.[20] Yet another commenter noted that expanding the trading halt pilot to securities in the Russell 1000 would protect investors in publicly traded companies not in the S&P 500 that experienced severely aberrational trading on May 6.[21]

Some commenters raised concerns about the proposed rule changes. The two main areas of concern were: (1) The ability of erroneous trades to trigger a trading pause; and (2) whether ETPs—particularly broad-based index products—should be included in the pilot.

1. Erroneous Trades Triggering the Trading Pause

Several commenters pointed out that, under the circuit breaker pilot, erroneous trades can trigger—and have triggered—trading pauses, when there otherwise is no extraordinary market volatility.[22] One commenter asserted that under the current circuit breaker logic, erroneous trades would have triggered a trading halt at least 238 times in the past 18 months.[23] This same commenter pointed out that, as of the date of its letter, three stocks had been halted under the Phase I Circuit Breaker Pilot, two of which were triggered on markets with prices that were far away from the current national best bid or offer ("NBBO") and prevailing prices at other markets.[24]

Other commenters expressed concern that any trader in the world, ill-intentioned [25] or not, has the power to halt trading in a stock simply by printing a trade outside the circuit breaker range on a trade reporting facility for the OTC market.[26] One of these commenters suggested that either a minimum number of trades outside the circuit breaker range occur before trading is halted, or that the trade first be checked for consistency with the NBBO before trading is halted.[27]

Several commenters concerned with erroneous trades triggering the circuit breakers offered alternatives to the "trading pause" mechanism used in the current pilot. A number of commenters suggested that the Commission consider moving to a "limit up/limit down" approach to moderate market volatility, similar to that utilized in the futures markets.[28] Some commenters also encouraged the Commission to consider adopting collars on market orders and eliminating stub quotes.[29] One commenter suggested that the markets trigger the single stock circuit breakers

[15] For details on how the Exchanges developed the pilot list of ETPs, *see, e.g.,* Securities Exchange Act Release No. 62413 (June 30, 2010), 75 FR 39076 (July 7, 2010) (SR–NYSEArca–2010–61).

[16] One consequence of excluding leveraged ETFs is that they could still suffer significant price dislocations even though trading in the stocks they track might be paused as discussed above.

The Exchanges do not believe that the 10% price movement is an appropriate threshold for leveraged ETPs because, by definition, leveraged ETPs are based on multiples of price movements in the underlying index. Accordingly, a 10% percent price movement in a leveraged ETP may not signify extraordinary volatility. Because the Exchanges are not proposing to adopt revised price movement thresholds at this time, they are not proposing to include leveraged ETPs for now.

[17] *See* Phase II Circuit Breaker Pilot Notices, *supra* note 5.

[18] *See* Accenture Letter, Business Roundtable Letter; CCMC Letter; ICI Letter; ICI 2 Letter; ICI 3 Letter; Issuer Advisory Group Letter; Wellington Letter; Deutsche Bank Letter; SIFMA Letter; and BlackRock Letter.

[19] *See* SIFMA Letter.

[20] *See* Business Roundtable Letter.

[21] *See* Accenture Letter.

[22] *See, e.g.,* Themis Letter; Accenture Letter; Molinete Letter; SIFMA Letter; and Angel Letter.

[23] *See* Molinete Letter.

[24] *Id.* (referring to the trading pauses in Citigroup on June 29, 2010 and in Anadarko Petroleum on July 6, 2010). As of August 25, stock-specific circuit breakers have been triggered seven times in six stocks.

[25] The Commission notes that anyone reporting a trade with the intention of triggering a trading pause could be charged with manipulation, fraud or other violations of the Federal securities laws.

[26] *See* Themis Letter and Angel Letter.

[27] *Id.*

[28] *See* SIFMA Letter; Accenture Letter; Wellington Letter; and CME 2 Letter. Under this approach, trades could occur within the established price bands, so that erroneous trades would largely be eliminated. In addition, there would not be a complete trading halt—trading would be prevented outside the applicable price band, but could continue within it.

[29] *See* SIFMA Letter and CME 2 Letter.

off of changes to the NBBO rather than to changes in the last trade price.[30]

The Commission believes that the ability of an erroneous trade to trigger a trading pause is a concern that the Exchanges should seek to address promptly. The Commission understands that the Exchanges are working on a variety of measures to reduce the instances of erroneous trades and to assure that, when they occur, they are resolved promptly through a clear and transparent process.[31] The Commission also notes that, under the pilot rules, the Listing Market can exclude a transaction price that results from an erroneous execution from triggering a circuit breaker. In this regard, the Commission notes that the Listing Markets, pursuant to this authority, intend to implement automated processes to help prevent trades that may be erroneous—specifically, those outside the NBBO—from triggering a circuit breaker.[32] Various Exchanges have taken steps to "collar" market orders, which are intended to prevent executions that occur a specified percentage away from the last sale,[33] and Commission staff has been working with the Exchanges on an initiative to prevent stub quotes. The Commission, in conjunction with the Exchanges, will continue to evaluate what further steps need to be taken to reduce the likelihood of erroneous trades and to improve the efficiency of the pilot. However, the Commission does not believe it is appropriate to delay implementation of the Phase II Circuit Breaker Pilot pending the conclusion of those efforts.

2. Inclusion of ETPs

Many commenters addressed the inclusion of ETPs in the pilot program.[34] Several supported the proposed expansion of the Phase II Circuit Breaker Pilot to include ETPs.[35] One of these commenters stated that ETFs experienced significant volatility on May 6, and would benefit from a uniform trading pause.[36] Another commenter noted that the price of an ETF is typically highly correlated to the market price of its basket of component securities.[37] Under normal circumstances, when trading has been halted for one or two component securities, an ETF may experience a slight deviation from the price of its basket because of the challenge of pricing the non-trading security, and may trade with a wider spread to account for the associated risk. When multiple underlying securities are affected, however, the correlation between the prices of an ETF and its underlying basket may break down and the ETF may experience more severe price dislocation.[38] While this commenter thought that a different circuit breaker trigger may be appropriate for ETFs, it nonetheless encouraged the Commission to include all ETFs in the pilot where a substantial number of the component securities are subject to the circuit breakers.[39] Doing otherwise, in its view, creates risks that ETFs could again suffer disproportionately during a market event similar to that of May 6.[40]

One commenter supported the inclusion of ETFs in the pilot program, in part because halting trading in the underlying component securities, but not in the ETF, would hinder the arbitrage mechanism that is critical to the ability of ETFs to track the performance of their underlying basket or benchmark index.[41] According to this commenter, if an ETF were allowed to continue to trade while trading in the majority of its underlying securities were halted, the arbitrage mechanism would not work effectively, with the result that liquidity for the ETF would diminish greatly, and perhaps lead to a collapse in price similar to that which occurred on May 6.[42]

Other commenters criticized various aspects of the application of the proposed rule change to ETPs. One commenter described certain ETFs—such as the S&P 500 SPDR (SPY)—as "systemically important," and expressed concern that halting trading in these ETFs, especially as a result of erroneous trades, might destabilize markets. Because the SPY, for example, is used as a hedging vehicle in many trading strategies, halting trading in it could cause liquidity providers broadly to withdraw from the market, increasing volatility and perhaps leading to a chain reaction like that witnessed on May 6.[43] This commenter did not believe that allowing ETFs to continue to trade while some of the underlying component securities were halted would be detrimental, because market participants would determine their own fair value of the halted component securities.[44]

Another commenter expressed significant concern with the proposed expansion of the pilot to broad-based equity index ETFs, as it believed there could be potentially significant disruptions to trading across related markets.[45] This commenter noted that

[30] *See* Molinete Letter. As an alternative, this commenter suggested requiring at least two consecutive trades outside the NBBO to trigger the circuit breaker, and the exclusion of manually-entered trades from being potential triggers.

[31] *See* SR–BATS–2010–016; SR–BX–2010–040; SR–CBOE–2010–056; SR–CHX–2010–13; SR–EDGA–2010–03; SR–EDGX–2010–03; SR–FINRA–2010–032; SR–ISE–2010–62; SR–NASDAQ–2010–076; SR–NSX–2010–07; SR–NYSE–2010–47; SR–NYSEAmex–2010–60; SR–NYSEArca–2010–58 (proposed rule changes to amend certain SRO rules to set forth clearer standards and curtail SRO discretion with respect to breaking erroneous trades).

[32] *See* Letter from Janet M. Kissane, Senior Vice President—Legal & Corporate Secretary, NYSE Euronext to Elizabeth M. Murphy, Secretary, Commission, dated August 25, 2010; Letter from Thomas P. Moran, Associate General Counsel, The NASDAQ Stock Market LLC to Elizabeth M. Murphy, Secretary, Commission, dated August 26, 2010. The Listing Markets may roll out these new automated processes on a staggered basis.

In addition, the Commission understands FINRA is developing more effective ways to prevent erroneous OTC trades from being printed on a trade reporting facility, and it encourages those efforts. *See, e.g.,* FINRA Trade Reporting Notice, dated August 19, 2010 (issuing new guidance on the use of the weighted-average price/special pricing formula (.W) trade modifier for reporting certain types of OTC trades in NMS stocks to FINRA).

[33] *See, e.g.,* Securities Exchange Act Release Nos. 62485 (July 13, 2010), 75 FR 41914 (July 19, 2010) (SR–NYSEArca–2010–67); 60371 (July 23, 2009), 74 FR 38075 (July 30, 2009) (SR–NASDAQ–2009–70).

[34] *See* Accenture Letter; Android Alpha Fund Letter; BlackRock Letter; Business Roundtable Letter; CME Letter; CME 2 Letter; CCMC Letter; ICI Letter; ICI 2 Letter; ICI 3 Letter; Molinete Letter; SIFMA Letter.

[35] *See* Accenture Letter; BlackRock Letter; Business Roundtable Letter; CCMC Letter; ICI Letter; ICI 2 Letter; ICI 3 Letter; SIFMA Letter.

[36] *See* SIFMA Letter at 2.

[37] *See* ICI Letter and ICI 2 Letter.

[38] *Id.*

[39] *See* ICI Letter. In a subsequent letter, that commenter supported examining the connection between price discovery in the equities and the futures markets, and potentially making rules consistent across markets. *See* ICI 2 Letter. According to this commenter, however, such an examination should not prevent including broad-based index ETFs in the pilot program. *Id.*

[40] *See* ICI 2 Letter.

[41] *See* BlackRock Letter. According to the commenter, this arbitrage mechanism generally requires liquidity providers to sell a basket of stocks equivalent to an ETF's underlying portfolio (or a correlated derivative) as a hedge when purchasing ETF shares.

[42] *Id.* This commenter did, however, question the exclusion of lower-volume ETFs from the Phase II Circuit Breaker Pilot, and urged that these ETFs be included in the pilot at the earliest opportunity. *See* discussion on pages 6–7 describing the rationale for selecting the list of ETPs for inclusion in the pilot program.

[43] *See* Molinete Letter at 4.

[44] *Id.* at 4–5.

[45] *See* CME Letter and CME 2 Letter. This commenter expressed further concerns with the prospect of multiple constituent stocks in an index being halted without the market-wide circuit breaker being triggered. The commenter thought this would create complexity and confusion in understanding the index calculation. In addition, the commenter was of the view that the halting of high capitalization, highly-liquid index components would be disruptive because it could affect whether the index triggers a market-wide circuit breaker, the intra-day index values circulated for risk management purposes may not be reflective of the true value of the underlying market, and large liquidity providers in index futures and ETFs may have difficulty hedging with the result that they withdraw from the market.

the indices underlying the most active ETFs are the same as those underlying the most active cash index options, index futures, and options on ETFs.[46] If a different circuit breaker mechanism applied to broad-based equity index ETFs and ETF options than applied to index futures and index options, or differed from the overall market-wide circuit breakers, the commenter feared this could lead to further market stress during periods of turbulence, perhaps impeding liquidity and exacerbating risk management challenges.[47] In addition, the commenter thought that the inability of market makers to hedge using equity index ETFs during a trading pause could lead to their withdrawing liquidity across all markets, including in the E-mini index futures.[48] Accordingly, the commenter believed that the circuit breakers applicable to equity index-based ETFs (as well as index futures, index options, options on ETFs, and swaps) should be consistent with both the methodology and levels of the market-wide circuit breakers.[49] Specifically, the commenter recommended the adoption of uniform price limits across all broad-based index products based upon the S&P 500, the DJIA, and the NASDAQ 100, which would preclude trading beyond the enumerated limit but not within it.[50] This commenter also recommended that automated risk and volatility mitigation mechanisms be implemented in place of trading halts in individual securities.[51]

In its response to comments, NYSE stated that the "prompt review and implementation of revised and coordinated market wide circuit breakers is * * * a high priority."[52] NYSE also indicated that it would continue to review the operation of the pilot, including its effect on how index-based products trade across multiple markets, and would propose "such changes as may be warranted for those securities."[53]

The Commission believes that, on balance, the inclusion of ETPs, including broad-based index equity ETFs, in the Phase II Circuit Breaker Pilot is warranted and consistent with the Act. The Commission notes that there are a number of scenarios in which the application of a circuit breaker to trading in an ETF would promote market stability. For example, if an ETF triggers a circuit breaker when none of its component stocks is experiencing abnormal moves, then it is likely that the ETF is suffering from a temporary liquidity imbalance. In that case, the ETF would no longer be suitable for use as a hedging instrument because its price would no longer reflect an accurate consensus market value of the ETF or its underlying stocks. By pausing the ETF under these circumstances, the Exchanges would allow liquidity to rebuild and provide time for the market to self-correct without allowing the aberrant price of the ETF to adversely affect the trading and pricing of the underlying stocks, other ETFs or other related products.

In another scenario, an ETF might trigger a circuit breaker, even though its component stocks have not, because the ETF is leading its underlying stocks in price discovery. In that case, the prices of many of the underlying stocks may follow, triggering their own circuit breakers shortly after the ETF does. In a broad market event such as this, the net result would be that trading in the ETF and individual stocks have each been paused, providing time for the market as a whole to re-evaluate prices.

In yet another scenario, a number of individual component stocks might trigger their circuit breakers even though the related ETF has not yet done so. In that case, different market participants may very well have differing opinions on the market value for the ETF because they will be required to estimate the value of those component stocks that have been paused. If only a small number of component stocks is paused (perhaps due to some temporary liquidity imbalances in those stocks) then there likely would be minimal effect on the ETF, and the ETF circuit breakers appropriately would not be triggered. But if a large number of component stocks trigger halts, the market likely is experiencing a broad-based move, either for fundamental reasons, or because of a large-scale liquidity imbalance similar to that of May 6. As noted above, if many component stocks of an ETF are paused, but the ETF itself continues to trade, the arbitrage relationship between the ETF and its component stocks likely will break down as market participants find they cannot hedge their exposures and, as a consequence, cease to provide liquidity. Without a circuit breaker mechanism that also applies to ETFs, the ETF could experience excessive volatility that is not necessarily driven by the prices of its underlying stocks. By pausing the ETF, market participants would be given time to re-evaluate prices and replenish liquidity as needed.

The Commission acknowledges that a variety of ETFs do indeed trade without incident when most, and sometimes all, of their underlying components are not trading (*e.g.,* ETFs on international stocks). However, market makers and other participants trading these ETFs account for this known and permanent structural difference by building alternative methods for hedging and pricing into their trading models. Market participants trading ETFs for which the component stocks normally trade at the same time would not necessarily have the opportunity to implement new hedging and pricing strategies in real time if underlying component stocks were suddenly paused. Rather, they would most likely withdraw from the market leaving the ETF with little liquidity and even further need for a trading pause.[54]

The above arguments demonstrating the need to couple pauses in ETFs with pauses in underlying stocks are equally applicable to the futures market, and the Commission acknowledges the comments and concerns of the CME for consistent treatment across instrument types. However, the Commission notes that the CME's markets already have mechanisms for limiting or pausing trading, and thus some inconsistency exists today between the two markets. Maintaining the status quo, moreover,

[46] *Id.* The commenter also noted that these markets are very closely linked and the absence of effective coordination across comparable markets was one factor cited by many as having contributed to certain market issues experienced on May 6. The Commission addresses issues of cross-market linkage in its discussion *infra.*

[47] *Id.*

[48] *See* CME Letter.

[49] *See* CME Letter. This commenter also noted that, while approximately 70% of the trades broken on May 6, 2010 were in ETFs, they were not in the most liquid domestic, large cap index products.

[50] *See* CME 2 Letter. These price limits would be established at the 5%, 10% and 20% levels, and would be implemented for a 10 minute period, after which trading would continue to the next applicable limit.

[51] *Id.* Specifically, the commenter recommended that all markets adopt: (1) Automated means—similar to the commenter's stop logic functionality—to briefly pause the market in the event that cascading sell orders precipitate a material market decline because of a transitory dearth of liquidity; (2) functionality—similar to the commenter's protection point functionality—to automatically apply limit prices to all orders, including market and stop orders; and (3) automated price banding functionality and maximum order size restrictions to help prevent erroneous trades. For as long as single stock circuit breakers continue to be employed, however, the commenter believed regulators and the markets should establish uniform policies and procedures to address situations where the computation of the market-wide circuit breaker index value is negatively affected due to the triggering of stock specific circuit breakers on the component securities.

[52] *See* Response Letter.

[53] *Id.*

[54] The Commission notes that a pause in the ETF could also affect trading in underlying component stocks that were not otherwise halted to the extent that the ETF was no longer available as a hedging mechanism.

would leave ETFs without a trading pause mechanism. In addition, the Commission notes that there will need to be substantial work to determine how best to make the volatility constraints in the futures markets and the securities markets consistent.

Commenters also raised related concerns that a pause in a broad-based ETF (such as the SPY) could lead to significant liquidity pressures on other index-based products in the futures market (such as the E-mini).[55] Although this is a potential point of concern, as noted above the futures markets already have in place volatility mechanisms that should help mitigate the effect of such an event. Moreover, it should be noted that currently there could be a pause on the futures market (*e.g.,* in the E-mini) which could create liquidity pressure for corresponding ETFs—but there is currently no mechanism to protect the ETF against aberrant prices as a result of such liquidity pressures.

NYSE also recognized these concerns in its response to comments, and committed to working with regulators and other markets in coordinating alerts to trading interruptions "so consistent application of pauses will be effected."[56] NYSE also described "the prompt review and implementation of revised and coordinated market wide circuit breakers" as "a high priority."[57]

In response to the comment that the Commission instead implement automated risk and volatility mitigation mechanisms—such as price banding or stop logic functionality—the Commission notes that, even as the circuit breaker pilot is being expanded, the Commission is simultaneously exploring possible alternatives to a circuit breaker approach that may include price limit bands or other mechanisms described by the commenters.

One commenter noted that the proposal would exclude many ETFs with trading volumes below the criteria set by the Exchanges and FINRA, although such ETFs were significantly affected in the cancelled trades of May 6.[58] The Commission acknowledges that fact, but notes that, as the Exchanges have indicated, the potential application of the circuit breakers to less liquid securities is more complex, as different triggering thresholds may be appropriate for them. As the pilot progresses, the Commission will work with the SROs to consider expanding the circuit breakers to cover additional securities in an appropriate manner.

The Commission acknowledges the point made by commenters that broad-based index products were not significantly implicated in the cancelled trades on May 6.[59] However, the Commission notes that broad-based index products did experience substantial volatility on May 6[60] and, like other securities, could benefit from the protections of a circuit breaker. In addition, a sudden change in price, due to a loss of liquidity or otherwise, to a widely traded ETF could have an adverse market-wide effect even more far-reaching than that of May 6. It is important that the use of circuit breakers not be limited to only those ETFs that happened to have experienced severe dislocations on May 6, since there is no fundamental reason why broad-based ETFs could not experience a similar liquidity crisis. In addition, there were no circuit breakers in effect for underlying stocks on May 6. If a similar event occurred when many underlying stocks in an index were halted by circuit breakers, broad-based ETFs could experience greater volatility than occurred on May 6.

3. Other Areas of Comment

Other areas of comment included potential ways to expand or modify the circuit breaker pilot going forward,[61] the need to carefully study the effect of the pilot,[62] the effect and continued advisability of individual market volatility moderators in addition to the uniform single-stock circuit breakers,[63] and possible modifications to the market-wide circuit breakers.[64]

With regard to expanding or modifying the circuit breaker pilot, as noted above, the Commission intends to continue working with the Exchanges to consider expanding the pilot to include additional securities, or modifying the circuit breaker mechanism or pursuing other approaches to moderating market volatility, in the coming months. In addition, as noted in the Joint Report, the Commission currently is evaluating the extent to which individual market volatility moderators exacerbated the market instability that occurred on May 6, 2010, and expects to develop appropriate policy recommendations based on the outcome of that analysis. Finally, as noted in the Joint Report, the Commission intends to work with the CFTC to consider whether modifications to the existing market-wide circuit breakers are warranted in light of the events of May 6. While all of these issues warrant further study in the coming months, the Commission does not believe they provide a basis for not approving the Phase II Circuit Breaker Pilot at this time. The fact that better alternatives to address inordinate market volatility ultimately may be developed does not provide a basis for the Commission not to approve the Exchanges' proposals if, as the Commission believes, the proposed rule changes are consistent with Section 6(b)(5) of the Act.

4. Findings

The Commission finds that the proposed rule changes are consistent with the requirements of the Act and the rules and regulations thereunder applicable to national securities exchanges. In particular, the Commission finds that the proposals are consistent with Section 6(b)(5) of the Act,[65] which among other things requires that the rules of national securities exchanges be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and in general, to protect investors and the public interest.[66]

The proposed rule changes will expand the trading pause pilot to include the securities in the Russell 1000 and specified ETPs. The Commission believes that expanding the uniform, market-wide trading pauses will serve to prevent potentially destabilizing price volatility and will thereby help promote the goals of investor protection and fair and orderly markets.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[67] that the proposed rule changes (SR–BATS–2010–018; SR–BX–2010–044; SR–

[55] *See* CME Letter.

[56] *See* NYSE Response Letter.

[57] *Id.*

[58] *See* BlackRock Letter.

[59] *See* CME Letter.

[60] *See* Joint Report, *supra* note 11, at 39 (noting that many ETFs "experienced extreme daily lows" on May 6, and that a "significant number of ETFs" experienced extreme daily highs on May 6).

[61] *See* Angel Letter (recommending that the trading pause be expanded to cover the open, close, and after-hours trading); ICI Letter (recommending examining whether a different circuit breaker trigger is appropriate for ETFs); Wellington Letter (recommending that the Commission require the Exchanges to continuously disclose the high/low trigger of a security and its maximum remaining life).

[62] *See* Android Alpha Fund Letter.

[63] *See* Deutsche Bank Letter.

[64] *See* CME 2 Letter; SIFMA Letter.

[65] 15 U.S.C. 78f(b)(5).

[66] In approving the proposed rule change, the Commission notes that it has considered the proposed rules' impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[67] 15 U.S.C. 78s(b)(2).

CBOE–2010–065; SR–CHX–2010–14; SR–EDGA–2010–05; SR–EDGX–2010–05; SR–ISE–2010–66; SR–NASDAQ–2010–079; SR–NYSE–2010–49; SR–NYSEAmex–2010–63; SR–NYSEArca–2010–61; SR–NSX–2010–08) be, and hereby are, approved.

By the Commission.

Elizabeth M. Murphy,

Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62876; File No. SR–Phlx-2010–120]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NASDAQ OMX PHLX, Inc. To Establish Fees for NASDAQ OMX PSX

September 9, 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 August 31, 2010, NASDAQ OMX PHLX, Inc. ("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 adopt new fees in connection with the trading of NMS stocks through the new NASDAQ OMX PSX system ("PSX"). The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqtrader.com/micro.aspx?id=PHLXfilings,* on the Commission's Web site at *http://www.sec.gov,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Shortly after its acquisition by The NASDAQ OMX Group, Inc. ("NASDAQ OMX") in 2008, the Exchange ceased operation of XLE, its former system for trading NMS stocks.[3] Earlier this year, the Exchange filed a proposed rule change to resume trading NMS stocks through a new electronic platform known as NASDAQ OMX PSX.[4] In anticipation of approval and launch of PSX, the Exchange is filing this proposed rule change to establish fees, dues, and other charges applicable to PSX. The proposed fees are structurally similar to those of the Exchange's affiliated exchanges, The NASDAQ Stock Market LLC (the "NASDAQ Exchange") and NASDAQ OMX BX, Inc. ("BX"), but with the omission of fees that are not pertinent to the Exchange's planned business and with differences in the level of certain fees.

Order Execution Fees

Order execution fees will be uniform for all types of securities and member organizations. Specifically, for securities executed at prices of $1 or more, the Exchange will charge $0.0013 per share executed and pay a liquidity provider rebate of $0.0020 per share executed. For executions below $1, the execution fee will be 0.2% of the total transaction cost, and the rebate will be $0. The Exchange proposes this "inverted" pricing structure as a temporary promotional mechanism to attract liquidity to PSX. Other exchanges and trading venues have adopted inverted pricing in the past as a means to promote the development of a new market entrant.[5]

PSX TotalView

The Exchange proposes to establish fees for its PSX TotalView data product. Like NASDAQ TotalView and BX TotalView, PSX TotalView will provide all Displayed Orders in the market at every price level.[6] In recognition of the start-up nature of the new market, the data feed will be provided free of charge to subscribers and distributors for a period ending on the last day of the twelfth full calendar month of PSX's operation. Thus, if PSX commences operations on September 27, 2010, PSX TotalView fees will be waived until October 1, 2011.

After the initial free period, the Exchange will offer users a range of pricing options. In general, charges will be assessed to distributors of PSX Total View on a per distributor basis, with additional charges assessed on a per subscriber basis for each subscriber receiving the data from a distributor. A "distributor" is defined as any entity that receives a feed or data file of Exchange data directly from the Exchange (a "direct distributor") or indirectly through another entity (an "indirect distributor") and then distributes the data either internally (within that entity) or externally (outside that entity). Distributors of PSX TotalView will pay a $1,000 monthly fee to receive the data directly from the Exchange (including from the Exchange through an extranet); indirect distributors would not pay this charge. Distributors will also pay either a $500 monthly fee to distribute the data feed internally (i.e., to employees) or a $1,250 monthly fee to distribute to external customers (as well as internally, if applicable). All of the foregoing fees will be waived during the initial free period. Finally, distributors receiving any PSX TotalView or any other PSX data feed will be charged an annual administrative fee: either $500 for delayed distribution of data, or $1,000 for real-time distribution.[7] The administrative fees, which are assessed annually, will be charged at the beginning of the first calendar year after the launch of PSX, rather than being subject to the one-year free period applicable to other data fees. If, as the Exchange expects, PSX launches in

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 58613 (September 22, 2008), 73 FR 57181 (October 1, 2008) (SR–PHLX–2008–65).

[4] Securities Exchange Act Release No. 62519 (July 16, 2010), 75 FR 43597 (July 26, 2010) (SR–PHLX–2010–79).

[5] *See, e.g.,* Securities Exchange Act Release No. 59452 (February 25, 2009), 74 FR 9456 (March 4, 2009) (SR–BX–2009–012) (temporarily decreasing order execution fee to a level below prevailing liquidity provider rebate); BATS ECN Unveils Ultra-Aggressive January Pricing Special (December 19, 2006) (available at *http://www.batstrading.com/resources/press_releases/BATS%20ECN%20Unveils%20Ultra-Aggressive%20January%20Pricing%20Special.pdf).*

[6] In contrast with the NASDAQ Exchange and BX, however, all orders designated as Displayed Orders will be displayed without attribution to the entering market participant.

[7] These annual administrative fees may be waived for colleges and universities receiving the data for research and educational purposes.

2010, the fees would therefore be charged in January 2011.[8]

In addition to the distributor fees, the Exchange will also charge subscriber fees for controlled accesses to the TotalView data feed. "Subscriber" is defined with reference to instances of access to the data on computer equipment that can receive the data. Specifically, a "subscriber" is defined as any access that a distributor provides to (i) access the information in the PSX TotalView entitlement package, or (ii) communicate with a distributor so as to cause the distributor to access the information in the entitlement package. If a distributor provides its customers or employees an option to use or not to use PSX TotalView data on their computers, and the data is not actually used on a specific computer that has access to it, then the computer in question would not be charged as a subscriber. However, the burden is on the distributor to demonstrate that a particular computer with access is not using the data.

Following the initial one-year free period, the Exchange will assess a monthly charge for each subscriber. The fee for each professional PSX TotalView subscriber is $40 per month.[9] Alternatively, market participants using the data internally on non-display controlled devices may purchase an enterprise license at a rate of $16,000 per month for internal use on an unlimited number of non-display devices within the firm, and thereby avoid individual subscription charges for these devices.[10]

In addition to the foregoing fees, which apply to professional users of PSX TotalView, the Exchange will also allow distributors to provide PSX TotalView to non-professional subscribers at a reduced rate. A "non-professional" is defined as a natural person who is neither (i) registered with the Commission, the Commodities Futures Trading Commission, a state securities agency, a securities exchange or securities association, or a commodities or futures contract market or association; (ii) engaged as an investment advisor as defined in Section 202(a)(11) of the Investment Advisors Act of 1940[11] (the "1940 Act") (whether or not the person is registered or qualified under the 1940 Act); nor (iii) employed by a bank or other organization exempt from registration under federal or state securities laws to perform functions that would require registration or qualification if performed for another organization. The non-professional fee is $1 per subscriber per month. This fee will also be waived until the end of the twelfth full calendar month following PSX's launch.

After the expiration of the one-year introductory period, the Exchange will allow distributors to provide PSX TotalView to new subscribers receiving PSX TotalView for the first time free of charge for an individual one-month trial period. The free trial period applies to individual subscribers receiving the data on a per-subscriber basis, and to broker-dealers that opt to receive the data under an enterprise license. The fee waiver would be applied to the first full month of charges following the date on which a new subscriber is first entitled by a distributor to receive access to PSX TotalView.

The foregoing fee structure is similar to the structure for NASDAQ TotalView and BX TotalView, but the overall level of fees will be lower than for NASDAQ TotalView and comparable to those for BX TotalView. These fee levels reflect the start-up nature of the Exchange's new equities trading platform, and will help to promote competition among exchanges with respect to the quoting and trading services. Specifically, the Exchange believes that the fees it sets for PSX TotalView will help to attract order flow to the Exchange. At inception, the Exchange will have zero market share and therefore must set its fees, including data fees, with a view to attracting order flow. Moreover, the alternatives that exist for market participants to determine market depth—such as other depth of book products that may be associated with markets with more liquidity, or order routing strategies designed to ascertain market depth—provide incentives for the Exchange to ensure that its fees for PSX TotalView are set reasonably. Accordingly, the Exchange will charge no fee at all for a period of more than twelve months, and thereafter will charge fees comparable to those already established for BX.

The fees are not unreasonably discriminatory. The fees for subscribers are uniform for all subscribers, except with respect to reasonable and well-established distinctions between fees for professional and non-professional subscribers. These distinctions, previously approved by the Commission for the NASDAQ Exchange and BX, are designed to promote more widespread distribution to non-professional users. Similarly, the fees for distributors are uniform except with respect to reasonable and well-established distinctions between internal and external distribution and direct and indirect receipt of data. These distinctions, also previously approved by the Commission for the NASDAQ Exchange and BX, are designed to charge lower fees to distributors whose activities do not require the Exchange to establish and maintain direct connections to the distributor, and to distributors that do not establish and maintain external distribution networks requiring more extensive procedures to monitor subscriber usage. The fees are fair and reasonable in that they compare favorably to fees charged by other exchanges for comparable products.

TradeInfo PSX

TradeInfo PSX is an order and execution management tool, similar to comparable products offered by the NASDAQ Exchange and BX. TradeInfo PSX allows users to manage their order flow and mitigate risk by giving them the ability to view their orders and executions, as well as the ability to perform cancels at the port level. It also allows users to download records of their orders and executions for record-keeping purposes. It will be available to PSX participants for a fee of $95 per user per month, which is the same as the fee for the comparable products of the NASDAQ Exchange and BX.

Testing

The Exchange proposes to establish fees for its testing facility, to be set at levels identical to the fees for the NASDAQ Exchange's and BX's testing facilities. In general, the Exchange will charge $285 per hour for an active connection during the facility's normal operating hours and $333 per hour for an active connection at other times. The fees are waived for testing of new, enhanced, or modified services and/or software offered by the Exchange, as well as for modifications initiated by the Exchange and for a 30-day period for new subscribers to existing services. In addition, all testing fees will be waived for the period ending on the last day of the sixth full calendar month following the launch of PSX. Thereafter, as provided in the rule, the fees will be

[8] The administrative fees will also cover distribution of any other PSX data feeds, including free data feeds such as the PSX Last Sale Data Feeds described later in this proposed rule change, and other free or fee-liable feeds that the Exchange offers in the future.

[9] The fee is comparable to the corresponding fee on BX, but BX bifurcates the product between a version of the product covering NASDAQ Exchange-listed securities and a version covering securities listed on other exchanges, charging $20 per subscriber per month for each version. PSX TotalView will provide data about orders for all securities for a fee of $40 per subscriber per month.

[10] A non-display device uses data from the PSX TotalView for calculations and routing decisions but does not provide means to display the information on a screen.

[11] 15 U.S.C. 80b–2(a)(11).

waived for a 30-day period for each new market participant.

Other Fees

Other fee rules relate to installation, removal or relocation of equipment at a subscriber's premises,[12] administrative reports,[13] special data requests,[14] and partial month charges [15] and are comparable to corresponding fees of the NASDAQ Exchange and BX. Fee language governing the aggregation of the activity of affiliated Exchange member organizations for purposes of volume pricing discounts would not be immediately operative, since the Exchange will not initially offer such discounts, but is being adopted at this time to address any such discounts adopted in the future.

Non-Fee Liable Data

The Exchange also proposes to make certain data feeds and other data products available without assessing any distributor or subscriber fees.[16] If the Exchange opts to charge a fee for these feeds or products at a later date, it will file a proposed rule change under Section 19 of the Act to establish the fee.

The feeds are comparable to corresponding feeds offered by BX. First, the Exchange will offer PSX Last Sale Data Feeds, which will provide real-time last sale information, including execution price, volume, and time for executions occurring within PSX. The Exchange believes that these data feeds will increase transparency and the efficiency of executions by enabling vendors to provide additional market data in a cost-efficient manner. The Exchange will offer the PSX Last Sale for NASDAQ and the PSX Last Sale for NYSE/Amex feeds, providing information for (i) NASDAQ Exchange-listed securities, and (ii) securities listed on the New York Stock Exchange ("NYSE"), NYSE Amex, and other exchanges.

Second, the Exchange will offer real-time data feeds of PSX's Best Bid and Offer ("BBO"). The Exchange will offer three different feeds, one providing the BBO for NASDAQ Exchange-listed securities, a second for NYSE-listed securities, and a third for NYSE Amex-listed securities.

Third, the Exchange will offer the PSX Ouch BBO Feed, a data feed that will represent PSX's internal view of the best bid and offer among all market centers other than PSX. The PSX Ouch BBO Feed will be available to all PSX market participants equally at no charge, and will offer all firms transparent, real-time data concerning the Exchange's internal view of the BBO. This data feed reflects the Exchange's view of the BBO, at any given time, based on orders executed on PSX and updated quote information from the SIPs. PSX will make the PSX Ouch BBO Feed available to all market participants via subscription through an established connection to PSX.

The PSX Ouch BBO Feed will contain the following data elements: Symbol, bid price, and ask price.[17] Unlike the PSX TotalView feed, the Ouch BBO feed will not contain information about individual orders, either those residing within the PSX system or those executed or routed by PSX. Unlike the SIP feeds containing the National Best Bid and Offer ("NBBO"), the PSX Ouch BBO Feed will not identify either the market center quoting the BBO or the size of the BBO quotes. It merely contains the symbol and bid and offer prices.

By making the PSX Ouch BBO Feed data available, the Exchange will enhance market transparency and foster competition among orders and markets. Member organizations may use the PSX Ouch BBO Feed to more accurately price their orders based on PSX's view of what the BBO is at any point in time, which may not be reflected in the official NBBO due to latencies inherent in the NBBO's dissemination. As a consequence, firms may more accurately price their orders on PSX, thus avoiding price adjustments by PSX based on a quote that is no longer available. Additionally, market participants can price orders more aggressively to narrow the NBBO and provide better reference prices for investors.

Fourth, the Exchange will make a version of NASDAQ OMX's Weblink ACT product available for use by PSX participants. For PSX participants, Weblink Act will provide a convenient system for member organizations to access comprehensive records of their own trades in PSX. Weblink ACT will be provided free of charge at the time of PSX's launch. Users will have the option of receiving the Weblink ACT service for PSX as a standalone product, or in addition to Weblink ACT for the NASDAQ Exchange service that they may already be receiving. In either case, the Exchange will not charge a fee for the PSX version.

Finally, the PSX Trading and Compliance Data Package will provide PSX Participants with historical data reports containing trade-reporting information about the Participant's own trades in PSX, for delivery on an end-of-day or T+1 basis. The Exchange may modify the contents of the PSX Trading and Compliance Data Package from time to time based on subscriber interest. Users will have the option to request and download these reports as a standalone product, and subscribers to the existing NASDAQ Exchange Trading and Compliance Data package who are PSX Participants will also have the option to request PSX reports through their existing service. In either case, the Exchange will not charge a fee for the PSX version at this time.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[18] in general and with Section 6(b)(4) of the Act,[19] in particular, in that it provides an equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities. The Exchange makes all services and products subject to these fees available on a non-discriminatory basis to similarly situated recipients. All fees are structured in manner comparable to corresponding fees of the NASDAQ Exchange or BX already in effect, and are set at levels equal to or lower than the levels of the comparable NASDAQ Exchange and BX fees. Most of the proposed fees, including transaction execution and testing fees, are uniform for all customers and are therefore equitably allocated based on usage of PSX services. The proposed fees for PSX TotalView are equitably allocated since the fees vary solely based on reasonable and well-established distinctions with respect to professional and non-professional users, internal and external distribution, and direct and indirect

[12] This provision allows the Exchange to pass through any costs it incurs.

[13] An administrative report is prepared at a member organization's request regarding its activities to assist the firm in activities such as auditing its internal systems, verifying back-office processing, or projecting monthly costs. The fee is $25 per month.

[14] This provision allows the Exchange to recoup costs associated with responding to ad hoc requests for market data, such as requests that may be made by news reporters or academic researchers.

[15] This provision provides that market data distributors may elect to be billed on a prorated basis during the month of initiation or termination of service.

[16] The Exchange will assess the annual administrative fee described above to all distributors receiving a data feed, including non-fee-liable feeds. The Exchange reserves the right to impose distributor and/or subscriber fees for these products at a later date by submitting a proposed rule change under Section 19 of the Act. 15 U.S.C. 78s.

[17] PSX also provides a time stamp and message type field for reference.

[18] 15 U.S.C. 78f.

[19] 15 U.S.C. 78f(b)(4).

receipt of data. The fees are fair and reasonable in that they compare favorably to fees charged by other exchanges for comparable products.

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. Despite its long history, the Exchange will effectively be entering the highly competitive markets for trading NMS stocks as a start-up venture. Accordingly, its fees must be set at a level that will promote competition in these markets, or potential users of its services will simply continue to obtain services from the Exchange's multiple competitors. If the Exchange sets fees at inappropriately high levels, market participants will seek to avoid using the Exchange. Thus, the products and services introduced by the Exchange will promote competition if they succeed in providing market participants with viable and cost-effective alternatives to existing competitors. Conversely, they will impose no burden on competition if they fail to provide such alternatives.

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.[20] 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 proposal 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 No. SR–Phlx–2010–120 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 No. SR–Phlx–2010–120. 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 will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–Phlx–2010–120 and should be submitted on or before October 7, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–23103 Filed 9–15–10; 8:45 am]

BILLING CODE 8010–01–P

[20] 15 U.S.C. 78s(b)(3)(A)(ii).

[21] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62878; File No. SR–CBOE–2010–079]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change, as Modified by Amendment No. 1, To Change the Transaction Fees for 51 Securities on CBSX

September 9, 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 August 31, 2010, the Chicago Board Options Exchange, Incorporated (the "Exchange" or "CBOE") 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. On September 7, 2010, the Exchanged filed Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CBOE proposes to amend the Fee Schedule of its CBOE Stock Exchange ("CBSX") to modify the transaction fees for fifty securities currently traded on CBSX. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Exchange's principal office, and at the Commission.

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] 17 CFR 240.19b–4.

[3] In Amendment No. 1, the Exchange deleted a duplicative reference to the securities IYR, MDT, and MGM in the Fee Schedule and the Purpose section.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

On August 23, 2010, the Commission published an immediately effective rule filing to modify the transaction fees for 24 securities currently traded on CBSX (the following symbols: BAC, C, DXD, EMC, EWJ, F, FAX, FAZ, GE, INTC, MOT, MSFT, MU, NOK, Q, QID, S, SIRI, SKF, T, TWM, UNG, UWM, XLF).[4] The Exchange now proposes to add 51 securities to that list of securities (the following symbols: AA, AMAT, AMD, BGZ, BP, BSX, CMCSA, COCO, CSCO, CX, DELL, DUK, EBAY, EEM, EWT, FAS, FLEX, HBAN, IYR, MDT, MGM, NLY, NVDA, NWSA, ORCL, PFE, QCOM, QQQQ, SBUX, SH, SLV, SMH, SSO, SYMC, TBT, TSM, TXN, UCO, USO, VALE, VWO, WFC, XHB, XLB, XLK, XLP, XLU, XLV, XLY, XRX, YHOO). For those securities already approved for the new transaction fees as well as those that would be added by this proposed rule change, assuming their prices do not drop below $1, the takers of liquidity will receive a $0.0014 per share rebate, and makers of liquidity will incur a $0.0018 charge. The new pricing strategy is designed to incent order routing behavior that selects CBSX as the first destination. The changes will take effect on September 1, 2010.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 ("Act"),[5] in general, and furthers the objectives of Section 6(b)(4)[6] of the Act in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among CBOE members and other persons using its facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE 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 solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and paragraph (f) of Rule 19b–4 thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2010–079 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–CBOE–2010–079. 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–CBOE–2010–079 and should be submitted on or before October 7, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–23105 Filed 9–15–10; 8:45 am]

BILLING CODE 8010–01–P

[4] See Securities Exchange Act Release No. 34–62758 (August 23, 2010), 75 FR 52792 [sic] (August 27, 2010) (SR–CBOE–2010–075).

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(4).

[7] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62880; File No. SR–CBOE–2010–080]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1, To Trade Options on Leveraged Exchange-Traded Notes and To Broaden the Definition of "Futures-Linked Securities"

September 9, 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 August 31, 2010, the Chicago Board Options Exchange, Incorporated ("Exchange" or "CBOE") 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. On September 9, 2010, the Exchange filed Amendment No. 1 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 1, from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CBOE proposes to amend Interpretation and Policy .13 to Rule 5.3 to: (a) permit trading options on leveraged (multiple or inverse) exchange-traded notes, and (b) broaden the definition of "Futures-Linked Securities." The text of the rule proposal is available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Exchange's Office of the Secretary and at the Commission.

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

Amendment 1 replaces the original filing in its entirety. The purpose of Amendment 1 is to make technical corrections to rule references in Item 1 and Item 3. No changes to the proposed rule text that was submitted in the original filing are being proposed by this Amendment 1.

The Exchange proposes to amend Interpretation and Policy .13 to Rule 5.3 to: (a) Permit trading options on leveraged (multiple or inverse) exchange-traded notes ("ETNs"), and (b) broaden the definition of "Futures-Linked Securities." ETNs are also known as "Index-Linked Securities," which are designed for investors who desire to participate in a specific market segment by providing exposure to one or more identifiable underlying securities, commodities, currencies, derivative instruments or market indexes of the foregoing. Index-Linked Securities are the non-convertible debt of an issuer that have a term of at least one (1) year but not greater than thirty (30) years. Despite the fact that Index-Linked Securities are linked to an underlying index, each trade as a single, exchange-listed security. Accordingly, rules pertaining to the listing and trading of standard equity options apply to Index-Linked Securities.

Leveraged ETN Options

The Exchange proposes to amend Rule 5.3.13 to permit the listing of options on leveraged (multiple or inverse) ETNs. Multiple leveraged ETNs seek to provide investment results that correspond to a specified multiple of the percentage performance on a given day of a particular Reference Asset. Inverse leveraged ETNs seek to provide investment results that correspond to the inverse (opposite) of the percentage performance on a given day of a particular Reference Asset by a specified multiple. Multiple leveraged ETNs and inverse leveraged ETNs differ from traditional ETNs in that they do not merely correspond to the performance of a given Reference Asset, but rather attempt to match a multiple or inverse of a Reference Asset's performance.

The Barclays Long B Leveraged S&P 500 TR ETN ("BXUB"), the Barclays Long C Leveraged S&P 500 TR ETN ("BXUC") and the UBS AG 2x Monthly Leveraged Long Exchange Traded Access Securities ("E–TRACS") linked to the Alerian MLP Infrastructure Index due July 9, 2040 ("MLPL") currently trade on the NYSE Arca Stock Exchange and are examples of multiple leveraged ETNs. In addition, the Barclays ETN + Inverse S&P 500 VIX Short-Term Futures ETN ("XXV") currently trades on the NYSE Arca Stock Exchange and is an example of an inverse leveraged ETN. The NYSE Arca Stock Exchange also lists several other inverse leveraged ETNs for trading.[3]

Currently, Interpretation and Policy .13 to Rule 5.3 provides that securities deemed appropriate for options trading shall include shares or other securities ("Equity Index-Linked Securities," "Commodity-Linked Securities," "Currency-Linked Securities," "Fixed Income Index-Linked Securities," "Futures-Linked Securities," and "Multifactor Index-Linked Securities," collectively known as "Index-Linked Securities") that are principally traded on a national securities exchange and an "NMS Stock" (as defined in Rule 600 of Regulation NMS under the Securities Exchange Act of 1934), and represent ownership of a security that provides for the payment at maturity, as described below:

- Equity Index-Linked Securities are securities that provide for the payment at maturity of a cash amount based on the performance of an underlying index or indexes of equity securities ("Equity Reference Asset");
- Commodity-Linked Securities are securities that provide for the payment at maturity of a cash amount based on the performance of one or more physical commodities or commodity futures, options on commodities, or other commodity derivatives or Commodity-Based Trust Shares or a basket or index of any of the foregoing ("Commodity Reference Asset");
- Currency-Linked Securities are securities that provide for the payment at maturity of a cash amount based on the performance of one or more currencies, or options on currencies or currency futures or other currency derivatives or Currency Trust Shares (as defined in Interpretation and Policy .06 to this Rule 5.3), or a basket or index of any of the foregoing ("Currency Reference Asset");
- Fixed Income Index-Linked Securities are securities that provide for the payment at maturity of a cash amount based on the performance of one or more notes, bonds, debentures or evidence of indebtedness that include, but are not limited to, U.S. Department of Treasury securities ("Treasury Securities"), government-sponsored entity securities ("GSE Securities"), municipal securities, trust preferred securities, supranational debt and debt of a foreign country or a subdivision thereof or a basket or index of any of the foregoing ("Fixed Income Reference Asset");
- Futures-Linked Securities are securities that provide for the payment at maturity of a cash amount based on the performance of an index of (a) futures on Treasury Securities, GSE Securities, supranational debt and debt of a foreign country or a subdivision thereof, or options or other derivatives on any of the foregoing; or (b) interest rate futures or options or derivatives on the foregoing in this subparagraph (b); or (c) CBOE Volatility Index (VIX) futures ("Futures Reference Asset"); and
- Multifactor Index-Linked Securities are securities that provide for the payment at maturity of a cash amount based on the performance of any combination of two or more Equity Reference Assets, Commodity Reference Assets, Currency Reference Assets, Fixed Income References Assets, or Futures Reference Assets ("Multifactor Reference Asset").

For purposes of Interpretation and Policy .13 to this Rule 5.3, Equity Reference Assets, Commodity Reference Asset, Currency Reference Assets, Fixed Income Reference Assets, Futures Reference Assets together with

[3] These ETNs include: the Barclays Short B Leveraged Inverse S&P 500 TR ETN ("BXDB"), the Barclays Short C Leveraged Inverse S&P 500 TR ETN ("BXDC") and the Barclays Short D Leveraged Inverse S&P 500 TR ETN ("BXDD").

Multifactor Reference Assets, collectively are referred to as "Reference Assets."

In addition, Index-Linked Securities must meet the criteria and guidelines for underlying Securities set forth in Interpretation and Policy .01 to this Rule 5.3.; or the Index-Linked Securities must be redeemable at the option of the holder at least on a weekly basis through the issuer at a price related to the applicable underlying Reference Asset. In addition, the issuing company is obligated to issue or repurchase the securities in aggregation units for cash, or cash equivalents, satisfactory to the issuer of Index-Linked Securities which underlie the option as described in the Index-Linked Securities prospectus.

The Exchange proposes to amend Interpretation and Policy .13 to Rule 5.3 to expand the type of Index-Linked Securities that may underlie options to include leveraged (multiple or inverse) ETNs. To affect this change, the Exchange proposes to amend Rule 5.3.13 by adding the phrase, "or the leveraged (multiple or inverse) performance" to each of the subparagraphs ((A) through (F)) in that section which set forth the different eligible Reference Assets.

The Exchange's current continuing listing standards for ETN options will continue to apply. Specifically, under Interpretation and Policy .16 to Rule 5.4, ETN options shall not be deemed to meet the Exchange's requirements for continued approval, and the Exchange shall not open for trading any additional series or option contracts of the class covering such Securities whenever the underlying Securities are delisted and trading in the Securities is suspended on a national securities exchange, or the Securities are no longer an "NMS Stock" (as defined in Rule 600 of Regulation NMS under the Securities Exchange Act of 1934). In addition, the Exchange shall consider the suspension of opening transactions in any series of options of the class covering Index-Linked Securities in any of the following circumstances: (1) The underlying Index-Linked Security fails to comply with the terms of Interpretation and Policy .13 to Rule 5.3; (2) in accordance with the terms of Interpretation and Policy .01 to Rule 5.4, in the case of options covering Index-Linked Securities when such options were approved pursuant to Interpretation and Policy .13 to Rule 5.3, except that, in the case of options covering Index-Linked Securities approved pursuant to Interpretation and Policy .13(3)(B) to Rule 5.3 that are redeemable at the option of the holder at least on a weekly basis, then option contracts of the class covering such Securities may only continue to be open for trading as long as the Securities are listed on a national securities exchange and are "NMS" stock as defined in Rule 600 of Regulation NMS; (3) in the case of any Index-Linked Security trading pursuant to Interpretation and Policy .13 to Rule 5.3, the value of the Reference Asset is no longer calculated; or (4) such other event shall occur or condition exist that in the opinion of the Exchange make further dealing in such options on the Exchange inadvisable. Expanding the eligible types of ETNs for options trading under Interpretation and Policy .13 to Rule 5.3 will not have any effect on the rules pertaining to position and exercise limits [4] or margin.[5]

This proposal is necessary to enable the Exchange to list and trade options on shares of the BXUB, BXUC, XXV, BXDB, BXDC, BXDD and the MLPL. The Exchange believes the ability to trade options on leveraged (multiple or inverse) ETNs will provide investors with greater risk management tools. The proposed amendment to the Exchange's listing criteria for options on ETNs is necessary to ensure that the Exchange will be able to list options on the above listed leveraged (multiple and inverse) ETNs as well as other leveraged (multiple and inverse) ETNs that may be introduced in the future.

The Exchange represents that its existing surveillance procedures applicable to trading in options are adequate to properly monitor the trading in leveraged (multiple and inverse) ETN options.

It is expected that The Options Clearing Corporation will seek to revise the Options Disclosure Document ("ODD") to accommodate the listing and trading of leveraged (multiple and inverse) ETN options.

Broaden the Definition of "Futures-Linked Securities"

The second change being proposed by this filing is to amend the definition of "Future [sic]-Linked Securities" set forth in Rule 5.3.13(1)(E). Currently, the definition of "Futures-Linked Securities" is limited to securities that provide for the payment at maturity of a cash amount based on the performance of an index of (a) futures on Treasury Securities, GSE Securities, supranational debt and debt of a foreign country or a subdivision thereof, or options or other derivatives on any of the foregoing; or (b) interest rate futures or options or derivatives on the foregoing in this subparagraph (b); or (c) CBOE Volatility Index (VIX) futures.

Rule 5.3 sets forth generic listing criteria for securities that may serve as underlyings for listed options trading. The Exchange believes that the current definition of "Futures-Linked Securities" is unnecessarily restrictive and requires the Exchange to submit a filing to amend the definition each time a new ETN is issued that tracks the performance of an index of futures/options on futures that is not enumerated in the existing rule. To address this issue, the Exchange is proposing to revise the definition of "Futures- Linked Securities" to provide that they are securities that for the payment at maturity of a cash amount based on the performance or the leveraged (multiple or inverse) performance of an index or indexes of futures contracts or options or derivatives on futures contracts ("Futures Reference Asset"). The Exchange notes that all ETNs eligible for options trading must [sic] principally traded on a national securities exchange and an "NMS Stock." As a result, the Exchange believes that broadening the definition of "Futures-Linked Securities" by no longer specifically listing the types of futures and options on futures contracts that may be tracked by an ETN is appropriate.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) [6] of the Act, in general, and furthers the objectives of Section 6(b)(5),[7] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanisms 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 rules applicable to trading pursuant to generic listing and trading criteria serve to foster investor protection.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE 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.

[4] *See* Rules 4.11, *Position Limits,* and 4.12, *Exercise Limits.*

[5] *See* Rule 12.3, *Margin Requirements.*

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2010–080 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–CBOE–2010–080. 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–CBOE–2010–080 and should be submitted on or before October 7, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–23107 Filed 9–15–10; 8:45 am]

BILLING CODE 8010–01–P

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62879; File No. SR–OCC–2010–15]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Interpret By-Laws as to Dividend Adjustments

September 9, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] notice is hereby given that on August 31, 2010, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change described in Items I and II below, which items have been prepared primarily by OCC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The purpose of the proposed rule change is to amend Interpretation and Policy .01 under Article VI, Section 11A of OCC's By-Laws to allow the Securities Committee under certain conditions to cease adjusting for recurring cash dividends previously deemed to be non-ordinary dividends.

[1] 15 U.S.C. 78s(b)(1).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. OCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.[2]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The principal purpose of this rule change is to amend Interpretation and Policy .01 under Article VI, Section 11A of OCC's By-Laws. Under that Interpretation, cash dividends or distributions of an issuer which are deemed by the Securities Committee[3] to be non-ordinary will usually result in an adjustment to the terms of listed stock options.[4]

OCC is proposing to amend Interpretation .01 to allow the Securities Committee under certain conditions to cease adjusting for recurring cash dividends previously deemed to be non-ordinary dividends. Interpretation .01 under Section 3 of Article XII of OCC's By-Laws, which provides that non-ordinary (as determined by OCC) cash dividends or distributions of an issuer will usually occasion an adjustment to the terms of listed stock futures, would similarly be amended. The discussion below addresses the proposed amendments to Interpretation .01 of Section 11A of Article VI, but the purpose behind those changes is equally applicable to the changes proposed to Interpretation .01 of Section 3 of Article XII.[5]

[2] The Commission has modified the text of the summaries prepared by OCC.

[3] The Securities Committee is comprised of one designated representative of each participant exchange and the Chairman of OCC or his designee. The OCC representative is not a voting member of the Committee except in cases of tie votes. Article VI, Section 11(c) of OCC's By-Laws.

[4] Generally speaking, a cash dividend or distribution would be deemed to be "ordinary" if it is declared pursuant to a policy or practice of paying such dividends on a quarterly or other regular basis. Dividends paid outside such practice would be considered "non-ordinary." Non-ordinary cash dividends usually would trigger an adjustment to options contracts subject to the minimum size requirement. Article VI, Section 11A, Interpretation and Policy .01 of OCC's By-Laws. See Securities Exchange Act Release No. 55258 (February 8, 2007).

[5] Stock futures likewise are adjusted in response to non-ordinary cash dividends or distributions. See

Continued

The amendment was prompted by a series of cash dividends declared by Diamond Offshore Corporation ("DO"). DO characterized these dividends as "special" and differentiated them from the company's "regular" cash dividends. These "special" and "regular" DO dividends have customarily gone "ex-distribution" on the same date. Initially, the Securities Committee deemed these "special" dividends to be non-ordinary under Interpretation .01 and appropriately adjusted listed options in response.[6] Since Interpretation .01 was revised effective February 1, 2009, DO options have been adjusted for five successive quarterly "special" dividends. Notwithstanding that these dividends were characterized by DO as "special" dividends and clearly differentiated from the company's "regular" dividends, OCC and the options exchanges have received strong feedback from investors that such dividends have been declared so consistently and thereby have achieved such predictability that they should no longer be considered "non-ordinary" for adjustment purposes. Furthermore, the options exchanges and many OCC clearing member firms believe that the proliferation of option strikes caused by successive quarterly adjustments will have an adverse affect on liquidity and occasion other adverse operational effects.[7] The Securities Committee also solicited the opinion of participant members of the OCC Clearing Member Roundtable regarding this issue.[8] The Roundtable strongly supported authorizing the Securities Committee to cease adjusting for "special" cash dividends whose consistency and predictability of payment have been demonstrated.

The proposed amended Interpretation .01 enumerates factors that the Securities Committee may take into account in determining whether a dividend is "ordinary." Importantly, it allows the Securities Committee to reclassify as "ordinary" dividends previously deemed "non-ordinary." The conditions under which this may occur are as follows: (1) The issuer discloses that it intends to pay such dividends or distributions on a quarterly or other regular basis, (2) the issuer has paid such dividends or distributions for four or more consecutive months or quarters or two or more years after the initial payment, whether or not the amounts paid were the same from period to period, or (3) the Securities Committee determines for other reasons that the issuer has a policy or practice of paying such dividends or distributions on a quarterly or other regular basis.[9]

It is the intent of the Securities Committee that any such recharacterization of a dividend as "ordinary" would be announced in advance to investors. For example, after adjusting for a given dividend, OCC would announce that subsequent dividends of the same nature would no longer occasion adjustment.[10] A discussion of the new adjustment approach also will be included in published interpretative guidance.[11] Clean and marked copies of the interpretative guidance are attached as Exhibit 5 to the OCC filing of the proposed rule change. The marked copy shows changes from the current language.

In fairness to existing holders of open interest (especially DO and OIH) who may have assumed option positions with the belief that OCC would continue to adjust for recurring "special" dividends, OCC has determined that the portion of Interpretation .01, which allows recharacterization of dividends as ordinary will be effective only for dividends and distributions announced after February 1, 2012. This date is chosen because it occurs after the latest expiration of all existing open interest in DO and OIH options (inclusive of LEAPS options). All existing open interest and any positions created with new expiration dates occurring before February 1, 2012, will thus be "grandfathered" under the current adjustment approach for these dividends.[12]

OCC believes that the proposed rule change is consistent with the requirements of Section 17A of the Act[13] and the rules and regulations thereunder applicable to OCC because it provides for the prompt and accurate clearance and settlement of securities transactions, ensures the protection of investors and reduces unnecessary costs and burdens on them and persons facilitating transactions on their behalf. It does so by responding to strong investor feedback regarding the need to cease treating certain cash dividends or distributions as "non-ordinary" for adjustment purposes based on the consistent declaration of such dividends, by publishing information regarding those factors which would lead OCC to make such a determination, and by reducing the likelihood of series proliferation in the case of options contracts. The proposed rule change is not inconsistent with the existing rules of OCC, including any other rules proposed to be amended.

(B) Self-Regulatory Organization's Statement on Burden on Competition

OCC does not believe that the proposed rule change will have any impact on or impose any burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments relating to the proposed rule change have been solicited or received. OCC will notify the Commission of any written comments received by OCC.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective upon filing pursuant to Section 19(b)(3)(A)(i) of the Act[14] and Rule 19b–4(f)(1)[15] thereunder because the proposed rule constitutes an interpretation with respect to the meaning, administration, or enforcement of an existing rule. At any time within sixty days of the filing of such rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is

Article XII, Section 3, Interpretation and Policy .01, of OCC's By-Laws. See Securities Exchange Act Release No. 46595 (October 3, 2002).

[6] In like manner, options on Oil Service HLDRS Trust (OIH) which contain DO as a component security and make pro-rata distributions in response to DO dividends, were also adjusted.

[7] The standard method of adjustment is to reduce strike prices by the amount of the dividend. Options with "standard" strike prices are then reintroduced by the listing option exchange(s). With each successive adjustment, this process is repeated, proliferating strike prices. Liquidity naturally gravitates to the options with standard strike prices at the expense of liquidity for options with non-standard strikes.

[8] The OCC Roundtable is an OCC sponsored advisory group comprised of representatives from OCC's participant exchanges, OCC, a cross-section of OCC clearing members, and industry service bureaus. The Roundtable considers operational improvements that may be made to increase efficiencies and lower costs in the options industry.

[9] These same factors would be used by OCC to reclassify a recurrent non-ordinary dividend as "ordinary" with respect to its determination to adjust stock futures.

[10] OCC will follow a similar practice with respect to stock futures.

[11] Securities Exchange Act Release Nos. 58059 (June 30, 2008) and 59442 (February 24, 2009). Consistent with past practice, the interpretative guidance will be available on OCC's public Web site but not incorporated into OCC's By-Laws and Rules. Other technical or clarifying changes have also been made to update the guidance. For example, the use of the term "special dividend" has been removed in favor of the term "non-ordinary."

[12] For consistency, the changes to the Interpretation relating to stock futures also will not be effective until February 1, 2012.

[13] 15 U.S.C. 78q–1.

[14] 15 U.S.C. 78s(b)(3)(A)(i).

[15] 17 CFR 240.19b–4(f)(1).

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–OCC–2010–15 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–OCC–2010–15. 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 changes 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 inspection and copying in the Commission's Public Reference Section, 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 filings also will be available for inspection and copying at the principal office of OCC and on OCC's Web site at *http://www.theocc.com.* All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–OCC–2010–15 and should be submitted on or before October 7, 2010.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[16]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–23106 Filed 9–15–10; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62877; File No. SR–PHLX–2010–79]

Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Order Approving a Proposed Rule Change, as Modified by Amendment No. 1, Relating to the Establishment of NASDAQ OMX PSX as a Platform for Trading NMS Stocks

September 9, 2010.

I. Introduction

On June 8, 2010, NASDAQ OMX PHLX, Inc. ("PHLX" or "Exchange"), filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to establish NASDAQ OMX PSX as a new electronic platform for trading NMS stocks. The proposed rule change was published for comment in the **Federal Register** on July 26, 2010.[3] On August 5, 2010, the Exchange filed Amendment No. 1 to the proposed rule change.[4] The Commission received no comment letters regarding the proposed rule change. This order approves the proposed rule change, as modified by Amendment No. 1.

II. Background

The Exchange proposes to establish a new cash equities trading platform, to be called NASDAQ OMX PSX ("PSX or "System").[5] The System will be an open-access fully electronic integrated order display and execution system for NMS stocks. PSX will not list securities, but rather will trade NMS stocks listed on other exchanges on an unlisted trading privileges basis.

The System will allow PSX participants to enter orders at multiple price levels. Orders will be integrated and displayed via data feeds to participants and other data subscribers. PSX participants will be able to access the aggregated trading interest of all other PSX participants in accordance with non-discretionary order execution algorithms. The System will not route orders to other market centers.

In contrast with most markets, which employ a price/time execution priority system (where the displayed order on the book that is first in time at the best price is satisfied fully, then the next in time at that price, and so on), PSX will use a price/pro rata execution priority system,with displayed orders receiving priority over non-displayed orders. Specifically, multiple orders displayed on the PSX book at the best price would be allocated shares of an incoming order pro rata based on the proportion of the size of the displayed order to the total size of all displayed orders at that price. Once all displayed size at any price level is exhausted, the same pro rata logic would apply to non-displayed orders at that price level.

The Exchange proposes to adopt new rules governing trading on the System. The proposed new rules are based to a substantial extent on the rules of Nasdaq[6] and NASDAQ OMX BX, Inc. ("BX"). In addition, the Exchanges proposes to apply the PHLX rules listed in proposed PHLX Rule 3202, including certain rules that governed XLE when it was operational, to PHLX members with respect to their activities on the System.[7] The Exchange also proposes to amend PHLX Rule 803 (Criteria For Listing—Tier I) to support unlisted trading privileges for NMS stocks on PSX and PHLX Rule 985 (Affiliate and Ownership Restrictions) to address potential competitive advantage and conflict of interest concerns regarding

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[16] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 62519 (July 16, 2010), 75 FR 43597 ("Notice").

[4] Amendment No. 1 clarifies that the proposal to accept orders routed by Nasdaq Execution Services, LLC to the Exchange on a one-year pilot basis is made by the Exchange, rather than by The NASDAQ Stock Market, LLC ("Nasdaq"). This is a technical amendment and is not subject to notice and comment.

[5] The Exchange previously operated an electronic trading facility, XLE, for the trading of cash equity securities. XLE ceased its operations in October 2008 following the acquisition of the Exchange by The NASDAQ OMX Group, Inc. ("NASDAQ OMX"), the parent corporation of Nasdaq. *See* Securities Exchange Act Release No. 58613 (September 22, 2008), 73 FR 57181 (October 1, 2008) (SR–Phlx-2008–65). Since ceasing operations of XLE, the Exchange has solely operated an options market.

[6] Unlike Nasdaq, PSX will not route orders to other exchanges and will not have market makers. As a result, the PSX rules do not contain provisions related to outbound routing or market makers that are found in Nasdaq's rules.

[7] The Exchange also proposes to delete two existing PHLX Rules relating to XLE, PHLX Rule 160 (NMS Stock Execution on the Exchange) and PHLX Rule 188 (Trade Execution and Reporting), and to move their content to the proposed rules governing PSX. *See* proposed PHLX Rules 3301(a), 3305(a)(1) and 3309).

inbound routing from Nasdaq to PSX. Finally, the Exchange proposes to adopt rules governing Recommendations to Customers (Suitability) and Best Execution and Interpositioning,[8] and commentaries relating thereto, which rules shall be applicable to all members of the Exchange, including those trading on PSX.

Pursuant to the terms of a regulatory services agreement (the "FINRA RSA") between PHLX and Financial Industry Regulatory Authority, Inc. ("FINRA"), administration and enforcement of many of the new rules applicable to the System will be supported by FINRA. In addition, certain regulatory responsibilities of PHLX relating to PSX may be administered by personnel employed by Nasdaq or "BX"[9] pursuant to a regulatory services agreement (the "Intercompany RSA").

III. Discussion and Commission Findings

After careful review of the proposed rule change, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[10] Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[11] which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to foster cooperation and coordination with persons engaged in regulating, clearing, settling, and 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. Section 6(b)(5) of the Act also requires that the rules of an exchange not be designed to permit unfair discrimination among customers, issuers, brokers, or dealers.

Overall, the Commission believes that approving the Exchange's proposed rule change could benefit the public and market participants. Approval of the proposal would establish rules for the operation of a new electronic facility for the trading of cash equity securities that is designed to encourage displayed orders of larger size, which could foster best execution, price discovery, competition and innovation. The discussion below does not review every detail of the proposed rule change, but rather focuses on the most significant rules and policy issues considered in review of the proposals.

A. Proposed New Rules for PSX

1. Access and Participation

The System will only have one class of membership and, unlike Nasdaq, will not have a separate class of market makers.[12] In addition, PSX will make its facilities available to electronic communications networks ("ECN") and alternative trading systems ("ATS") that meet certain requirements, to allow such ECNs and/or ATSs to display best prices and size of orders on PSX and members to access such orders.[13] PSX will provide authorized access for Sponsored Participants on terms identical to those set forth in Nasdaq Rule 4211(d) (Sponsored Participants).[14]

The System will be accessible to all PHLX members that meet the registration, qualification and other membership requirements set forth in the PHLX rules.[15] In addition, in order to trade on PSX, a member must comply with certain additional requirements set forth in proposed PHLX Rule 3211 (PSX Participant Registration). Such requirements are substantially similar to the requirements set forth in Nasdaq Rule 4611 (Nasdaq Market Center Participant Registration), and include, among others, the execution of applicable agreements with the Exchange, membership in or access to a registered clearing agency through which PSX-compared trades may be settled, compliance with all applicable rules and operating procedures of PHLX[16] and the Commission in the use of PSX, and maintenance of equipment to prevent the improper use of and access to PHLX systems.[17]

Each PSX participant will be under a continuing obligation to inform PHLX of any noncompliance with any of the registration requirements.[18] Failure by a PSX participant to comply with any registration requirements, including failure to comply with any PHLX rules applicable to PSX, shall subject such participant to censure, fine, suspension or revocation of its registration as a PSX participant, or any other appropriate penalty under the rules of the Exchange.[19] The Exchange may terminate access to the System if a participant fails to meet the participant eligibility qualifications.[20]

The Commission finds that the Exchange's access and participation requirements for the System are consistent with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to foster cooperation and coordination with persons engaged in regulating, clearing, settling, and 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.[21] Section 6(b)(5) also requires that the rules of an exchange not be designed to permit unfair discrimination among customers, issuers, brokers, or dealers. The Commission notes that the access and participation requirements applicable to PSX are substantially similar to rules of

[8] *See* proposed PHLX Rules 763 and 764.

[9] Each of Nasdaq and BX is a self-regulatory organization ("SRO") owned by NASDAQ OMX and, therefore, an affiliate of the Exchange.

[10] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[11] 15 U.S.C. 78f(b)(5).

[12] *See* Notice, *supra* note 3, 75 FR at 43598.

[13] *See* proposed Rule 3223. The ATS or ECN must be a PHLX member organization, enter into and comply with applicable agreements, agree that PHLX may disseminate the ECN's or ATS's best priced orders, demonstrate that it is in compliance with applicable regulatory requirements, and accept automated executions against orders that it enters into the System.

[14] *See* proposed Rule 3211(d). The Exchange has represented that upon implementation by Nasdaq of recently approved changes to its rule governing Sponsored Participants, the Exchange will adopt and implement identical rules to govern sponsored access on PSX. *See* Securities Exchange Act Release No. 61345 (January 13, 2010), 75 FR 32631 (January 20, 2010) (SR–NASDAQ–2008–104). If NASDAQ's rules are superseded by rules adopted by the Commission, the Exchange has represented that PSX will operate sponsored participant access in accordance with such rules. *See* Notice, *supra* note 3, 75 FR at 43598.

[15] As discussed above, proposed PHLX Rule 3202 sets forth the current PHLX Rules applicable to market participants trading on PSX, and includes, among others, PHLX Rule 600 (Registration) and PHLX Rule 604 (Registration and Termination of Registered Persons). In a separate order, the Commission approved the amendment of PHLX Rule 604 to require all members trading on PSX to register representatives and principals in accordance with rules similar to those governing registration of associated persons of members of Nasdaq. *See* Securities Exchange Act Release No. 62776 (August 26, 2010), 75 FR 53727 (September 1, 2010) (SR–Phlx–2010–91).

[16] In addition to proposed rules specific to the operation of PSX, members must comply with existing PHLX rules governing member conduct, to the extent that they are relevant to trading on PSX. The PHLX Rules applicable to activities of members on PSX are listed in proposed PHLX Rule 3202.

[17] *See* proposed PHLX Rule 3211(a).

[18] *See* proposed PHLX Rule 3211(b).

[19] *See* proposed PHLX Rule 3228(a).

[20] *See* proposed PHLX Rule 3222.

[21] 15 U.S.C. 78f(b)(5).

Nasdaq previously approved by the Commission.[22] The Commission also notes that all PSX participants will participate on consistent terms when entering orders into PSX for posting and accessing liquidity. In addition, the Commission notes that the membership and registration requirements applicable to PSX are set forth in the current rules of the Exchange, which have been previously approved by the Commission.

2. Trading System and Regulation NMS Compliance

a. PSX Order Entry, Display and Execution

The System will operate, and orders can be entered into the System, from 9 a.m. to 5 p.m., Eastern Time, on each business day.[23] PSX will not have any specialized opening or closing processes, and will begin to process all eligible orders at 9 a.m.[24]

Participants may submit multiple orders at multiple price levels, which PSX will manage and display, consistent with the parameters of each order.[25] PSX will time-stamp each order upon receipt, although, as discussed below, the time stamp will not determine the order's ranking for execution purposes.[26] The System will not display orders on an attributable basis.[27] Orders may be entered either as Displayed Orders or Non-Displayed Orders.[28]

Displayed Orders will be displayed anonymously to participants through the System book feed and the aggregate size of all best-priced Displayed Orders to buy and sell on the System will be transmitted for display to the appropriate network processor (unless the aggregate size is less than one round lot).[29] Non-Displayed Orders and Reserve Size will not be displayed, but will nevertheless remain available for potential execution against incoming orders.[30]

Incoming marketable orders automatically execute against resting orders on the PSX book, and the posted orders are decremented accordingly.[31] Incoming orders that are not marketable against posted interest in the System book will be cancelled or posted to the book, depending on the time-in-force for the order.[32] An incoming order with a price that crosses the price of an order posted on the book will execute at the price of the posted order. Thus, any potential price improvement resulting from an execution in the System will accrue to the taker of liquidity.[33]

As provided by PHLX Rule 3309, executions occurring as a result of orders matched on PSX shall be reported by PHLX to an appropriate consolidated transaction reporting system. As transactions executed in the System will be cleared and settled anonymously, the transaction reports produced by the System will indicate the price and size of the transaction, but will not reveal contra party identities.[34]

To determine the allocation of incoming marketable orders against orders on the book, the System uses a price/pro-rata algorithm, with Displayed Orders receiving priority over Non-displayed Orders and round lot orders receiving priority over odd lot orders.[35] The algorithm executes trading interest in the System as follows:

- Better priced trading interest will be executed ahead of inferior-priced trading interest;
- Displayed Orders at a particular price with a size of at least one round lot will be executed ahead of Non-Displayed Orders and the reserve portion of Reserve Orders (collectively, "non-displayed interest") at the same price;
- Displayed Orders at a particular price with a size of at least one round lot will be executed ahead of odd lot at the same price; however, odd-lot Displayed Orders will execute ahead of non-displayed interest of one round lot at the same price, as Displayed Orders will always execute ahead of Non-Displayed Orders at the same price;[36]
- As among equally priced Displayed Orders with a size of at least one round lot, the System will allocate round lot portions of incoming executable orders to displayed trading interest within the System pro rata based on the size of the Displayed Orders. Portions of an order that would be executed in a size other than a round lot if they were allocated on a pro rata basis will be allocated for execution against available displayed trading interest on the basis of a random function that assigns probability of execution based on the size of displayed interest.[37] As among equally priced Displayed Orders with a size of less than one round lot, the System will allocate incoming orders based on the size of the Displayed Orders, but not in pro rata fashion.[38] If there are two or more odd lot orders of equal size, the System will determine the order of execution on the basis of a random function that assigns each order an equal probability of execution. This same allocation methodology applies to equally-priced non-displayed interest with a size of at least one round lot or with a size of less than one round lot, as the case may be.

The Commission finds that the Exchange's trading rules for the System, including PSX's execution priority rules, are consistent with the Act. The Commission notes that, other than with respect to the price/pro rata execution priority system, the Exchange' market model for the trading of cash equity securities is substantially similar to each of Nasdaq's and BX's equity market models and does not raise novel issues. The Commission believes that PSX's price/pro rata execution priority system may encourage participants, particularly those who wish to execute orders of large size, to display liquidity on the System. This in turn could facilitate the efficient execution of large orders, and foster best execution and price discovery. A novel exchange priority system that is designed to achieve these goals also may foster competition and innovation. Accordingly, the Commission finds that the price/pro rata execution priority system proposed by PHLX is consistent with the Act.

b. Regulation NMS

The Exchange will implement such systems, procedures, and rules in connection with the operation of PSX as are necessary to render it capable of meeting the requirements for automated quotations.[39]

[22] *See* Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (order approving Nasdaq's application to register as a national securities exchange) ("Nasdaq Registration Approval Order").

[23] *See* proposed PHLX Rules 3217 and 3306(a)(3).

[24] *See* proposed PHLX Rule 3302.

[25] *See* proposed PHLX Rule 3306.

[26] *Id.*

[27] *See* proposed PHLX Rule 3301(a).

[28] *See* proposed PHLX Rule 3301(e).

[29] *See* proposed PHLX Rule 3306(c)(1) and (2).

[30] *See* proposed PHLX Rule 3306(c)(3).

[31] *See* proposed PHLX Rule 3307(a)(2).

[32] *See* proposed PHLX Rule 3301(h).

[33] *See* proposed PHLX Rule 3307(a)(3).

[34] *See* proposed PHLX Rule 3310.

[35] *See* proposed PHLX Rule 3307(a)(1).

[36] *See id.*

[37] For example, if Displayed Orders to buy at 10 reside on the PSX book with sizes of 6,000 (Participant A) and 4,000 (Participant B), and an incoming order to sell 1,100 at 10 comes into the System, the System will allocate 600 shares of the incoming order to Participant A and 400 shares of the incoming order to Participant B. The remaining 100 shares of the incoming order will be allocated on the basis of a random function that assigns a 60% probability of executing the 100 shares to Participant A and a 40% probability to Participant B.

[38] Thus, a resting displayed order with a size of 90 shares would get filled in full before a displayed order with size of 50 shares.

[39] *See* proposed PHLX Rule 3306(c)(4). As defined in PHLX Rule 600(b) of Regulation NMS under the Act, 17 CFR 242.600(b), the term "quotation" includes the "bid price or the offer price communicated by a member of a national securities exchange * * * to any broker or dealer, or to any

Continued

The Exchange has designed PSX's rules relating to orders, modifiers, and order execution to comply with the requirements of Regulation NMS. The proposed Rules are consistent with Regulation NMS [40] by requiring that all orders be processed in a manner that avoids trading through protected quotations [41] and avoids locked and crossed markets.[42] PSX will not route orders to other market centers. Proposed PHLX Rule 3305(b) provides that in addition to such other designations as may be chosen by a market participant,[43] all orders that are not entered with a time in force of "System Hours Immediate or Cancel" [44] must be designated as an Intermarket Sweep Order, a Pegged Order, a Price to Comply Order, or a Post-Only Order.[45] Any orders that are entered into the System that would lock or cross another order in the System will be execute d to avoid a lock or cross.[46]

As described in the Notice, a System Hours Immediate or Cancel Order is compliant with Regulation NMS because by its terms it would not execute or post at a price that would result in a trade-through of a protected quotation or lock or cross another market.[47] A Pegged Order similarly is compliant with Regulation NMS because it continually re-prices to avoid locking or crossing.[48]

The proposed rules also permit PSX participants to submit Intermarket Sweep Orders to comply with Regulation NMS. Orders so designated will be automatically matched and executed within the System.[49] As described in the Notice, when a participant enters an Intermarket Sweep Order it is representing that it is also simultaneously routing one or more additional limit orders (also marked as Intermarket Sweep Orders), as necessary, to execute against the full displayed size of any protected bid or offer (as defined in Rule 600(b) of Regulation NMS) in the case of a limit order to sell or buy with a price that is superior to the limit price of the order identified as an Intermarket Sweep Order.[50]

Both a Price to Comply and a Post-Only Order are also designed to comply with the Regulation NMS.[51] Specifically, if at the time of entry, a Price to Comply Order will lock or cross the quotation of an external market, the order will be priced to the current best offer (for bids) or to the current best bid (for offers) but displayed at a price one minimum price increment lower than the offer (for bids) or higher than the bid (for offers).[52] Thus, an incoming order priced to execute against the displayed price will receive the superior undisplayed price.[53] If, at the time of entry, a Post-Only Order will lock an order on the System, the order will be re-priced and displayed on the System to one minimum price increment (*i.e.*, $0.01 or $0.0001) below the current best offer (for bids) or above the current best bid (for offers).[54]

The Commission believes that by requiring all orders to be entered with one of the designations described above, all PSX orders should either be priced or cancelled in a manner consistent with the avoidance of trade-throughs and locked and crossed markets. The Commission also notes that, because PSX will not route orders to other market centers, the Exchange's Regulation NMS policies and procedures under Rule 611(a) will rely on information provided by Nasdaq for purposes of determining whether another trading center is experiencing a failure, material delay, or malfunction of its systems or equipment within the meaning of Rule 611(b)(1).[55]

The Commission finds that the rules relating to orders, modifiers, and order execution that are designed to comply with Regulation NMS are consistent with the Act.

2. Section 11 of the Act

Section 11(a)(1) of the Act [56] prohibits a member of a national securities exchange from effecting transactions on that exchange for its own account, the account of an associated person, or an account over which it or its associated person exercises discretion (collectively, "covered accounts") unless an exception applies. Rule 11a2–2(T) under the Act,[57] known as the "effect versus execute" rule, provides exchange members with an exemption from the Section 11(a)(1) prohibition. Rule 11a2–2(T) permits an exchange member, subject to certain conditions, to effect transactions for covered accounts by arranging for an unaffiliated member to execute transactions on the exchange. To comply with Rule 11a2–2(T)'s conditions, a member: (i) Must transmit the order from off the exchange floor; (ii) may not participate in the execution of the transaction once it has been transmitted to the member performing the execution; [58] (iii) may not be affiliated with the executing member; and (iv) with respect to an account over which the member has investment discretion, may not, nor may its associated person, retain any compensation in connection with effecting the transaction except as provided in the Rule.

In a letter to the Commission, the Exchange requests that the Commission concur with PHLX's conclusion that members who enter orders into the System satisfy the requirements of Rule 11a2–2(T).[59] For the reasons set forth

customer, at which it is willing to buy or sell one or more round lots of an NMS security, either as principal or agent." Thus, the term "quotation" includes orders entered into the System by PSX participants, notwithstanding the fact that PSX will not have market makers with obligations to maintain continuous two-sided quotations. Under Rule 602 of Regulation NMS, brokers and dealers are required to communicate to a national securities exchange or national securities association their best bids, best offers, and quotation sizes. By displaying orders communicated to it by its members and complying with the requirements for automation described in Rule 600(b)(3), PSX will display "automated quotations" within the meaning of that rule, and therefore its best bid and best offer will constitute "protected quotations" entitled to trade-through protection under Regulation NMS.

[40] 17 CFR 242.611.

[41] *See* discussion of protected quotations *supra* note 39.

[42] *See* proposed PHLX Rules 3305(b) and 3213(c).

[43] As is the case with Nasdaq, different order designations can be combined. Thus, for example, a Price to Comply Order could be entered with reserve size or as a Non-displayed Order.

[44] A "System Hours Immediate or Cancel" order is an immediate or cancel order that may be entered between 9 a.m. and 5 p.m. Eastern Time, PSX's hours of operation. If a System Hours Immediate or Cancel order (or a portion thereof) is not marketable, the order (or unexecuted portion thereof) is canceled and returned to the entering participant. *See* proposed PHLX Rule 3301(h)(1).

[45] *See* proposed PHLX Rule 3305(b).

[46] *See* proposed PHLX Rule 3213(c). In addition, members may enter orders that are re-priced if they would lock or cross so as to avoid executing.

[47] *See* Notice, *supra* note 3, 75 FR at 43603; proposed PHLX Rule 3301(h).

[48] *See* Notice, *supra* note 3, 75 FR at 43603; proposed PHLX Rule 3301(f)(4).

[49] *See* proposed PHLX Rule 3301(f)(6).

[50] *See* Notice, *supra* note 3, 75 FR at 43603. The Exchange has represented that members will be responsible for ensuring that their use of Intermarket Sweep Orders complies with Regulation NMS, and the Exchange's T+1 surveillance program will monitor members' use of Intermarket Sweep Orders.

[51] *See* Notice, *supra* note 3, 75 FR at 43603.

[52] *See* proposed PHLX Rule 3301(f)(8).

[53] For example, if the national best bid and best offer is $9.97×$10.00, and a participant enters a price to comply order to buy 10,000 shares at $10.01, the order will display at $9.99, but will reside on the System book at $10.00. If a seller then enters an order at $9.99, it will execute at $10.00, up to the full 10,000 shares of the order.

[54] *See* proposed PHLX Rule 3301(f)(10). For example, if the System best bid and best offer is $9.97×$10.00, and a participant enters a Post-Only Order to buy at $10.01, the order will be repriced and displayed at $9.99. If a seller enters an order at $9.96, the order will be repriced and displayed at $9.98.

[55] *See* Notice, *supra* note 3, 75 FR at 43603–42604

[56] 15 U.S.C. 78k(a)(1).

[57] 17 CFR 240.11a2–2(T).

[58] The member may, however, participate in clearing and settling the transaction.

[59] *See* Letter from Charles Rogers, Chief Regulatory Officer, PHLX, to Elizabeth M. Murphy,

below, the Commission believes that Exchange members entering orders into the System would satisfy the conditions of the Rule.

The Rule's first condition is that orders for covered accounts be transmitted from off the exchange floor. The System receives orders electronically through remote terminals or computer-to-computer interfaces. In the context of other automated trading systems, the Commission has found that the off-floor transmission requirement is met if a covered account order is transmitted from a remote location directly to an exchange's floor by electronic means.[60] Because PSX receives orders electronically through remote terminals or computer-to-computer interfaces, the Commission believes that the System satisfies the off-floor transmission requirement.

Second, the Rule requires that the member not participate in the execution of its order. PHLX has represented that at no time following the submission of an order is a member organization able to acquire control or influence over the result or timing of an order's execution.[61] According to the Exchange, the execution of a member's order is determined by what other orders are present in the System and the priority of those orders.[62] Accordingly, the Commission believes that a member does not participate in the execution of an order submitted to the System.

Third, Rule 11a2–2(T) requires that the order be executed by an exchange member who is unaffiliated with the member initiating the order. The Commission has stated that this requirement is satisfied when automated exchange facilities, such as PSX, are used, as long as the design of these systems ensures that members do not possess any special or unique trading advantages in handling their orders after transmitting them to the exchange.[63] PHLX has represented that the design of the System ensures that no member organization has any special or unique trading advantage in the handling of its orders after transmitting its orders to the System.[64] Based on the Exchange's representation, the Commission believes that PSX satisfies this requirement.

Fourth, in the case of a transaction effected for an account with respect to which the initiating member or an associated person thereof exercises investment discretion, neither the initiating member nor any associated person thereof may retain any compensation in connection with effecting the transaction, unless the person authorized to transact business for the account has expressly provided otherwise by written contract referring to Section 11(a) of the Act and Rule 11a2–2(T).[65] PHLX represents that member organizations relying on Rule 11a2–2(T) for transactions effected through the System must comply with this condition of the Rule.[66]

B. Exception to Limitation on Affiliation Between PSX and Its Members

Although the Exchange will not route orders to other market centers, it proposes to receive orders routed to it by other market centers, including orders routed from Nasdaq.[67] Nasdaq Execution Services, LLC ("NES") is the approved outbound routing facility of Nasdaq for cash equities. NES is owned by NASDAQ OMX, which also owns the Exchange.[68] Thus, NES is an affiliate of the Exchange.

Nasdaq is permitted to operate NES as a facility providing outbound routing services from Nasdaq to other market centers, subject to the conditions that: (1) NES is operated and regulated as a facility of Nasdaq; (2) NES only provides outbound routing services unless otherwise approved by the Commission; (3) the designated examining authority of NES is a SRO unaffiliated with Nasdaq; and (4) the use of NES for outbound routing is available only to Nasdaq members and the use of NES remains optional.[69] Currently, NES may not route Directed Orders[70] to a facility of an exchange that is an affiliate of Nasdaq, other than BX.[71] In connection with PHLX's resumption of equity trading on PSX pursuant to this filing, Nasdaq has proposed a rule change to permit NES to route all forms of orders, including Directed Orders, to PSX.[72]

Recognizing that the Commission has expressed concern regarding the potential for conflicts of interest in instances where a member firm is affiliated with an exchange to which it is routing orders, the Exchange proposes the following limitations and conditions to NES's affiliation with the Exchange to permit the Exchange to accept inbound orders that NES routes in its capacity as a facility of Nasdaq:

• First, the Exchange states that pursuant to the FINRA RSA, FINRA will review NES's compliance with the Exchange's rules through FINRA's examination program.[73] Pursuant to the

Secretary, Commission, dated August 18, 2010 ("PHLX 11(a) Letter").

[60] *See, e.g.,* Securities Exchange Act Release Nos. 61419 (January 26, 2010), 75 FR 5157 (February 1, 2010) (SR–BATS–2009–031) (approving BATS options trading); 59154 (December 23, 2008), 73 FR 80468 (December 31, 2008) (SR–BSE–2008–48) (approving equity securities listing and trading on BSE); 57478 (March 12, 2008), 73 FR 14521 (March 18, 2008) (SR–NASDAQ–2007–004 and SR–NASDAQ–2007–080) (approving NOM options trading) ; 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (File No. 10–131) (approving The Nasdaq Stock Market LLC); 44983 (October 25, 2001), 66 FR 55225 (November 1, 2001) (SR–PCX–00–25) (approving Archipelago Exchange); 29237 (May 24, 1991), 56 FR 24853 (May 31, 1991) (SR–NYSE–90–52 and SR–NYSE–90–53) (approving NYSE's Off-Hours Trading Facility); and 15533 (January 29, 1979), 44 FR 6084 (January 31, 1979) ("1979 Release").

[61] *See* PHLX 11(a) Letter, *supra* note 59.

[62] *See id.* A member may cancel or modify the order, or modify the instruction for executing the order, but only from off the floor. The Commission has stated that the non-participation requirement is satisfied under such circumstances, so long as such modifications or cancellations are also transmitted from off the floor. *See* Securities Exchange Act Release No. 14713 (April 27, 1978), 43 FR 18557 (May 1, 1978) ("1978 Release") (stating that the "non-participation requirement does not prevent initiating members from canceling or modifying orders (or the instructions pursuant to which the initiating member wishes orders to be executed) after the orders have been transmitted to the executing member, provided that any such instructions are also transmitted from off the floor").

[63] In considering the operation of automated execution systems operated by an exchange, the Commission noted that, while there is not an independent executing exchange member, the execution of an order is automatic once it has been transmitted into the system. Because the design of these systems ensures that members do not possess any special or unique trading advantages in handling their orders after transmitting them to the exchange, the Commission has stated that executions obtained through these systems satisfy the independent execution requirement of Rule 11a2–2(T). *See* 1979 Release, *supra* note 60.

[64] *See* PHLX 11(a) Letter, *supra* note 59.

[65] *See* 17 CFR 240.11a2–2(T)(a)(2)(iv). In addition, Rule 11a2–2(T)(d) requires a member or associated person authorized by written contract to retain compensation, in connection with effecting transactions for covered accounts over which such member or associated persons thereof exercises investment discretion, to furnish at least annually to the person authorized to transact business for the account a statement setting forth the total amount of compensation retained by the member in connection with effecting transactions for the account during the period covered by the statement. *See* 17 CFR 240.11a2–2(T)(d). *See also* 1978 Release, *supra* note 62 (stating "[t]he contractual and disclosure requirements are designed to assure that accounts electing to permit transaction-related compensation do so only after deciding that such arrangements are suitable to their interests").

[66] *See* PHLX 11(a) Letter, *supra* note 59.

[67] *See* Notice, *supra* note 3, 75 FR at 43604.

[68] *See* Securities Exchange Act Release No. 58179 (July 17, 2008), 73 FR 42874 (July 23, 2008) (order approving NASDAQ OMX's acquisition of PHLX).

[69] Nasdaq Rule 4758.

[70] Nasdaq Rule 4751(f)(9) defines Directed Orders as immediate-or-cancel orders that are directed to an exchange other than Nasdaq without checking the Nasdaq book.

[71] Nasdaq Rule 4751(f)(9).

[72] *See* Securities Exchange Act Release No. 62736 (August 17, 2010) (SR–Nasdaq–2010–100).

[73] The Exchange also states that NES is subject to independent oversight by FINRA, its Designated Examining Authority, for compliance with financial responsibility requirements. *See* Notice, *supra* note 3, 75 FR at 43605.

FINRA RSA, however, PHLX retains ultimate responsibility for enforcing its rules with respect to NES.

• Second, FINRA and the Exchange [74] will monitor NES for compliance with the Exchange's trading rules, and will collect and maintain certain related information.[75]

• Third, the Exchange states that FINRA will provide a report to the Exchange's CRO, on at least a quarterly basis, that: (i) Quantifies all alerts (of which the Exchange and FINRA are aware) that identify NES as a participant that has potentially violated Commission or Exchange rules, and (ii) quantifies the number of all investigations that identify NES as a participant that has potentially violated Commission or Exchange rules.[76]

• Fourth, the Exchange proposes Rule 985(c)(2), which will require NASDAQ OMX, as the holding company owning both the Exchange and NES, to establish and maintain procedures and internal controls reasonably designed to ensure that NES does not develop or implement changes to its system, based on non-public information regarding planned changes to the Exchange's systems obtained as a result of its affiliation with the Exchange, until such information is available generally to similarly situated Exchange members, in connection with the provision of inbound order routing to the Exchange.[77]

• Fifth, the Exchange proposes that routing of orders from NES to the Exchange, in NES's capacity as a facility of Nasdaq, be authorized for a pilot period of one year.[78]

The operation of NES as a facility of Nasdaq providing outbound routing services from that exchange will be subject to Nasdaq oversight, as well as Commission oversight. Nasdaq will be responsible for ensuring that NES's outbound routing function is operated consistent with Section 6 of the Act and Nasdaq rules. In addition, Nasdaq must file with the Commission rule changes and fees relating to NES's outbound routing function.

In the past, the Commission has expressed concern that the affiliation of an exchange with one of its members raises potential conflicts of interest, and the potential for unfair competitive advantage.[79] Although the Commission continues to be concerned about potential unfair competition and conflicts of interest between an exchange's self-regulatory obligations and its commercial interest when the exchange is affiliated with one of its members, for the reasons discussed below, the Commission believes that it is consistent with the Act to permit NES to provide inbound routing to the Exchange on a pilot basis, subject to the conditions described above.

The Exchange has proposed five conditions applicable to NES's routing activities, which are enumerated above. The Commission believes that these conditions mitigate its concerns about potential conflicts of interest and unfair competitive advantage. In particular, the Commission believes that FINRA's oversight of NES,[80] combined with FINRA's monitoring of NES's compliance with the equity trading rules and quarterly reporting to the Exchange's CRO, will help to protect the independence of the Exchange's regulatory responsibilities with respect to NES. The Commission also believes that the proposed addition of Rule 985(c) is designed to ensure that NES cannot use any information advantage it may have because of its affiliation with the Exchange. Furthermore, the Commission believes that the Exchange's proposal to allow NES to route orders inbound to the Exchange from Nasdaq, on a pilot basis, will provide the Exchange and the Commission an opportunity to assess the impact of any conflicts of interest of allowing an affiliated member of the Exchange to route orders inbound to the Exchange and whether such affiliation provides an unfair competitive advantage. The Commission notes that it previously approved inbound routing by NES to an affiliate under substantially similar conditions.[81]

C. Listing Standards/Unlisted Trading Privileges

The Exchange has represented that it will not resume its listings business, and instead will trade all NMS stocks on the System pursuant to unlisted trading privileges ("UTP"), consistent with Section 12(f) of the Act [82] and Rule 12f–5 thereunder.[83] Rule 12f–5 requires an exchange that extends unlisted trading privileges to securities to have in effect a rule or rules providing for transactions in the class or type of security to which the exchange extends unlisted trading privileges.[84]

In connection with its proposal to trade NMS stocks [85] on PSX on an unlisted trading privileges basis, the Exchange proposes several amendments to PHLX Rule 803, including amending PHLX Rule 803(o) (Unlisted Trading Privileges) to, among other things, (1) clearly state that the Exchange will not list any securities, and that any provisions of PHLX Rules 800 through 868 that permit listing of securities will not be effective until the Exchange amends its rules to make any changes needed to comply with Rule 10A–3 under the Act [86] and to incorporate additional qualitative listing standards, and (2) enhance the listing requirements for new derivative securities products (as defined in Rule 19b–4(e) under the Act [87]) trading on the Exchange. In addition, the Exchange proposes to adopt new listing standards for securities linked to the performance of

[74] The Exchange represents that personnel performing real-time oversight of equity trading on Nasdaq will also perform similar functions with respect to PSX pursuant to the Intercompany RSA, under the direction, authority, and oversight of PHLX's Chief Regulatory Officer ("CRO") and the Regulatory Oversight Committee ("ROC") of its Board of Governors.

[75] The Exchange represents that both FINRA and the Exchange will collect and maintain all alerts, complaints, investigations and enforcement actions in which NES (in its capacity as a facility of Nasdaq routing orders to the PSX) is identified as a participant that has potentially violated applicable Commission or Exchange rules. The Exchange and FINRA will retain these records in an easily accessible manner in order to facilitate any potential review conducted by the Commission's Office of Compliance Inspections and Examinations. *See* Notice, *supra* note 3, 75 FR at 43605.

[76] *See id.*

[77] *See* proposed PHLX Rule 985(c)(2); Notice, *supra* note 3, 75 FR at 43605.

[78] *See* Amendment No. 1, *supra* note 4. In Amendment No. 1, the Exchange clarified that its proposal, as opposed to Nasdaq's corresponding proposal, be approved on a one year pilot basis.

[79] *See, e.g.,* Securities Exchange Act Release Nos. 54170 (July 18, 2006), 71 FR 42149 (July 25, 2006) (SR–NASDAQ–2006–006) (order approving Nasdaq's proposal to adopt Nasdaq Rule 2140, restricting affiliations between Nasdaq and its members); 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (SR–NYSE–2005–77) (order approving the combination of the New York Stock Exchange, Inc. and Archipelago Holdings, Inc.); and 58673 (September 29, 2008), 73 FR 57707 (October 8, 2008) (SR–Amex–2008–62) (order approving the combination of NYSE Euronext and the American Stock Exchange LLC).

[80] This oversight will be accomplished through the 17d–2 Agreement between FINRA and the FINRA RSA.

[81] *See* Securities Exchange Act Release No. 59154 (December 23, 2008), 73 FR 80468, (December 31, 2008) (SR–BSE–2008–48) ("BX Equities Market Approval Order").

[82] 15 U.S.C. 78l(f).

[83] 17 CFR 240.12f–5. *See* Notice, *supra* note 3, 75 FR at 43599.

[84] 17 CFR 240.12f–5. *See also* Securities Exchange Act Release No. 35737 (April 21, 1995), 60 FR 20891 (April 28, 1995) (adopting Rule 12f–5).

[85] Proposed PHLX Rule 803(o) defines "NMS Stocks" for purposes of the rule as having the meaning given such term by Rule 600 under Regulation NMS, including, but not limited to, common stock, preferred stock and similar issues, shares or certificates of beneficial interest of trusts, notes, limited partnership interests, warrants, certificates of deposit for common stock, convertible debt securities, American Depositary Receipts, contingent value rights, Trust Shares, Trust Issued Receipts, Index Fund Shares, Equity Index-Linked Securities, Commodity-Linked Securities, Equity-Linked Notes, and Managed Fund Shares.

[86] 17 CFR 240.10A–3.

[87] 17 CFR 240.19b–4(e)

indexes and commodities (including currencies) and managed fund shares, to allow such securities to trade on PSX pursuant to unlisted trading privileges.[88] The Exchange also proposes PHLX Rule 3230 to establish additional rules to govern trading of Commodity-Related Securities on PSX pursuant to unlisted trading privileges, including a requirement that members provide all purchasers of a newly issued Commodity-Related Securities with a prospectus.

The Commission finds that these rules are consistent with the Act. The Commission notes that the Exchange will not list any securities for trading on PSX until it amends its rules to make any changes needed to comply with Rule 10A–3 under the Act[89] and to incorporate additional qualitative listing standards. The Commission also notes that these rules are similar to the rules of other Exchanges.[90]

D. Regulation of the Exchange and its Members

As a facility of the Exchange, PSX will be subject to the Exchange's SRO functions and the Exchange will have regulatory responsibility for the activities of the System. Notwithstanding the delegation of such responsibilities via contract, the Exchange retains ultimate legal responsibility for the regulation of its members and its market activities, including activities on PSX.

1. Disciplinary Rules

Trading on PSX is subject to the Exchange's disciplinary rules set forth in PHLX Rules 960.1 through 960.12.[91] Such rules provide the Exchange with disciplinary jurisdiction over its members so that it can enforce members' compliance with its rules and the Act and the rules and regulations thereunder. The Exchange's rules also permit it to sanction members for violations of its rules and violations of the Act by, among other things, expelling or suspending members, limiting or terminating members' activities, functions, or operations, fining or censuring members, or suspending or barring a person from being associated with a member.[92]

2. Order Audit Trail System

PHLX proposes rules requiring FINRA members trading on PSX to comply with FINRA's Order Audit Trail System ("OATS") requirements,[93] which rules are substantially similar to Nasdaq Rules Series 6950 ("Order Audit Trail System).[94] Like Nasdaq, OATS data will be used by PHLX for regulatory purposes only.[95]

3. Trading Halts; Clearly Erroneous Transactions

PSX's proposed rule relating to trading halts is substantially similar to Nasdaq Rule 4120 (Trading Halts), except that the PSX rule includes only those provisions relevant to securities traded on an unlisted trading privileges basis.[96] Proposed PHLX Rule 3100 provides that PSX will participate in the circuit breaker pilot program for stocks included in the S&P 500® Index, which ends on December 10, 2010.[97] Current PHLX Rule 133 (Trading Halts Due to Extraordinary Market Volatility) will also apply to trading on PSX.[98]

PHLX has proposed a rule which is substantially similar to Nasdaq Rule 11890 (Clearly Erroneous Transactions) to govern the breaking of clearly erroneous transactions.[99] Appeals from determinations regarding trades made by PHLX staff will be made to a committee of industry and non-industry experts established under the PHLX By-Laws, which committee is subject to identical compositional requirements[100] as NASDAQ's Market Operations Review Committee, which performs a comparable function under NASDAQ rules.[101]

The Commission finds that the Exchange's proposed rules relating to the regulation of PSX and its members are consistent with the requirements of the Act. The Commission notes that the proposed rules relating to the regulation of PSX are substantially similar to rules of Nasdaq previously approved by the Commission.[102] In addition, the disciplinary rules applicable to PSX are set forth in the current rules of the Exchange, which have been previously approved by the Commission.

4. Regulatory Contracts

The Exchange represents that it is a party to two regulatory services agreements (the "Regulatory Contracts").[103] Pursuant to the FINRA

[88] *See* proposed PHLX Rules 803(m) and (n). As with other standards, PHLX represented that it will not list these securities until the filing and approval of a proposed rule change to authorize such listing. In connection with adopting these new standards, the Exchange also proposed to (1) delete current PHLX Rules 803(m) and (n), which contain listing standards for products that are covered by the new listing standards and (2) amend PHLX Rule 803(f) (Other Securities) to adopt continued listing requirement provisions that are complementary to the new standards for securities linked to commodities.

[89] 17 CFR 240.10A–3.

[90] As proposed to be amended, the requirements of PHLX Rule 803(o) are substantially similar to the requirements set forth in Rule 14.1 (Unlisted Trading Privileges) of EDGX Exchange, Inc. ("Direct Edge"). Proposed PHLX Rule 3230 substantially mirrors the requirements of Nasdaq Rule 4630 (Trading in Commodity-Related Securities). Proposed Rules 803(m) and (n) are substantially similar to those set forth in Nasdaq Rules 5710 (Securities Linked to Performance of Indexes and Commodities (Including Currencies)) and 5735 (Managed Fund Shares).

[91] *See* proposed PHLX Rule 3202.

[92] *See* PHLX Rule 960.10 and proposed PHLX Rule 3221.

[93] *See* proposed PHLX Rule 3400 Series.

[94] As is the case for Nasdaq members under the Nasdaq rules, PHLX members that are not FINRA members must compile and maintain audit trail information for securities listed on Nasdaq, but are required to transmit this information to FINRA only if requested. *See* proposed PHLX Rule 3405. If PHLX resumes operations as a listing market in the future, all members will be required to maintain audit trail information for securities listed on PHLX, and to transmit the information to FINRA upon request, but daily OATS reporting for such securities would not be required. *Id.*

[95] *See* Securities Exchange Act Release No. 53128 (January 13, 2006); 71 FR 3350 (January 23, 2006) (File No. 10–131).

[96] *See* proposed PHLX Rule 3100.

[97] *See* proposed PHLX Rule 3100(a)(4). *See also* Securities Exchange Act Release No. 62252 (June 10, 2010), 75 FR 34186 (June 16, 2010) (order approving rules relating to the circuit breaker pilot program adopted by other national securities exchanges). Nasdaq and the other equities exchanges have proposed to expand the circuit breaker pilot program to include securities in the Russell 1000 Index and certain exchange traded products. *See, e.g.,* Securities Exchange Act Release Nos. 62414 (June 30, 2010), 75 FR 39081 (July 7, 2010) and 62415 (June 30, 2010), 75 FR 39086 (July 7, 2010). The Exchange has represented that it will promptly submit a proposed rule change in accordance with Section 19(b) of the Act and Rule 19b–4(f)(6) thereunder to adopt corresponding changes to the rules governing PSX if and when the Commission approves the corresponding Nasdaq rule. *See* Letter from John Yetter, Vice President and Deputy General Counsel, The NASDAQ OMX Group, to David Shillman, Associate Director, Division of Trading and Markets, Commission, dated September 8, 2010 ("Yetter Letter").

[98] *See* proposed PHLX Rule 3202.

[99] *See* proposed PHLX Rule 3312. As a result of precipitous declines in the prices of certain securities on May 6, 2010, however, the Commission and the national securities exchanges are currently evaluating the advisability of further changes to clearly erroneous rules. As a result of this evaluation, Nasdaq and the other equities exchanges have proposed to amend their clearly erroneous execution rules to set forth clearer standards and curtail their discretion with respect to breaking erroneous trades. *See, e.g.,* Securities Exchange Act Release Nos. 62334 (June 21, 2010), 75 FR 36732 (June 28, 2010) and 62342 (June 21, 2010), 75 FR 36752 (June 28, 2010). The Exchange has represented that it will promptly file a proposed rule change to amend its clearly erroneous rule in a manner consistent with Nasdaq's clearly erroneous rule, in accordance with Section 19(b) of the Act and Rule 19b–4(f)(6) thereunder, if and when the Commission approves the corresponding Nasdaq rule. *See* Yetter Letter, *supra* note 97.

[100] *See* Section 10–10 of the PHLX By-Laws, which requires that 20% of the members of the committee represent PHLX members, and prohibits more than 50% of the committee's members from being employed by firms that are market makers or that derive more than 10% of their revenues from market making.

[101] By-Laws of Nasdaq, Article III, Section 6.

[102] *See* Nasdaq Registration Approval Order, *supra* note 22.

[103] *See* Notice, *supra* note 3, 75 FR at 43604.

RSA, FINRA will provide a range of regulatory services to the Exchange and its facilities, including PSX, including T+1 surveillance, investigation, and enforcement with respect to the Exchange's rules, arbitration services, and membership services.[104] Under the FINRA RSA, FINRA will conduct T+1 market surveillance and examine members to monitor compliance with applicable PHLX rules and securities laws and regulations.[105] The Intercompany RSA provides that employees and contractors of each party may perform regulatory services for the Exchange.[106] All regulatory services performed for the Exchange under the Intercompany RSA, including those performed with respect to the System, are subject to the direction, authority, and oversight of the Exchange's CRO and the ROC, and all personnel performing services for the Exchange under the Intercompany RSA are subject to the jurisdiction, authority and oversight of the Exchange's CRO and ROC.[107] The Exchange represents that any personnel performing real-time oversight of equity trading on Nasdaq will also perform similar functions with respect to PSX, under the direction, authority, and oversight of the Exchange's CRO and the ROC.[108] The Exchange represents that the Exchange retains ultimate legal responsibility for, and control of, functions performed for PHLX under the Regulatory Contracts.[109]

The Exchange has represented that many aspects of compliance with PSX rules, such as avoidance of locked and crossed markets and trade throughs, will be enforced by the System itself, and the Exchange will periodically test operations of PSX to determine that the System is operating in accordance with applicable rules.[110]

The Commission notes that the Exchange will continue to bear ultimate regulatory responsibility for functions performed on its behalf under the Regulatory Contracts. Further, the Exchange retains ultimate legal responsibility for the regulation of its members and its markets (including PSX).

The Commission believes that it is consistent with the Act and the public interest to allow the Exchange to contract with FINRA to perform surveillance, disciplinary, and enforcement functions.[111] Surveillance, discipline, and enforcement are fundamental elements to a regulatory program, and constitute core self-regulatory functions. It is essential to the public interest and the protection of investors that these functions are carried out in an exemplary manner. With respect to certain regulatory functions contracted to FINRA by the Exchange, including surveillance, disciplinary and enforcement functions, the Commission previously noted its belief that FINRA has the expertise and experience to perform such functions on behalf of an exchange, and that the contracting of such functions to FINRA is consistent with the Act and the public interest.[112] The Commission continues to believe that this is true with respect to FINRA's regulation of the Exchange and the conduct of its members pursuant to the FINRA RSA.

The Commission believes that it is consistent with the Act and the public interest to allow the Exchange to enter into the Intercompany RSA. Nasdaq and BX have self-regulatory obligations similar to those of the Exchange, and it is beneficial to the public interest and the protection of investors that these functions are carried out in an exemplary manner. The Commission notes that the Exchange has represented that all regulatory services performed for the Exchange under the Intercompany RSA are subject to the direction, authority, and oversight of the Exchange's CRO and ROC, and any personnel performing such services for the Exchange are subject to the jurisdiction, authority and oversight of the Exchange's CRO and ROC. In this way, the Exchange will maintain control over the performance of regulatory services with respect to the Exchange.

The Exchange, unless relieved by the Commission of its responsibility,[113] shall bear the responsibility for self-regulatory conduct and primary liability for self-regulatory failures, not the SRO retained to perform regulatory functions on the Exchange's behalf.[114] In performing these functions, however, an SRO may nonetheless bear liability for causing or aiding and abetting the failure of the Exchange to perform its regulatory functions.[115] Accordingly, although FINRA, Nasdaq and BX will not act on their own behalf under their respective SRO responsibilities in carrying out regulatory services for the Exchange pursuant to the FINRA RSA or Intercompany RSA, as applicable, such SROs may have secondary liability if, for example, the Commission finds that the contracted functions are being performed so inadequately as to cause a violation of the federal securities laws by the Exchange.[116]

E. Additional Proposed Rules for the Exchange

PHLX proposes to adopt rules addressing recommendations to customers (or suitability) and best execution and interpositioning,[117] which mirror the requirements of NASD Rules 2310 and 2320. Although members would become subject to these rules by virtue of being members of FINRA, PHLX believes that the requirements set forth in these rules are sufficiently important that they should be explicitly set forth in the PHLX rulebook.[118]

The Commission finds that the proposed rules regarding suitability and best execution and interpositioning are consistent with the Act. The Commission notes that rules are substantially similar to the requirements of NASD Rules 2310 and 2320.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[119] that the proposed rule change (SR–PHLX–2010–79), as modified by Amendment No. 1, be, and it hereby is, approved, except for (1) the circuit breaker pilot program, which is approved on a pilot basis through December 10, 2010, and (2) the inbound routing of orders from NES to PSX, which is approved on a pilot basis through September 9, 2011.

Although the Commission's approval of the rule proposal, as amended, is final and the proposed rules are therefore effective, it is further ordered

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *See, e.g.,* Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844 (December 22, 1998). *See also* Securities Exchange Act Release Nos. 57478 (March 12, 2008) 73 FR 14521, (March 18, 2008) (order approving rules governing the trading of options on the NASDAQ Options Market) ("NOM Approval Order"); 50122 (July 29, 2004), 69 FR 47962 (August 6, 2004) (order approving File No. SR–Amex–2004–32) ("Amex Approval Order"); 42455 (February 24, 2000), 65 FR 11388 (March 2, 2000) (File No. 10–127) (order approving ISE's registration as a national securities exchange) ("ISE Registration Approval Order"); Nasdaq Registration Approval Order, *supra* note 22.

[112] *See* Nasdaq Registration Approval Order, *supra* note 22; BX Equities Market Approval Order, *supra* note 81.

[113] *See* Section 17(d)(1) of the Act and Rule 17d-2 thereunder. 15 U.S.C. 78q(d)(1); and 17 CFR 240.17d–2. The Commission notes that it is not approving or declaring effective the FINRA RSA or the Intercompany RSA.

[114] *See* NOM Approval Order, *supra* note 111; Nasdaq Registration Approval Order, *supra* note 22; Amex Approval Order, *supra* note 111; and ISE Registration Approval Order, *supra* note 111.

[115] *Id.*

[116] *Id.*

[117] *See* proposed PHLX Rules 763 and 764.

[118] *See* Notice, *supra* note 3, 75 FR at 43604.

[119] 15 U.S.C. 78s(b)(2).

that the operation of PSX is conditioned on the satisfaction of the following requirements:

A. *Examination by the Commission.* The Exchange must have, and must represent in a letter to the staff in the Commission's Office of Compliance Inspections and Examinations that it has adequate surveillance procedures and programs in place to effectively regulate PSX.

B. *Trade Processing and Exchange Systems.* The Exchange must have, and must represent in a letter to the staff in the Commission's Division of Trading and Markets that it has adequate procedures and programs in place, as noted in Commission Automation Review Policy guidelines,[120] to effectively process trades and maintain the confidentiality, integrity, and availability of the Exchange's systems.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[121]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–23104 Filed 9–15–10; 8:45 am]

BILLING CODE 8010–01–P

[120] On November 16, 1989, the Commission published its first Automation Review Policy ("ARP I"), in which it created a voluntary framework for self-regulatory organizations to establish comprehensive planning and assessment programs to determine systems capacity and vulnerability. On May 9, 1991, the Commission published its second Automation Review Policy ("ARP II") to clarify the types of review and reports that were expected from self-regulatory organizations. *See* Securities Exchange Act Release Nos. 27445 (November 16, 1989), 54 FR 48703 (November 24, 1989); and 29185 (May 9, 1991), 56 FR 22490 (May 15, 1991).

[121] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62885; File No. SR–FINRA–2010–032]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Granting Approval of Proposed Rule Change Relating to Clearly Erroneous Transactions

I. Introduction

September 10, 2010.

On June 17, 2010, the Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), and Rule 19b–4 thereunder, a proposed rule change to amend its rules to set forth clearer standards and curtail its discretion with respect to breaking erroneous trades.[1] The proposed rule change was published for comment in the **Federal Register** on June 28, 2010.[2] The Commission received nine comment letters on the proposal.[3] BATS responded to the comments in a letter dated August 16, 2010.[4] This order approves the proposed rule change.

II. Background and Description of the Proposal

On May 6, 2010, the U.S. equity markets experienced a severe disruption.[5] Among other things, the prices of a large number of individual securities suddenly declined by significant amounts in a very short time period, before suddenly reversing to prices consistent with their pre-decline levels. This severe price volatility led to a large number of trades being executed at temporarily depressed prices, including many that occurred at prices dramatically away from pre-decline levels. In response, the Exchanges and FINRA exercised their authority under their clearly erroneous execution rules to break trades that were effected at prices 60% or more away from pre-decline prices, using a process that was not sufficiently clear or transparent to market participants. There are reports that the lack of clear guidelines for dealing with clearly erroneous transactions under circumstances such as occurred on May 6, and the lack of transparency surrounding the Exchanges' and FINRA's decision to break only trades at least 60% away from the market, added to the confusion and uncertainty faced by investors on May 6.[6]

The Commission is concerned that events such as those that occurred on May 6 can undermine the integrity of the U.S. securities markets. Accordingly, it is working on a variety of fronts to assess the causes and contributing factors of the May 6 market disruption and to fashion policy responses that will help prevent a recurrence. The Commission also recognizes the importance of moving quickly to implement steps that could help limit potential harm from extreme price volatility. On June 10, 2010, the Commission approved rules, on a pilot basis, that require the Exchanges to pause trading in securities included in the S&P 500 Index if the price moves 10% or more in a five-minute period.[7] By establishing circuit breakers that uniformly pause trading in these securities across all markets, the new rules are designed to facilitate coordinated price discovery and provide time for investors to trade at rational prices. In addition to the individual stock trading pause rules, FINRA

[1] Also, on June 17, 2010, each of BATS Exchange, Inc. ("BATS"), NASDAQ OMX BX, Inc. ("BX"), Chicago Board Options Exchange, Incorporated ("CBOE"), Chicago Stock Exchange, Inc. ("CHX"), EDGA Exchange, Inc. ("EDGA"), EDGX Exchange, Inc. ("EDGX"), International Securities Exchange LLC ("ISE"), The NASDAQ Stock Market LLC ("Nasdaq"), National Stock Exchange, Inc. ("NSX"), New York Stock Exchange LLC ("NYSE"), NYSE Amex LLC ("NYSE Amex"), NYSE Arca, Inc. ("NYSE Arca") (collectively, the "Exchanges") filed similar proposed rule changes with respect to breaking erroneous trades. *See* Securities Exchange Act Release Nos. 62330 (June 21, 2010), 75 FR 36725; 62331 (June 21, 2010), 75 FR 36746; 62332 (June 21, 2010), 75 FR 36749; 62333 (June 21, 2010), 75 FR 36759; 62334 (June 21, 2010), 75 FR 36732; 62335 (June 21, 2010), 75 FR 37494; 62336 (June 21, 2010), 75 FR 36743; 62337 (June 21, 2010), 75 FR 36739; 62338 (June 21, 2010), 75 FR 36762; 62339 (June 21, 2010), 75 FR 36765; 62340 (June 21, 2010), 75 FR 36768; and 62342 (June 21, 2010), 75 FR 36752. These proposals also were approved today. *See* Securities Exchange Act Release No. 62886 (Sept. 10, 2010).

[2] *See* Securities Exchange Act Release No. 62341 (June 21, 2010), 75 FR 36756.

[3] *See* letter from Peter Ianello, Partner, CSS, LLC, to Elizabeth Murphy, Secretary, Commission, dated July 15, 2010 ("CSS Letter"); letter from Gary DeWaal, Senior Managing Director and Group General Counsel, Newedge USA, LLC, to Elizabeth M. Murphy, Secretary, Commission, dated July 19, 2010 ("Newedge Letter"); letter from Karrie McMillan, General Counsel, Investment Company Institute, to Elizabeth M. Murphy, Secretary, Commission, dated July 19, 2010 ("ICI Letter"); David C. Cushing, Director of Global Equity Trading, Wellington Management Company, LLP, to Elizabeth M. Murphy, Secretary, Commission, dated July 19, 2010 ("Wellington Letter"); letter from John A. McCarthy, General Counsel, GETCO, to Elizabeth Murphy, Secretary, Commission, dated July 20, 2010 ("GETCO Letter"); letter from Ira P. Shapiro, Managing Director, BlackRock, Inc., to Elizabeth M. Murphy, Secretary, Commission, dated July 20, 2010 ("BlackRock Letter"); and letter from Manisha Kimmel, Executive Director, Financial Information Forum, On behalf of the FIF Front Office Committee, to Elizabeth M. Murphy, Secretary, Commission, dated July 21, 2010 ("FIF Letter"); letter from Ann Vlcek, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, to Elizabeth M. Murphy, Secretary, Commission, dated July 26, 2010 ("SIFMA Letter"); and letter from Leonard J. Amoruso, General Counsel, Knight Capital Group, Inc., to Elizabeth M. Murphy, Secretary, Commission, dated July 27, 2010 ("Knight Letter").

[4] *See* letter from Eric J. Swanson, SVP and General Counsel, BATS, to Elizabeth M. Murphy, Secretary, Commission, dated August 16, 2010 ("BATS Letter").

[5] The events of May 6 are described more fully in the report of the staffs of the Commodity Futures Trading Commission ("CFTC") and the Commission, titled *Report of the CFTC and SEC to the Joint Advisory Committee on Emerging Regulatory Issues,* "Preliminary Findings Regarding the Market Events of May 6, 2010," dated May 18, 2010.

[6] *See, e.g.,* Written Statement of Leonard J. Amoruso, Senior Managing Director and General Counsel, Knight Capital Group, Inc., Submitted before the CFTC–SEC Advisory Committee on Emerging Regulatory Issues, Panel Discussion, "The events of May 6—views and observations regarding liquidity, trading and the apparent breakdown of an orderly market," dated June 22, 2010.

[7] *See* Securities Exchange Act Release Nos. 62251; 75 FR 34183 (June 10, 2010); and 62252, 75 FR 34186 (June 16, 2010).

worked with the Exchanges to develop proposed amendments to their clearly erroneous execution rules to provide greater transparency and certainty to the process of breaking trades.

The current clearly erroneous execution rule sets forth procedures FINRA must use to break trades. Specifically, the current rule provides that FINRA will break trades in Exchange-listed stocks only if the price of the trades exceeds a specified "Reference Price"—usually the consolidated last sale—by an amount that equals or exceeds specified "Numerical Guidelines." The Numerical Guidelines vary depending on the price of the stock and during the regular trading session are 10% if the consolidated last sale is $25 or less, 5% if the consolidated last sale is more than $25 and up to and including $50, and 3% if the consolidated last sale is more than $50. These percentages double during pre-open and post-close trading sessions. For events involving five or more securities, the Numerical Guidelines currently are 10% during pre-open, regular, and post-close trading sessions.

While the current rule does not give FINRA discretion to break trades that do not exceed the Numerical Guidelines, it does permit FINRA discretion to select a percentage threshold at which trades will be broken that is higher than the Numerical Guidelines. As noted above, on May 6 the Exchanges selected 60% as the threshold for breaking trades in a process that, from the perspective of market participants, was not clear or transparent, and led to further uncertainty and confusion in the market. Thus, the events of May 6 highlight the need to clarify the clearly erroneous execution review process across all markets, and reduce the discretion of FINRA to deviate from the objective standards in its rule when dealing with clearly erroneous transactions.

Under the proposed rule change, FINRA will no longer have the discretion to deviate from the specified percentage threshold at which trades will be broken in many situations, including those where the single-stock circuit breakers are applicable and in other larger "Multi-Stock Events" involving five or more securities. Under the proposed rule, a Multi-Stock Event is determined by looking at the number of securities with potentially erroneous executions occurring within a period of five minutes or less.

When an individual stock trading pause is triggered, transactions could occur before the trading pause is fully implemented on all of the Exchanges and in the over-the-counter (OTC) market. In such event, FINRA proposes to review, on its own motion, all transactions triggering an individual stock trading pause and subsequent transactions that may occur before the trading pause is in effect.[8] FINRA would use the price that triggered the trading pause (the "Trading Pause Trigger Price")[9] as the Reference Price and break trades that are 10% or more away from the Reference Price for stocks priced $25 or less, 5% or more away from the Reference Price for stocks priced from $25 to $50, and 3% or more away from the Reference Price for stocks priced more than $50. If the security is a leveraged exchange-traded fund (ETF) or exchange-traded note (ETN), these percentage thresholds would be multiplied by the leverage multiplier.

For situations in which a stock is not subject to an individual stock trading pause (*e.g.,* because the stock is not in the circuit breaker pilot program, or when the stock is part of the pilot program but the circuit breaker does not apply because it is the beginning or end of the day), the trade break rules will differ based on the number of stocks involved. In the event of Multi-Stock Events involving 20 or more securities, FINRA proposes to review on its own motion and break all transactions at prices equal to or greater than 30% away from the Reference Price in each affected security during the review period selected. In such event, FINRA may use a Reference Price other than the consolidated last sale. To ensure consistent application across markets, FINRA will consult with the Exchanges to determine the appropriate review period, which may be greater than the period (of five minutes or less) that triggered the application of this provision, as well as select one or more specific points in time prior to the transactions in question and use transaction prices at or immediately prior to the time(s) selected as the Reference Price(s).

Similarly, in the event of Multi-Stock Events involving five or more, but less than twenty, securities, FINRA proposes to review on its own motion and break all transactions at prices equal to or greater than 10% away from the Reference Price. In such event, the Reference Price will generally be the consolidated last sale immediately prior to the execution(s) under review. However, if there is relevant news impacting a security, periods of extreme volatility, sustained illiquidity, or widespread systems issues, FINRA may use a different Reference Price, where necessary for the maintenance of a fair and orderly market and the protection of investors, and where it is in the public interest.

The current rule provides that FINRA may consider "Additional Factors"[10] in determining whether to break trades. The proposed rule change limits the circumstances during which FINRA may consider those Additional Factors. Specifically, under the proposed rule, FINRA would only be permitted to consider Additional Factors in the context of clearly erroneous reviews that do not involve Multi-Stock Events involving five or more securities or individual stock trading pauses, as described above. In such event, FINRA would consider the Additional Factors with a view toward maintaining a fair and orderly market and the protection of investors and the public interest.

FINRA has proposed that this rule change be implemented as a pilot that would end on December 10, 2010.

III. Discussion of Comment Letters and Commission Findings

The Commission received nine comment letters on the proposed rule changes filed by FINRA and the Exchanges. Five commenters were generally supportive of the principles underlying the proposed rule change, to provide greater transparency and certainty to investors, market

[8] Such reviews would be limited to transactions that executed at a price lower than the Trading Pause Trigger Price in the event of a price decline and higher than the Trading Pause Trigger Price in the event of a price rise. Where a trading pause was triggered by a price decline (rise), FINRA shall deem as clearly erroneous all such transactions that occurred at a price lower (higher) than the Trading Pause Trigger Price but only if such prices exceeded the Trading Pause Trigger Price by an amount equal to or exceeding the Numerical Guidelines.

[9] FINRA proposes to use the Trading Pause Trigger Price as the Reference Price for such clearly erroneous execution reviews of a transaction triggering a trading pause and the transactions that occur immediately after such transactions but before the trading pause is in effect. The Trading Pause Trigger Price reflects a price calculated by the primary listing market over a rolling five-minute period and may differ from the execution price of a transaction that triggered a trading pause. The primary listing market that issued an individual stock trading pause will determine and communicate to FINRA the Trading Pause Trigger Price for such stock.

[10] Additional Factors that FINRA may consider include but are not limited to: System malfunctions or disruptions, volume and volatility for the security, derivative securities products that correspond to greater than 100% in the direction of a tracking index, news released for the security, whether trading in the security was recently halted or resumed, whether the security is an IPO, whether the security was subject to a stock split, reorganization, or other corporate action, overall market conditions, pre-opening and post-closing session executions, validity of consolidated tapes trades and quotes, consideration of primary market indications, and executions inconsistent with the trading pattern in the stock.

participants, and the public regarding the handling of clearly erroneous transactions.[11] However, these commenters also believed that the proposed rule change should go further, and offered a number of suggestions as discussed below. Two commenters generally did not oppose the proposed rule change, but believed it was "overly complex and opaque"[12] and does "not adequately address the most significant flaws in the current rules."[13] One commenter believed that trades should only be cancelled in extraordinary circumstances, stating that the Commission and the SROs should instead consider alternatives that would prevent the execution of erroneous trades rather than canceling them after the fact.[14] Another commenter supported a "principles-based approach" to handling clearly erroneous trades instead of numerical thresholds, particularly with respect to transactions involving illiquid stocks and the dissemination of news or a fundamental change that requires a significant reevaluation of underlying business conditions.[15] Additionally, BATS responded to the comments on the similar proposal by the Exchanges.[16] These comments are discussed in greater detail below.

A. Comments Recommending Other Comprehensive Approaches

Some commenters believed that FINRA's rule relating to clearly erroneous trades should be more definitive, and expressed the view that the proposed rule change was not sufficiently clear in all cases when trades would actually be cancelled.[17] For example, one commenter noted that FINRA "appear[s] to be able to cancel trades for many reasons other than significant price discrepancies—including, for example, systems malfunctions, news released regarding a security, whether a security was subject to a stock split or reorganization."[18] This commenter believed FINRA should adopt "no-bust" zones for transactions executed within specified price ranges, and cancel trades outside of the "no-bust" zones absent a compelling public interest to the contrary.[19]

Two commenters questioned whether the proposed rule change would achieve its stated goals of making the erroneous trade execution review process more transparent and less arbitrary.[20] Specifically, these commenters were concerned that the proposed rule change did not clearly establish a reference price upon which the Numerical Guidelines would be based.[21] They noted that FINRA retains the flexibility in certain circumstances to use a Reference Price other than the consolidated last sale, as well as to determine the review period for Multi-Stock Events involving twenty or more securities.[22] These commenters believed that if FINRA retained discretion in these areas, the proposed rule change may not achieve the goal of making the trade break process more transparent and less arbitrary,[23] or could create mass confusion.[24]

In response to comments made on similar proposals made by the Exchanges, BATS acknowledged that the proposals do not "in all circumstances provide 100% advanced certainty with respect to whether a particular execution will be deemed to be clearly erroneous," but stated its belief that "its proposal reflects a significant improvement * * * over its existing rule."[25] Specifically, BATS noted that its discretion to utilize "additional factors" would now be limited to instances involving less than five securities under review and further limited to securities that are not subject to a single stock circuit breaker.[26] BATS believed its limited discretion in this regard is necessary and appropriate for maintaining fair and orderly markets.[27]

With respect to the concern expressed by some commenters that the proposed rule change does not clearly establish a reference price upon which the Numerical Guidelines would be based, BATS, which proposed similar discretionary provisions, stated that it is "critical" for it to retain some limited discretion to use a different reference price when applying the clearly erroneous thresholds because "there are circumstances under which last sale would be an inappropriate reference price. * * *"[28] BATS noted, however, that this discretion is limited because its "rule is designed to generally guide BATS to look at the last sale as the reference price" for those securities not subject to a circuit breaker and its proposal tries to be "abundantly clear and objective that if a security is subject to a single stock circuit breaker, the reference price will be the circuit breaker trigger price."[29] BATS also noted that the determination of the point in time from which to derive the reference price on May 6 had "nothing to do" with the delay in announcing which trades would be broken on May 6; rather, the delay was attributable to the time it took the Exchanges and FINRA to determine the appropriate percentage at which trades would be broken.[30]

The Commission appreciates the suggestions and responses offered by these commenters to make the process by which FINRA addresses clearly erroneous executions more certain and transparent by reducing its discretion. The Commission intends to continue working with FINRA to further clarify, as appropriate, its process for breaking erroneous trades that arise in contexts not covered by the proposed rule change, as well as to continue to evaluate the operations of and potential refinements to such processes in contexts covered by the proposed rule change. Nevertheless, the Commission believes that the proposed rule change represents a productive first step by FINRA in bringing greater clarity and transparency to the process for breaking clearly erroneous trades, and that these improvements should not be delayed pending consideration of further changes.

B. Comments Recommending Alternative Approaches

Four commenters were of the view that, rather than breaking erroneous trades, FINRA should allow the trades to stand and adjust the price in line with the market.[31] These commenters were particularly concerned about the risk, when trades are broken, that market participants suddenly may find themselves exposed on one side of the

[11] *See* ICI Letter, at 1, FIF Letter, at 1, Newedge Letter, at 1–2, GETCO Letter, at 2, and SIFMA Letter, at 1–2 (also stating its belief that it is "critical for the options markets to achieve consistency in their existing clearly erroneous execution rules before additional rule changes are implemented * * *"). *See also* BlackRock Letter at 1 (supporting amendments to rules that contribute to market volatility).

[12] *See* CSS Letter, at 1.

[13] *See* BlackRock Letter, at 1.

[14] *See* Wellington Letter, at 3–4. *See also* FIF Letter, at 1–2 (supporting trade validation and rejection mechanisms) and GETCO Letter, at 3 (supporting protections designed to reject clearly erroneous orders that reach market centers).

[15] *See* Knight Letter, at 3.

[16] *See* BATS Letter. The response from BATS is discussed in this Order because FINRA's proposed clearly erroneous rule is similar to those of the Exchanges.

[17] *See* Newedge Letter, at 4–5, and BlackRock Letter, at 2.

[18] *See* Newedge Letter, at 4.

[19] *Id.*

[20] *See* BlackRock Letter, at 2, and CSS Letter, at 1–2.

[21] *Id.*

[22] *Id.*

[23] *See* BlackRock Letter, at 2.

[24] *See* CSS Letter, at 1–2.

[25] *See* BATS Letter, at 1.

[26] *Id.* at 5.

[27] *Id.*

[28] *Id.* at 3–4.

[29] *Id.*

[30] *Id.*

[31] *See* GETCO Letter, at 3, Newedge Letter, at 5, BlackRock Letter, at 2, and Knight Letter, at 2.

market when they thought they had a hedged position.[32] As one commenter stated, "[t]his uncertainty is even more problematic during periods of heightened volatility in the markets, when liquidity may be reduced as some market participants limit their trading until they are able to determine their positions, or volatility may increase further because of speculative hedging in an attempt to protect unknown positions."[33] These commenters believed that a price adjustment process would substantially reduce the uncertainty created by the potential for broken trades, and thus would be a better way to address erroneous executions.[34]

Other commenters urged alternatives to clearly erroneous execution rules. For example, one commenter believed that the proposed rule would "provide market participants more certainty as to whether or not their trades will stand in the event of market volatility," but urged the Commission to move to a "futures-style limit up/down functionality" as a better alternative to the circuit breaker trading halt approach.[35] This commenter argued that the limit up/limit down approach "would virtually eliminate clearly erroneous trades."[36] Another commenter also believed that the Commission should consider a "limit up/limit down approach or hybrid approach."[37] Other commenters suggested alternative procedures, systems or rules to prevent erroneous trades from occurring, such as by rejecting orders that are materially away from the market.[38]

The Commission appreciates the suggestions offered by these commenters to make more fundamental changes to the way in which FINRA addresses clearly erroneous executions. In the coming months, the Commission expects to continue to work with the markets and market participants on ways to reduce the occurrence of erroneous trades and improve the method by which they are resolved, as well as on enhancements to the mechanisms for addressing excessive market volatility, such as those that currently are reflected in the single-stock circuit breaker pilot. As noted above, however, the Commission believes that the proposed rule change represents a productive first step by FINRA in bringing greater clarity and transparency to the process for breaking clearly erroneous trades, and that these improvements should not be delayed pending consideration of more far-reaching initiatives.

C. Other Comments

One commenter was concerned that the proposed rule change was not clear as to how news or information regarding the review and cancellation of clearly erroneous trades would be disseminated to the markets.[39] This commenter believed that the proposed rule should require FINRA to disseminate this information quickly and in a non-discriminatory fashion to market participants in order to minimize the market impact and not favor any one group of market participants over another.[40] In its response letter with respect to its proposal, BATS stated that it e-mails members with respect to clearly erroneous reviews and determinations according to a consistent and well established protocol that, according to BATS, strikes an appropriate balance between notifying members of significant market events and avoiding notifications every time a transaction is reviewed as potentially clearly erroneous.[41] In addition, BATS believes that the existing requirement that an SRO promptly notify affected members of clearly erroneous reviews and determinations is sufficient.[42] BATS also stated that communication between the exchanges and members should remain flexible as such methods are constantly changing.[43] BATS indicated that it is not aware of discrimination amongst participants with respect to the dissemination of information in relation to clearly erroneous reviews and believes that the "anti-discrimination requirements of the Act would sufficiently restrain" discrimination.[44]

Another commenter believed that the Commission should require FINRA to clarify the application of the clearly erroneous execution rule when an event causes the price to cross to a different specified percentage threshold for breaking trades. Specifically, the commenter asked, "if a market decline triggers the CEE rules intra-day with respect to a stock that was priced at $25.01, so the CEE price is below $25, the proposed amendments do not explain at what price trading would be calculated for the next application of the CEE rules. Would it be at 5 percent for stocks between $25 and $50 or 10 percent for stocks priced less than $25?"[45] That commenter also expressed concern that the proposed rule change might provide an opportunity for market participants to manipulate events involving multiple stocks that are not subject to the single-stock circuit breakers. This might occur, for example, when an event subject to a 10% threshold (*e.g.,* involving 20 securities) could be forced into the 30% threshold category (*e.g.,* by manipulating the 21st security and causing an erroneous trade), by a market participant seeking the flexibility to trade at wider spreads with respect to all impacted securities.[46]

Another commenter noted that, when an individual stock trading pause is triggered, trades will be broken at specified percentages away from the Trading Pause Trigger Price.[47] According to this commenter, this calculation "has the practical effect of doubling the clearly erroneous price window for most U.S. equity securities and is a significant expansion of the window for certain securities."[48] This commenter suggested using more conservative parameters such as the greater of 2% or $0.05 from the Trading Pause Trigger Price or, alternatively, using the Trading Pause Trigger Price, in addition to a comparison to the last sale, as part of an analysis for clearly erroneous trades."[49] This commenter also favored providing FINRA discretion to break trades after the deadlines specified in its rule in extraordinary circumstances.[50]

With respect to the dissemination of information regarding the review and resolution of clearly erroneous trades, the Commission understands that the practice of FINRA is to promptly notify participants that specified trades are under review and, once that review is complete, to describe the resolution thereof. Although the Commission believes prompt communication by e-mail, phone, website or otherwise concerning erroneous trade reviews should generally assure dissemination in a non-discriminatory fashion, as noted above, it intends to continue to work with FINRA on additional ways to

[32] *Id.*

[33] *See* GETCO Letter, at 3.

[34] *See* GETCO Letter, at 3, Newedge Letter, at 5, BlackRock Letter, at 2, and Knight Letter, at 2.

[35] *See* GETCO Letter, at 2–3.

[36] *See* GETCO Letter, at 3.

[37] *See* SIFMA Letter, at 2.

[38] *See* FIF Letter, at 2, Wellington Letter, at 2–4, and SIFMA Letter, at 2. *See also* CSS Letter, at 2 (suggesting that circuit breakers for individual stocks based off of a percentage change from the previous day's closing price (or the opening price to allow for the dissemination of overnight news) would eliminate the need for erroneous trade rules).

[39] *See* Newedge Letter, at 6.

[40] *Id.*

[41] *See* BATS Letter, at 2.

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *See* ICI Letter, at 3.

[46] *Id.*

[47] *See* SIFMA Letter, at 2–3.

[48] *Id.*

[49] *Id.*

[50] *Id.*

improve the transparency of this process.

With respect to an event that causes the price to cross to a different specified percentage threshold for breaking trades, the Commission believes that the proposal is sufficiently clear regarding the applicability of the new rule. As to the specific example provided by the commenter, under the proposed rule, if a stock triggers a trading pause, the Trading Pause Trigger Price would be used as the Reference Price. The Trading Pause Trigger Price is calculated by the listing market over a rolling five minute period. If the Trading Pause Trigger Price is calculated at a level below $25.00, as identified in the example, then the 10% threshold would apply to clearly erroneous execution reviews of the Trigger Trade and other transactions that occur immediately after a Trigger Trade but before the trading pause is fully implemented across markets. If another series of transactions trigger a second trading pause, the review process set forth in the rule would be repeated and a new Reference Price would be calculated to determine the appropriate percentage threshold.

With respect to the potential for market participants to engage in manipulation in order to achieve a higher trade break percentage threshold, the Commission emphasizes that it will vigorously pursue instances of illegal market manipulation. In addition, during the pilot period, the Commission will work with FINRA to review the operation of the amended rule, and make improvements as warranted, including if it appears the selected percentage thresholds create distortions or incent improper or illegal behavior.

With respect to the chosen parameters, the Commission notes that the parameters that were selected were the product of a coordinated and deliberate effort by FINRA and the Exchanges to improve the handling of clearly erroneous trades. Regarding the specific comment expressing concern that breaking trades only when they are 10%, 5% or 3% away from the Trading Pause Trigger Price has the practical effect of doubling the trading pause parameters, the Commission notes that, as an initial matter, implementation of the individual stock trading pause should prevent most trades from occurring at prices outside of the Trading Pause Trigger Price. To the extent trades occur outside of such price before the trading pause is fully applied across all markets, the Commission believes that it is appropriate to break these "leakage" trades only when they are a meaningful percentage away from the Trading Pause Trigger Price. This is consistent with the traditional approach of the Exchanges and FINRA to take the more extreme step of breaking a trade only in cases where it occurs at a price sufficiently away from the current market price that the parties should have been on notice it may be "clearly erroneous." Of course, the pilot program may indicate that different parameters are better to accomplish the stated goals. If so, the parameters could be changed as part of the overall initiative. The Commission will further study and consider the examples and suggestions offered by the commenters during the pilot period.

D. Commission Findings

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to FINRA. In particular, the Commission finds that the proposed rule change is consistent with the requirements of Section 15A(b)(6) of the Act,[51] which, among other things, requires that the rules of FINRA be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and in general, to protect investors and the public interest.

In the Commission's view, the proposed rule change will help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed rule change also should help assure consistent results in handling erroneous trades across the U.S. markets, thus furthering fair and orderly markets, the protection of investors and the public interest. Finally, the Commission notes that the proposed rule change is being implemented on a pilot basis so that the Commission and FINRA can monitor the effects of the pilot on the markets and investors, and consider appropriate adjustments, as necessary.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[52] that the proposed rule change (SR–FINRA–2010–032), be, and hereby is, approved.

[51] 15 U.S.C. 78*o*–3(b)(6).

[52] 15 U.S.C. 78s(b)(2).

By the Commission.

Elizabeth M. Murphy,

Secretary.

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DEPARTMENT OF STATE

[Public Notice 7173]

Bureau of Educational and Cultural Affairs (ECA) Request for Grant Proposals: Study of the United States Institutes for Scholars and Secondary Educators

Announcement Type: New Cooperative Agreement.

Funding Opportunity Number: ECA/A/E/USS–11–05–09.

Catalog of Federal Domestic Assistance Number: 19.401.

Key Dates:

Application Deadline: October 27, 2010.

Executive Summary: The Branch for the Study of the United States, Office of Academic Exchange Programs, Bureau of Educational and Cultural Affairs, invites proposal submissions for the design and implementation of five different Study of the United States Institutes to take place over the course of six weeks beginning in June 2011, pending the availability of funds. These Institutes should provide a multinational group of experienced educators with a deeper understanding of U.S. society, culture, values, and institutions.

Four of these Institutes will be for groups of 18 foreign university level faculty, focusing on American Politics and Political Thought, Contemporary American Literature, Religious Pluralism in the United States, and U.S. Foreign Policy. The fifth Institute will be a general survey course on the study of the United States for a group of 30 foreign secondary educators.

Applicants may propose to submit one proposal to host only one Institute listed under this competition. Should an applicant submit multiple proposals under this competition, all proposals will be declared technically ineligible and given no further consideration in the review process.

I. Funding Opportunity Description

Authority

Overall grant making authority for this program is contained in the Mutual Educational and Cultural Exchange Act of 1961, Public Law 87–256, as amended, also known as the Fulbright-Hays Act. The purpose of the Act is "to enable the Government of the United

States to increase mutual understanding between the people of the United States and the people of other countries * * *; to strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments, and achievements of the people of the United States and other nations * * * and thus to assist in the development of friendly, sympathetic and peaceful relations between the United States and the other countries of the world." The funding authority for the program above is provided through legislation.

Purpose: Study of the United States Institutes are intensive academic programs whose purpose is to provide foreign university faculty, secondary educators, and other scholars the opportunity to deepen their understanding of American society, culture, and institutions. The ultimate goal is to strengthen curricula and to improve the quality of teaching about the United States in academic institutions abroad.

The Bureau is seeking detailed proposals for five different Study of the United States Institutes. Applications may be submitted by public and private U.S. colleges, universities, and other not-for-profit academic organizations that have an established reputation in a field or discipline related to the specific program theme, and which meet the provisions described in Internal Revenue Code section 26 U.S.C. 501(c)(3).

Overview: Each program should be six weeks in length; participants will spend approximately four weeks at the host institution, and approximately two weeks on an educational study tour, including four to five days in Washington, DC, at the conclusion of the Institute. The educational travel component should directly complement the academic program, and should include visits to cities and other sites of interest in the region around the recipient institution, as well as to another geographic region of the country. The recipient institution also will be expected to provide participants with guidance and resources for further investigation and research on the topics and issues examined during the Institute after they return home.

The Study of the United States Institute on American Politics and Political Thought should provide a multinational group of 18 experienced foreign university faculty and practitioners with a deeper understanding of U.S. political institutions and major currents in American political thought. The Institute should provide the foreign participants insight into how intellectual and political movements have influenced modern American political institutions. The Institute should provide an overview of political thought during the founding period (constitutional foundations), and the development and current functioning of the American presidency, Congress, and the federal judiciary. The examination of political institutions might be expanded to include the electoral system, political parties and interest groups, the civil service system, media and think tanks, or the welfare/regulatory state. The Institute should address modern political and cultural issues in the United States (including but not limited to civil rights, women's rights, immigration, *etc.*), and the significance of public discourse in the formulation of public policy. One award of up to $290,000 will support this Institute.

The Study of the United States Institute on Contemporary American Literature should provide a multinational group of up to 18 experienced foreign university faculty and practitioners with a deeper understanding of U.S. society and culture, past and present, through an examination of contemporary American literature. Its purpose is twofold: (1) To explore contemporary American writers and writing in a variety of genres; and (2) to suggest how the themes explored in those works reflect larger currents within contemporary American society and culture. The program should explore the diversity of the American literary landscape, examining how major contemporary writers, schools and movements reflect the traditions of the American literary canon. At the same time, the Institute should expose participants to writers who represent a departure from that tradition, and who are establishing new directions for American literature. One award of up to $290,000 will support this Institute.

The Study of the United States Institute on Religious Pluralism in the United States should provide a multinational group of up to 18 experienced foreign university faculty and practitioners with a deeper understanding of U.S. society and culture, past and present, through an examination of religious pluralism in the United States and its intersection with American democracy. Employing a multi-disciplinary approach, drawing on fields such as history, political science, sociology, anthropology, law and others where appropriate, the program should explore both the historical and contemporary relationship between church and state in the United States; examine the ways in which religious thought and practice have influenced, and been influenced by, the development of American-style democracy; examine the intersections of religion and politics in the United States in such areas as elections, public policy, and foreign policy; and explore the sociology and demography of religion in the United States today, including a survey of the diversity of contemporary religious beliefs and its impact on American politics. One award of up to $290,000 will support this Institute.

The Study of the U.S. Institute on U.S. Foreign Policy should provide a multinational group of 18 experienced foreign university faculty and practitioners with a deeper understanding of how U.S. foreign policy is formulated and implemented with an emphasis on the post Cold War period. This Institute should begin with a review of the historical development of U.S. foreign policy and cover significant events, individuals, and philosophies that have dominated U.S. foreign policy. In addition, the Institute should explain the role of key players in the field of foreign policy including the executive and legislative branches, the media, public opinion, think-tanks, non-governmental and international organizations and how these players debate, cooperate, influence policy, and are held accountable. Regional sessions, for the entire group, highlighting salient topics such as energy security and environmental policy in Europe; trade and human rights issues in Asia; foreign aid and humanitarian assistance in Africa; drug trafficking and immigration issues for the Western Hemisphere; and combating terrorism in the Near East and South Asia are among the relevant issues that might be explored. In addition, sessions focusing on current issues such as nuclear disarmament, the Middle East peace process, or U.S. military actions would be appropriate. The host institution should provide a comprehensive and cohesive program, ensuring that a diversity of views is presented and remain flexible based on final composition of the participant group. One award of up to $290,000 will support this Institute.

The Study of the U.S. Institute for Secondary Educators should provide a multinational group of 30 experienced secondary school educators (teachers, teacher trainers, curriculum developers, textbook writers, or education ministry officials) with a deeper understanding of U.S. society, education, and culture—past and present. The Institute should be organized around a central theme or themes in U.S. civilization and should have a strong contemporary component.

Through a combination of traditional, multi-disciplinary, and interdisciplinary approaches, program content should be imaginatively integrated in order to elucidate the history and evolution of U.S. educational institutions and values, broadly defined. The program should also serve to illuminate contemporary political, social, and economic debates in American society. One award of up to $360,000 will support this Institute.

Program Design: Each Study of the U.S. Institute should be designed as an intensive, academically rigorous seminar for an experienced group of educators from abroad. Each Institute should be organized through an integrated series of lectures, readings, seminar discussions, and regional travel and site visits, and also should include sessions that expose participants to U.S. pedagogical philosophy and practice for teaching the discipline. Each Institute also should include some opportunity for limited but well-directed independent research. Each program should draw from a diverse disciplinary base, and should itself provide a model of how a foreign university might approach the study of United States.

Applicants are encouraged to design thematically coherent programs in ways that draw upon the particular strengths, faculty, and resources of their institutions as well as upon the nationally recognized expertise of scholars and other experts throughout the United States.

Participants: Participants will be nominated by U.S. Embassies and Fulbright Commissions from all regions of the world, with final selection made by the Bureau's Branch for the Study of the United States. Every effort will be made to select a balanced mix of male and female participants. Participants will be diverse in terms of age, professional position, and experience abroad. All participants will have a good knowledge of English.

Program Dates: The Institutes should be a maximum of 44 days in length (including participant arrival and departure days) and should begin by June 2011, pending the availability of funds.

Program Guidelines: While the conception and structure of the Institute agenda is the responsibility of the recipient, it is essential that proposals provide a detailed and comprehensive narrative describing the objectives of the Institute; the title, scope and content of each session; planned site visits; and how each session relates to the overall Institute theme. Proposals must include a syllabus that indicates the subject matter for each lecture, panel discussion, group presentation, or other activity. The syllabus also should confirm or provisionally identify proposed speakers, trainers, and session leaders, and clearly show how assigned readings will advance the goals of each session. Overall, proposals will be reviewed on the basis of their responsiveness to RFGP criteria, coherence, clarity, and attention to detail. The accompanying Project Objectives, Goals, and Implementation (POGI) document provides program-specific guidelines that all proposals must address fully.

Please note: In a cooperative agreement, the Branch for the Study of the United States is substantially involved in program activities above and beyond routine grant monitoring. The Branch will assume the following responsibilities for the Institute: Participate in the selection of participants; oversee the Institute through one or more site visits; debrief participants in Washington, DC at the conclusion of the Institute; and engage in follow-on communication with the participants after they return to their home countries (see POGI document for additional details). The Branch may request that the recipient make modifications to the academic residency and/or educational travel components of the program. The recipient will be required to obtain approval of significant program changes in advance of their implementation.

II. Award Information

Type of Award: Cooperative Agreement. ECA's level of involvement in this program is listed under number I above.

Fiscal Year Funds: FY 2011.

Approximate Total Funding: $1,520,000 (pending the availability of funds).

Approximate Number of Awards: Five (5).

Approximate Average Award: Four awards of $290,000 for 18 participants each; one award of $360,000 for 30 participants.

Floor of Award Range: Approximately $290,000.

Ceiling of Award Range: $360,000.

Anticipated Award Date: Pending availability of funds, February 1, 2011.

Anticipated Project Completion Date: March 2012.

Additional Information: Pending successful implementation of these programs and the availability of funds in subsequent fiscal years, it is ECA's intent to renew these cooperative agreements for two additional fiscal years before openly competing them again.

III. Eligibility Information

III.1. Eligible Applicants

Applications may be submitted by public and private U.S. colleges, universities, and other not-for-profit academic organizations that have an established reputation in a field or discipline related to the specific program theme, and which meet the provisions described in Internal Revenue Code section 26 U.S.C. 501(c)(3).

III.2. Cost Sharing or Matching Funds

There is no minimum or maximum percentage required for this competition. However, the Bureau encourages applicants to provide maximum levels of cost sharing and funding in support of its programs.

When cost sharing is offered, it is understood and agreed that the applicant must provide the amount of cost sharing as stipulated in its proposal and later included in an approved agreement. Cost sharing may be in the form of allowable direct or indirect costs. For accountability, you must maintain written records to support all costs which are claimed as your contribution, as well as costs to be paid by the Federal government. Such records are subject to audit. The basis for determining the value of cash and in-kind contributions must be in accordance with OMB Circular A–110, (Revised), Subpart C.23—Cost Sharing and Matching. In the event you do not provide the minimum amount of cost sharing as stipulated in the approved budget, ECA's contribution will be reduced in like proportion.

III.3. Other Eligibility Requirements

(a) Bureau grant guidelines require that organizations with fewer than four years experience in conducting international exchanges be limited to $60,000 in Bureau funding. ECA anticipates making five awards, four in an amount up to $290,000, and in one in an amount up to $360,000 to support the program and administrative costs required to implement this exchange program. Therefore, organizations with fewer than four years experience in conducting international exchanges are ineligible to apply under this competition. The Bureau encourages applicants to provide maximum levels of cost sharing and funding in support of its programs.

(b) Technical Eligibility: It is the Bureau's intent to award five separate cooperative agreements to five different institutions under this competition. Therefore prospective applicants may submit only one proposal under this competition. All applicants must comply with this requirement. Should an applicant submit multiple proposals under this competition, all proposals will be declared technically ineligible

and given no further consideration in the review process.

IV. Application and Submission Information

Note: Please read the complete announcement before sending inquiries or submitting proposals. Once the RFGP deadline has passed, Bureau staff may not discuss this competition with applicants until the proposal review process has been completed.

IV.1 Contact Information to Request an Application Package

Please contact the Branch for the Study of the United States, ECA/A/E/USS, Fourth Floor, U.S. Department of State, SA–5, 2200 C Street, NW., Washington, DC 20522–0504, (202) 632–3340 to request a Solicitation Package. Please refer to the Funding Opportunity Number ECA/A/E/USS–11–05–09 located at the top of this announcement when making your request.

Alternatively, an electronic application package may be obtained from grants.gov. Please see section IV.3f for further information.

The Solicitation Package contains the Proposal Submission Instruction (PSI) document which consists of required application forms, and standard guidelines for proposal preparation.

It also contains the Project Objectives, Goals, and Implementation (POGI) document, which provides specific information, award criteria, and budget instructions tailored to this competition.

Please specify Brendan M. Walsh and refer to the Funding Opportunity Number ECA/A/E/USS–11–05–09 located at the top of this announcement on all other inquiries and correspondence.

IV.2. To Download a Solicitation Package Via Internet

The entire Solicitation Package may be downloaded from the Bureau's Web site at *http://exchanges.state.gov/grants/open2.html,* or from the Grants.gov Web site at *http://www.grants.gov.*

Please read all information before downloading.

IV.3. Content and Form of Submission

Applicants must follow all instructions in the Solicitation Package. The application should be submitted per the instructions under IV.3f. "Application Deadline and Methods of Submission" section below.

IV.3a. You are required to have a Dun and Bradstreet Data Universal Numbering System (DUNS) number to apply for a grant or cooperative agreement from the U.S. Government. This number is a nine-digit identification number, which uniquely identifies business entities. Obtaining a DUNS number is easy and there is no charge. To obtain a DUNS number, access *http://www.dunandbradstreet.com* or call 1–866–705–5711. Please ensure that your DUNS number is included in the appropriate box of the SF–424 which is part of the formal application package.

IV.3b. All proposals must contain an executive summary, proposal narrative, and budget.

Please Refer to the Solicitation Package. It contains the mandatory Proposal Submission Instructions (PSI) document and the Project Objectives, Goals, and Implementation (POGI) document for additional formatting and technical requirements.

IV.3c. You must have nonprofit status with the IRS at the time of application. **Please note:** Effective January 7, 2009, all applicants for ECA federal assistance awards must include in their application the names of directors and/or senior executives (current officers, trustees, and key employees, regardless of amount of compensation). In fulfilling this requirement, applicants must submit information in one of the following ways:

(1) Those who file Internal Revenue Service Form 990, "Return of Organization Exempt From Income Tax," must include a copy of relevant portions of this form.

(2) Those who do not file IRS Form 990 must submit information above in the format of their choice.

In addition to final program reporting requirements, award recipients will also be required to submit a one-page document, derived from their program reports, listing and describing their grant activities. For award recipients, the names of directors and/or senior executives (current officers, trustees, and key employees), as well as the one-page description of grant activities, will be transmitted by the State Department to OMB, along with other information required by the Federal Funding Accountability and Transparency Act (FFATA), and will be made available to the public by the Office of Management and Budget on its USASpending.gov Web site as part of ECA's FFATA reporting requirements.

If your organization is a private nonprofit which has not received a grant or cooperative agreement from ECA in the past three years, or if your organization received nonprofit status from the IRS within the past four years, you must submit the necessary documentation to verify nonprofit status as directed in the PSI document. Failure to do so will cause your proposal to be declared technically ineligible.

IV.3d. Please take into consideration the following information when preparing your proposal narrative:

IV.3d.1. Adherence to All Regulations Governing the J Visa. The Bureau of Educational and Cultural Affairs places critically important emphases on the security and proper administration of the Exchange Visitor (J visa) Programs and adherence by award recipients and sponsors to all regulations governing the J visa. Therefore, proposals should demonstrate the applicant's capacity to meet all requirements governing the administration of the Exchange Visitor Programs as set forth in 22 CFR part 62, including the oversight of Responsible Officers and Alternate Responsible Officers, screening and selection of program participants, provision of pre-arrival information and orientation to participants, monitoring of participants, proper maintenance and security of forms, record-keeping, reporting and other requirements.

ECA will be responsible for issuing DS–2019 forms to participants in this program.

A copy of the complete regulations governing the administration of Exchange Visitor (J) programs is available at *http://exchanges.state.gov* or from: Office of Designation, Private Sector Programs Division, U.S. Department of State, ECA/EC/D/PS, SA–5, 5th Floor, 2200 C Street, NW., Washington, DC 20522–0505.

Please refer to Solicitation Package for further information.

IV.3d.2. Diversity, Freedom and Democracy Guidelines. Pursuant to the Bureau's authorizing legislation, programs must maintain a non-political character and should be balanced and representative of the diversity of American political, social, and cultural life. "Diversity" should be interpreted in the broadest sense and encompass differences including, but not limited to ethnicity, race, gender, religion, geographic location, socio-economic status, and disabilities. Applicants are strongly encouraged to adhere to the advancement of this principle both in program administration and in program content. Please refer to the review criteria under the 'Support for Diversity' section for specific suggestions on incorporating diversity into your proposal. Public Law 104–319 provides that "in carrying out programs of educational and cultural exchange in countries whose people do not fully enjoy freedom and democracy," the Bureau "shall take appropriate steps to provide opportunities for participation in such programs to human rights and

democracy leaders of such countries." Public Law 106–113 requires that the governments of the countries described above do not have inappropriate influence in the selection process. Proposals should reflect advancement of these goals in their program contents, to the full extent deemed feasible.

IV.3d.3. Program Monitoring and Evaluation. Proposals must include a plan to monitor and evaluate the project's success, both as the activities unfold and at the end of the program. The Bureau recommends that your proposal include a draft survey questionnaire or other technique plus a description of a methodology to use to link outcomes to original project objectives. The Bureau expects that the recipient organization will track participants or partners and be able to respond to key evaluation questions, including satisfaction with the program, learning as a result of the program, changes in behavior as a result of the program, and effects of the program on institutions (institutions in which participants work or partner institutions). The evaluation plan should include indicators that measure gains in mutual understanding as well as substantive knowledge.

Successful monitoring and evaluation depend heavily on setting clear goals and outcomes at the outset of a program. Your evaluation plan should include a description of your project's objectives, your anticipated project outcomes, and how and when you intend to measure these outcomes (performance indicators). The more that outcomes are "smart" (specific, measurable, attainable, results-oriented, and placed in a reasonable time frame), the easier it will be to conduct the evaluation. You should also show how your project objectives link to the goals of the program described in this RFGP.

Your monitoring and evaluation plan should clearly distinguish between program *outputs* and *outcomes*. *Outputs* are products and services delivered, often stated as an amount. Output information is important to show the scope or size of project activities, but it cannot substitute for information about progress towards outcomes or the results achieved. Examples of outputs include the number of people trained or the number of seminars conducted. *Outcomes,* in contrast, represent specific results a project is intended to achieve and is usually measured as an extent of change. Findings on outputs and outcomes should both be reported, but the focus should be on outcomes.

We encourage you to assess the following four levels of outcomes, as they relate to the program goals set out in the RFGP (listed here in increasing order of importance):

1. Participant satisfaction with the program and exchange experience.
2. Participant learning, such as increased knowledge, aptitude, skills, and changed understanding and attitude. Learning includes both substantive (subject-specific) learning and mutual understanding.
3. Participant behavior, concrete actions to apply knowledge in work or community; greater participation and responsibility in civic organizations; interpretation and explanation of experiences and new knowledge gained; continued contacts between participants, community members, and others.
4. Institutional changes, such as increased collaboration and partnerships, policy reforms, new programming, and organizational improvements.

Please note: Consideration should be given to the appropriate timing of data collection for each level of outcome. For example, satisfaction is usually captured as a short-term outcome, whereas behavior and institutional changes are normally considered longer-term outcomes.

Overall, the quality of your monitoring and evaluation plan will be judged on how well it (1) specifies intended outcomes; (2) gives clear descriptions of how each outcome will be measured; (3) identifies when particular outcomes will be measured; and (4) provides a clear description of the data collection strategies for each outcome (i.e., surveys, interviews, or focus groups). (Please note that evaluation plans that deal only with the first level of outcomes [satisfaction] will be deemed less competitive under the present evaluation criteria.)

Recipient organizations will be required to provide reports analyzing their evaluation findings to the Bureau in their regular program reports. All data collected, including survey responses and contact information, must be maintained for a minimum of three years and provided to the Bureau upon request.

IV.3e. Please take the following information into consideration when preparing your budget:

IV.3e.1. Applicants must submit SF–424A—"Budget Information—Non-Construction Programs" along with a comprehensive budget for the entire program. Budget requests for either of the two scholar institutes may not exceed $290,000, and administrative costs should be no more than approximately $95,000. Budget requests for the Institute for Secondary Educators may not exceed $360,000, and administrative costs should be no more than approximately $110,000. There must be a summary budget as well as breakdowns reflecting both administrative and program budgets. Applicants may provide separate sub-budgets for each program component, phase, location, or activity to provide clarification.

IV.3e.2. Allowable costs for the program include the following:

(1) Institute staff salary and benefits;
(2) Participant housing and meals;
(3) Participant travel and per diem;
(4) Textbooks, educational materials, and admissions fees;
(5) Honoraria for guest speakers;
(6) Follow-on programming for alumni of Study of the United States programs.

Please refer to the Solicitation Package for complete budget guidelines and formatting instructions.

IV.3f. Application Deadline and Methods of Submission:

Application Deadline Date: October 27, 2010.

Reference Number: ECA/A/E/USS–11–05–09.

Methods of Submission:

Applications may be submitted in one of two ways:

(1) In hard-copy, via a nationally recognized overnight delivery service (*i.e.,* Federal Express, UPS, Airborne Express, or U.S. Postal Service Express Overnight Mail, *etc.*), or

(2) Electronically through *http://www.grants.gov.*

Along with the Project Title, all applicants must enter the above Reference Number in Box 11 on the SF–424 contained in the mandatory Proposal Submission Instructions (PSI) of the solicitation document.

IV.3f.1. Submitting Printed Applications. Applications must be shipped no later than the above deadline. Delivery services used by applicants must have in-place, centralized shipping identification and tracking systems that may be accessed via the Internet and delivery people who are identifiable by commonly recognized uniforms and delivery vehicles. Proposals shipped on or before the above deadline but received at ECA more than seven days after the deadline will be ineligible for further consideration under this competition. Proposals shipped after the established deadlines are ineligible for consideration under this competition. ECA will not notify you upon receipt of application. It is each applicant's responsibility to ensure that each package is marked with a legible tracking number and to monitor/confirm delivery to ECA via the Internet.

Delivery of proposal packages may not be made via local courier service or in person for this competition. Faxed documents will not be accepted at any time. Only proposals submitted as stated above will be considered.

Important note: When preparing your submission please make sure to include one extra copy of the completed SF–424 form and place it in an envelope addressed to "ECA/EX/PM".

The original and six (6) copies of the application should be sent to: Program Management Division, ECA–IIP/EX/PM, Ref.: ECA/A/E/USS–11–05–09, SA–5, Floor 4, Department of State, 2200 C Street, NW., Washington, DC 20522–0504.

IV.3f.2. Submitting Electronic Applications. Applicants have the option of submitting proposals electronically through Grants.gov (*http://www.grants.gov*). Complete solicitation packages are available at Grants.gov in the "Find" portion of the system.

Please Note: ECA bears no responsibility for applicant timeliness of submission or data errors resulting from transmission or conversion processes for proposals submitted via Grants.gov.

Please follow the instructions available in the 'Get Started' portion of the site (*http://www.grants.gov/GetStarted*).

Several of the steps in the Grants.gov registration process could take several weeks. Therefore, applicants should check with appropriate staff within their organizations immediately after reviewing this RFGP to confirm or determine their registration status with Grants.gov.

Once registered, the amount of time it can take to upload an application will vary depending on a variety of factors including the size of the application and the speed of your internet connection. In addition, validation of an electronic submission via Grants.gov can take up to two business days.

Therefore, we strongly recommend that you not wait until the application deadline to begin the submission process through Grants.gov.

The Grants.gov Web site includes extensive information on all phases/aspects of the Grants.gov process, including an extensive section on frequently asked questions, located under the "For Applicants" section of the Web site. ECA strongly recommends that all potential applicants review thoroughly the Grants.gov Web site, well in advance of submitting a proposal through the Grants.gov system. ECA bears no responsibility for data errors resulting from transmission or conversion processes.

Direct all questions regarding Grants.gov registration and submission to: Grants.gov Customer Support.

Contact Center Phone: 800–518–4726.

Business Hours: Monday–Friday, 7 a.m.–9 p.m. Eastern Time.

E-mail: support@grants.gov.

Applicants have until midnight (12 a.m.), Washington, DC time of the closing date to ensure that their entire application has been uploaded to the Grants.gov site. There are no exceptions to the above deadline. Applications uploaded to the site after midnight of the application deadline date will be automatically rejected by the grants.gov system, and will be technically ineligible.

Please refer to the Grants.gov Web site, for definitions of various "application statuses" and the difference between a submission receipt and a submission validation. Applicants will receive a validation e-mail from grants.gov upon the successful submission of an application. Again, validation of an electronic submission via Grants.gov can take up to two business days. Therefore, we strongly recommend that you not wait until the application deadline to begin the submission process through Grants.gov. ECA will not notify you upon receipt of electronic applications.

It is the responsibility of all applicants submitting proposals via the Grants.gov web portal to ensure that proposals have been received by Grants.gov in their entirety, and ECA bears no responsibility for data errors resulting from transmission or conversion processes.

Optional—IV.3f.3. You may also state here any limitations on the number of applications that an applicant may submit and make it clear whether the limitation is on the submitting organization, individual program director or both.

IV.3g. Intergovernmental Review of Applications: Executive Order 12372 does not apply to this program.

V. Application Review Information

V.1. Review Process

The Bureau will review all proposals for technical eligibility. Proposals will be deemed ineligible if they do not fully adhere to the guidelines stated herein and in the Solicitation Package. All eligible proposals will be reviewed by the program office, as well as the Public Diplomacy section overseas, where appropriate. Eligible proposals will be subject to compliance with Federal and Bureau regulations and guidelines and forwarded to Bureau grant panels for advisory review. Proposals may also be reviewed by the Office of the Legal Adviser or by other Department elements. Final funding decisions are at the discretion of the Department of State's Assistant Secretary for Educational and Cultural Affairs. Final technical authority for cooperative agreements resides with the Bureau's Grants Officer.

Technically eligible applications will be competitively reviewed according to the criteria stated below. These criteria are not rank ordered and all carry equal weight in the proposal evaluation:

1. *Quality of Program Plan and Ability to Achieve Program Objectives:* Proposals should exhibit originality, substance, precision, and relevance to the Bureau's mission. A detailed agenda and relevant work plan should demonstrate substantive undertakings and logistical capacity. Objectives should be reasonable, feasible, and flexible. Proposals should demonstrate clearly how the institution will meet the program's objectives and plan.

2. *Support for Diversity:* Proposals should demonstrate substantive support of the Bureau's policy on diversity. Achievable and relevant features should be cited in both program administration (program venue and program evaluation) and program content (orientation and wrap-up sessions, program meetings, presenters, and resource materials).

3. *Evaluation:* Proposals should include a plan to evaluate the activity's success, both as the activities unfold and at the end of the program. A draft survey questionnaire or other technique plus a description of a methodology to use to link outcomes to original project objectives is strongly recommended.

4. *Cost-effectiveness/Cost-sharing:* The overhead and administrative components of the proposal, including salaries and honoraria, should be kept as low as possible. All other items should be necessary and appropriate. Proposals should maximize cost-sharing through other private sector support, as well as institutional direct funding contributions.

5. *Institutional Track Record/Ability:* Proposals should demonstrate an institutional record of successful exchange programs, including responsible fiscal management and full compliance with all reporting requirements for past Bureau grants as determined by Bureau Grants Staff. The Bureau will consider the past performance of prior recipients and the demonstrated potential of new applicants. Proposed personnel and

institutional resources should be fully qualified to achieve the project's goals.

6. *Follow-up and Follow-on Activities:* Proposals should discuss provisions made for follow-up with returned participants as a means of establishing longer-term individual and institutional linkages. Proposals also should provide a plan for continued follow-on activity (without Bureau support) ensuring that Bureau supported programs are not isolated events.

VI. Award Administration Information

VI.1a. Award Notices

Final awards cannot be made until funds have been appropriated by Congress, allocated and committed through internal Bureau procedures. Successful applicants will receive a Federal Assistance Award (FAA) from the Bureau's Grants Office. The FAA and the original proposal with subsequent modifications (if applicable) shall be the only binding authorizing document between the recipient and the U.S. Government. The FAA will be signed by an authorized Grants Officer, and mailed to the recipient's responsible officer identified in the application.

Unsuccessful applicants will receive notification of the results of the application review from the ECA program office coordinating this competition.

VI.2 Administrative and National Policy Requirements

Terms and Conditions for the Administration of ECA agreements include the following:

Office of Management and Budget Circular A–122, "Cost Principles for Nonprofit Organizations."

Office of Management and Budget Circular A–21, "Cost Principles for Educational Institutions."

OMB Circular A–87, "Cost Principles for State, Local and Indian Governments."

OMB Circular No. A–110 (Revised), Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and other Nonprofit Organizations.

OMB Circular No. A–102, Uniform Administrative Requirements for Grants-in-Aid to State and Local Governments.

OMB Circular No. A–133, Audits of States, Local Government, and Non-profit Organizations.

Please reference the following Web sites for additional information: *http://www.whitehouse.gov/omb/grants; http://fa.statebuy.state.gov.*

VI.3. Reporting Requirements

You must provide ECA with a hard copy original plus one copy of the following reports:

Mandatory:

(1) A final program and financial report no more than 90 days after the expiration of the award;

(2) A concise, one-page final program report summarizing program outcomes no more than 90 days after the expiration of the award. This one-page report will be transmitted to OMB, and be made available to the public via OMB's USAspending.gov Web site—as part of ECA's Federal Funding Accountability and Transparency Act (FFATA) reporting requirements.

(3) A SF–PPR, "Performance Progress Report" Cover Sheet with all program reports.

Award recipients will be required to provide reports analyzing their evaluation findings to the Bureau in their regular program reports. (Please refer to IV. Application and Submission Instructions (IV.3.d.3) above for Program Monitoring and Evaluation information.)

All data collected, including survey responses and contact information, must be maintained for a minimum of three years and provided to the Bureau upon request.

All reports must be sent to the ECA Grants Officer and ECA Program Officer listed in the final assistance award document.

VII. Agency Contacts

For questions about this announcement, contact: Brendan M. Walsh, U.S. Department of State, Branch for the Study of the United States, ECA/A/E/USS, SA–5, Fourth Floor, ECA/A/E/USS–11–05–09, 2200 C Street, NW., Washington, DC 20522–0503, (202) 632–3340, *WalshBM@state.gov.*

All correspondence with the Bureau concerning this RFGP should reference the above title and number ECA/A/E/USS–11–05–09.

Please read the complete announcement before sending inquiries or submitting proposals. Once the RFGP deadline has passed, Bureau staff may not discuss this competition with applicants until the proposal review process has been completed.

VIII. Other Information

Notice

The terms and conditions published in this RFGP are binding and may not be modified by any Bureau representative. Explanatory information provided by the Bureau that contradicts published language will not be binding. Issuance of the RFGP does not constitute an award commitment on the part of the Government. The Bureau reserves the right to reduce, revise, or increase proposal budgets in accordance with the needs of the program and the availability of funds. Awards made will be subject to periodic reporting and evaluation requirements per section VI.3 above.

Dated: September 9, 2010.

Ann Stock,

Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. 2010–23145 Filed 9–15–10; 8:45 am]

BILLING CODE 4710–05–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Notice of Cancellation of Meeting of the Chairs of the Industry Trade Advisory Committee (ITACs)

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of meeting cancellation.

SUMMARY: A notice was published in the **Federal Register** dated September 7, 2010, Volume 75, No. 172, Page 54416, announcing a meeting of the Industry Trade Advisory Committee Chairs (ITACs), scheduled for September 17, 2010, from 10 a.m. to 12 noon. The meeting was to be closed to the public from 10 a.m. to 10:45 a.m. and open to the public from 11 a.m. to 12 noon. However, the meeting has been postponed. The new time and additional details will be provided in a later **Federal Register** announcement.

FOR FURTHER INFORMATION CONTACT: Ingrid Mitchem, DFO at (202) 482–3269, Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC.

Myesha Ward,

Assistant U.S. Trade Representative for Intergovernmental Affairs and Public Liaison.

[FR Doc. 2010–23146 Filed 9–15–10; 8:45 am]

BILLING CODE 3190–W0–P

DEPARTMENT OF TRANSPORTATION

ITS Joint Program Office; Trucking Industry Mobility & Technology Coalition Annual Meeting

AGENCY: Research and Innovative Technology Administration, U.S. Department of Transportation.

ACTION: Notice.

The Trucking Industry Mobility & Technology Coalition (TIMTC) Annual

Meeting will be held October 18–19, 2010 in conjunction with ATA's Management Conference & Exhibition in Phoenix, providing TIMTC members with the opportunity to participate in both events simultaneously. TIMTC is a U.S. DOT-sponsored forum for public and private sector stakeholders that are focused on the latest in truck technology and productivity initiatives. TIMTC members will convene in Phoenix this October for business and educational meetings focused on today's top issues including: Truck IntelliDrive: Beating Gridlock with a Smart Grid; U.S. DOT Truck Technology Initiatives; and State and Federal Reauthorization Objectives.

Confirmed speakers include: Anne Ferro, FMCSA Administrator; Jeff Lindley, FHWA Associate Administrator for Operations; Allen Biehler, Secretary of Transportation, Commonwealth of Pennsylvania; David Parker, Senior Legal Counsel, Great West Casualty; and other top industry executives.

For more information and your free registration for the TIMTC Annual Meeting, please contact Carla Schulz at 770–432–0628 or *TIMTC@trucking.org.* Not yet a member of TIMTC? Membership is free and provides the latest information and updates on trucking industry initiatives that improve the industry's safety and mobility. Send your contact information to *TIMTC@trucking.org* to receive your free membership.

Issued in Washington, DC, on the 9th day of September 2010.

John Augustine,

Managing Director, ITS Joint Program Office.

[FR Doc. 2010–22962 Filed 9–15–10; 8:45 am]

BILLING CODE 4910–HY–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Supplemental Draft Environmental Impact Statement (SDEIS) for Northwest I–75/I–575 Corridor, Cobb and Cherokee Counties, GA (Atlanta Metropolitan Area)

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of availability.

SUMMARY: In compliance with the National Environmental Policy Act of 1969, as amended, the FHWA, in cooperation with the Georgia Department of Transportation (GDOT), have jointly prepared a Supplemental Draft Environmental Impact Statement (SDEIS) for proposed transportation improvements in the I–75 and I–575 corridors. The proposed project is located in Cobb and Cherokee Counties, Georgia. The SDEIS identifies build and no-build alternatives and associated environmental impacts. Interested citizens are invited to review the SDEIS and submit comments. Copies of the SDEIS may be obtained by telephoning or writing the contact person listed below under **ADDRESSES**. The SDEIS and all supporting technical documentation may be reviewed on the project Web site at *http://www.nwcproject.com.* Reading copies of the SDEIS are available at the locations listed under **SUPPLEMENTARY INFORMATION**.

DATES: The public review period will begin on September 17, 2010, and conclude on November 3, 2010. Written comments on the alternatives and impacts to be considered must be received by GDOT by November 3, 2010. Two public hearings to receive comments on the SDEIS will be held in Woodstock, GA on October 21, 2010, and Marietta, GA on October 26, 2010.

ADDRESSES: Written comments on the SDEIS should be addressed to Mr. Darryl VanMeter, State Innovative Program Delivery Engineer, Georgia Department of Transportation, 600 West Peachtree Street, NW., One Georgia Center, 27th Floor, Atlanta, GA 30308. Requests for a copy of the SDEIS may be addressed to Mr. VanMeter at the address above. Please see **SUPPLEMENTARY INFORMATION** section for a listing of the available documents and formats in which they may be obtained. Copies of the Draft EIS are also available for public inspection and review. See **SUPPLEMENTARY INFORMATION** section for locations.

FOR FURTHER INFORMATION CONTACT: To request copies of the SDEIS or for additional information, contact: Mr. Darryl VanMeter, State Innovative Program Delivery Engineer, 600 West Peachtree Street, NW., One Georgia Center, 27th Floor, Atlanta, GA 30308.

SUPPLEMENTARY INFORMATION: Hearing Dates and Locations: Tuesday, October 21, 2010: Woodstock High School Cafeteria, Woodstock, GA (4 p.m.–7 p.m.), 2010 Towne Lake Hills South Drive, Woodstock, GA 30189 and Tuesday, October 26, 2010: Doubletree Hotel, Marietta Ballroom, 2055 South Park Place, Marietta, GA 30339.

Copies of the SDEIS are available in hard copy format for public inspection at: Georgia Department of Transportation, Office of Environmental Services, 600 West Peachtree Street, NW., Atlanta, GA 30308;

Georgia Department of Transportation District Six Office—500 Joe Frank Harris Parkway, Cartersville, GA 30120;

Georgia Department of Transportation District Seven—Cobb Area Engineer's Office, 1269 Kennestone Circle, Marietta, Georgia 30066;

Central Library, Cobb County Public Library System, 266 Roswell Street, Marietta, Georgia 30060;

Central Library, Atlanta-Fulton Public Library System, One Margaret Mitchell Square, Atlanta, Georgia 30303; and

Library Headquarters/R.T. Jones Memorial Library, Sequoyah Regional Library System, 116 Brown Industrial Parkway, Canton, Georgia 30114.

Background: The previous Alternatives Analysis (AA)/DEIS for the proposed improvements on the I–75 and I–575 corridors was published in May 2007 and three public hearings were held. The proposed alternatives for the DEIS included truck only lanes and a Bus Rapid Transit (BRT) system with five BRT Stations. Comments from the public, agencies, local businesses and the trucking industry indicated the desire for an approach that does not include truck only lanes or a BRT system and focuses on a more cost effective solution with a smaller footprint and fewer impacts. This SDEIS provides a detailed evaluation of such an approach. The project corridor lies within Cobb and Cherokee Counties, Georgia. This SDEIS includes a re-examination of the purpose and need, alternatives under consideration, travel demand, affected environment, environmental consequences, and mitigation measures as a result of the improvements under consideration. One Build alternative and the No-Build alternative were considered for improvements to the I–75 and I–575 corridors. The FHWA was the lead agency for the preparation of the SDEIS. The FHWA and GDOT invite interested individuals, organizations and Federal, State, and local agencies to comment on the evaluated alternatives and associated social, economic, or environmental impacts related to the alternatives.

Issued on: September 7, 2010.

Rodney N. Barry,

Division Administrator, Federal Highway Administration, Atlanta, Georgia.

[FR Doc. 2010–22958 Filed 9–15–10; 8:45 am]

BILLING CODE M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Suspension of Preparation of Environmental Impact Statement for the George Bush Intercontinental Airport, Houston, TX

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

ACTION: Notice suspending preparation of the Environmental Impact Statement (EIS) for the George Bush Intercontinental Airport (IAH).

SUMMARY: The FAA is issuing this notice to advise federal, state, and local government agencies and the public that the FAA has suspended preparation of the EIS for the proposed airport improvements at IAH. The Houston Airport System (HAS), the sponsor of the proposed project, has advised the FAA that significant changes in the aviation industry and at IAH warrant suspension of the on-going EIS in order to reevaluate development needs for the airport. HAS has determined that reevaluation of the Airport Master Plan (AMP) assumptions will provide the most current and reliable information on which to base decisions regarding future proposals for airport development.

FOR FURTHER INFORMATION CONTACT: DOT/FAA, Southwest Region, Mr. Paul Blackford, ASW–650, 2601 Meacham Boulevard, Fort Worth, TX 76137, (817) 222–5607, or e-mail at *paul.blackford@faa.gov*.

SUPPLEMENTARY INFORMATION: On April 9, 2009, the FAA issued a Notice of Intent in the **Federal Register** (74 FR 16255–16256) to prepare an EIS for proposed airfield improvements at IAH. The purpose of these proposed improvements is to increase airfield capacity and to reduce projected delays. Based on the results of the AMP, the airfield improvements being analyzed in the EIS included the proposed construction of additional runway(s) at IAH. Preparation of the EIS was undertaken by the FAA in accordance with the National Environmental Policy Act of 1969, as amended.

The FAA received a letter from HAS dated July 30, 2010 requesting that preparation of the EIS be delayed. Based on its letter, HAS believes that additional planning work is necessary to ensure that the assumptions used in the AMP remain valid. The letter points to the impacts of the potential United-Continental merger, the economic downturn, potential changes to aircraft fleet mix, and the need to update the existing terminal concept as reasons justifying their request to conduct additional planning. The FAA will issue another **Federal Register** notice when it determines that preparation of the EIS should resume.

Issued in Fort Worth, TX on September 3, 2010.

D. Cameron Bryan,

Acting Manager, Airports Division.

[FR Doc. 2010–22869 Filed 9–15–10; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35412]

Middletown & New Jersey Railroad, LLC—Lease and Operation Exemption–Norfolk Southern Railway Company

Under 49 CFR 1011.7(b)(10), the Director of the Office of Proceedings (Director) is delegated the authority to determine whether to issue notices of exemption for lease transactions under 49 U.S.C. 10902. However, the Board reserves to itself the consideration and disposition of all matters involving issues of general transportation importance. 49 CFR 1011.2(a)(6). Accordingly, the Board revokes the delegation to the Director with respect to the issuance of this notice of exemption. The Board determines that this notice of lease and operation exemption should be issued, and does so here.

Middletown & New Jersey Railroad, LLC (M&NJ), a Class III rail carrier, has filed a verified notice of exemption under 49 CFR 1150.41 to lease certain rail lines from Norfolk Southern Railway Company (NSR). In conjunction with the lease of the NSR rail lines, M&NJ states that it will also sublease connecting track owned by New York, Susquehanna & Western Railway (NYS&W) and receive incidental trackage rights. Pursuant to the Lease Agreement and other agreements, M&NJ will lease the following rail lines from NSR: (1) The Hudson Secondary located between mileposts LX 2.1 and LX 20.6 (18.5 miles in length); (2) the Walden Secondary located between mileposts DJ5.0–DJ 10.5 and WI 29.1–WI 32.9 (9.3 miles in length); (3) the Maybrook Industrial Track located between mileposts RT 1.3 and RT 7.5 (6.2 miles in length); (4) the Greycourt Industrial Track located between mileposts IL 52.5 and IL 53.4 (1.0 mile in length); and (5) the EL Connection Track located between mileposts QK 0.0 and QK 0.8 (0.8 mile in length). In conjunction with the lease of these lines, NSR is: (1) Granting M&NJ incidental overhead trackage rights over NSR's rail line located between mileposts JS 67.50 and 63.14 (4.36 miles in length); (2) subleasing to M&NJ NSR's lease operations over the connecting track owned by the NYS&W located between milepost JS 63.14, at Hudson Jct., NY, and milepost LX 2.1, at Hudson Jct. (approximately .35-miles in length); and (3) partially assigning to M&NJ all of NSR's rights under the NYS&W Trackage Rights Agreement for NYS&W's continued trackage rights operations over the Hudson Secondary track between Hudson Jct. and Warwick, NY. The Lease Agreement will expire on December 31, 2020. As required at 49 CFR 1150.43(h), M&NJ has disclosed that the Lease Agreement contains a provision that would provide for a "Lease Credit" whereby M&NJ may reduce its annual lease payments by receiving a credit for each car interchanged with NSR. M&NJ notes that NSR initially proposed a fixed rental payment with no option to reduce the rent, but M&NJ insisted on a lease credit option to provide an opportunity for M&NJ to earn a lower rental payment so it would be able to invest in improvements on the lease lines to increase traffic levels. According to M&NJ, the affected interchange point is Campbell Hall, NY.

M&NJ certifies that the projected annual revenues as a result of the proposed transaction will not result in M&NJ becoming a Class II or Class I rail carrier, and that its projected annual revenues will not exceed $5 million.

M&NJ states that it expects to consummate the transaction on or shortly after October 1, 2010, which is subsequent to 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 transaction. Petitions for stay must be filed not later than September 23, 2010 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 35412, 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 Karl Morell, Ball Janik LLP, 1455 F Street, NW., Suite 225, Washington, DC 20005.

Board decisions and notices are available at our Web site at *http://www.stb.dot.gov.*

It is ordered:

1. The delegation of authority of the Office of Proceedings, under 49 CFR 1011.7(b)(10), to determine whether to issue a notice of exemption in this proceeding is revoked.

2. This decision is effective on the date of service.

Decided: September 13, 2010.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Nottingham. Vice Chairman Mulvey dissented with a separate expression.

Vice Chairman Mulvey, dissenting:

Once again, I must disagree with the Board's decision to allow a transaction containing a significant interchange commitment to be processed under the Board's class exemption procedures at 49 CFR 1150.41. I believe that it is incumbent for the Board to take a close look at interchange commitments before permitting them to become effective, particularly when they contain outright bans on interchange with third-party carriers or, as here, economic incentives that can only be evaluated with the provision of additional information.

Here, M&NJ seeks authorization to lease or sublease approximately 36 miles from NSR. As disclosed in the M&NJ's Verified Notice of Exemption, the lease agreement contains an interchange commitment that gives M&NJ a "credit" toward its annual lease payment for every car that it interchanges with NSR at Campbell Hall, NY. But the notice of exemption and supporting documents do not explain (1) whether the "credit" is so large vis a vis the projected carloads and annual lease payment as to eliminate any incentive by M&NJ to interchange with a third-party carrier, (2) how many shippers and carloads will be impacted by the interchange commitment, (3) and what competitive routing options are being foreclosed during the term of the lease.[1] I believe that all of this information, which would be obtained through the Board's more detailed application or a petition for exemption procedures, is necessary to understand the impact of this new lease.

The trickle of transactions with interchange commitments since the Board's 2008 interchange commitment disclosure rules were adopted has turned into a steady drip.[2] Although the disclosure rules were an important first step to regulating interchange commitments, I urge my colleagues to closely scrutinize newly proposed long-term leases that will shape competition in the rail industry for years to come.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2010–23147 Filed 9–15–10; 8:45 am]

BILLING CODE 4915–01–P

[1] Indeed, M&NJ's Verified Notice of Exemption does not even indicate how long the proposed lease would be in effect. The Board has included that information in its decision.

[2] *E.g., Northern Plains R.R.—Lease Exemption—Soo Line R.R.,* FD 35382 (STB served Aug. 6, 2010) (Mulvey, dissenting); *Washington & Idaho Ry.—Lease and Operation Exemption—BNSF Ry.,* FD 35370 (STB served Apr. 23, 2010) (Mulvey, commenting). *See* disclosure rules at *Disclosure of Rail Interchange Commitments,* EP 575 (Sub-No. 1) (STB served May 29, 2008).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

RTCA NextGen Advisory Committee (NAC)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of RTCA NextGen Advisory Committee (NAC)

SUMMARY: The FAA published a Notice in the **Federal Register** on September 3, 2010 (75–FR–54221), concerning a Notice to advise the public of a meeting of RTCA NextGen Advisory Committee. The Agenda in that notice has been revised.

DATES: The meeting will be held September 23, 2010, from 8:30 a.m. to 11:30 a.m.

ADDRESSES: The meeting will be held at Bessie Coleman Room, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591. *Metro:* L'Enfant Plaza Station (Use 7th & Maryland Exit).

FOR FURTHER INFORMATION CONTACT: RTCA Secretariat, 1828 L Street, NW., Suite 805, Washington, DC 20036; telephone (202) 833–9339; fax (202) 833–9434; Web site *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: The Agenda published in the **Federal Register** Notice on September 3, 2010, (75–FR–54221) is revised to read as follows:

- Opening Plenary (Welcome and Introductions).
- Review Terms of Reference.
- Overview of NextGen—Setting the stage for Committee actions.
- RTCA Task Force 5 Recommendations.
- FAA Actions and Activities.
- Close-out ATMAC Action Items.
- Discussion of Initial Task.
- Discussion of Working Subcommittee.
- Set Meeting Dates for 2011.
- Closing Plenary (Other Business, Adjourn).

Attendance is open to the interested public but limited to space availability. With the approval of the chairmen, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on September 10, 2010.

Robert L. Bostiga,

RTCA Advisory Committee.

[FR Doc. 2010–23071 Filed 9–15–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Passenger Facility Charge (PFC) Approvals and Disapprovals

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Monthly Notice of PFC Approvals and Disapprovals. In August 2010, there were two applications approved. This notice also includes information on one application, approved in July 2010, inadvertently left off the July 2010 notice. Additionally, three approved amendments to previously approved applications are listed.

SUMMARY: The FAA publishes a monthly notice, as appropriate, of PFC approvals and disapprovals under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158). This notice is published pursuant to paragraph d of § 158.29.

PFC Applications Approved

Public Agency: Puerto Rico Ports Authority, San Juan, Puerto Rico.

Application Number: 09–06–C–00–SJC.

Application Type: Impose and use a PFC.

PFC Level: $3.00.

Total PFC Revenue Approved in This Decision: $19,713,152.

Earliest Charge Effective Date: August 1, 2031.

Estimated Charge Expiration Date: March 1, 2033.

Class of Air Carriers Not Required To Collect PFCs: None.

Brief Description of Project Approved for Collection at Luis Munoz Marin International Airport (SJU) and Use at SJU at a $3.00 PFC Level: PFC application development.

Brief Description of Projects Approved for Collection at SJU and Use at Jose Aponte de la Torre Airport at a $3.00 PFC Level:

Phase 0 construction—terminal facility.

Rehabilitation of airfield guidance signage.
Rehabilitation of taxiway lighting system.
Pavement rehabilitation of runway 7/25 and taxiways.
Airfield pavement markings.

Decision Date: July 22, 2010.

For Further Information Contact: Susan Moore, Orlando Airports District Office, (407) 812–6331.

Public Agency: Port of Bellingham, Bellingham, Washington.

Application Number: 10–11–C–00–BLI.

Application Type: Impose and use a PFC.

Total PFC Revenue Approved in This Decision: $30,250,000.

PFC Level: $4.50.

Earliest Charge Effective Date: October 1, 2010.

Estimated Charge Expiration Date: October 1, 2027.

Class of Air Carriers Not Required To Collect PFCs: None.

Brief Description of Project Approved for Collection and Use: Commercial terminal expansion.

Decision Date: August 11, 2010.

For Further Information Contact: Trang Tran, Seattle Airports District Office, (425) 227–1662.

Public Agency: City of Lubbock, Texas.

Application Number: 10–07–C–00–LBB.

Application Type: Impose and use a PFC.

Total PFC Revenue Approved in This Decision: $13,101,351.

PFC Level: $4.50.

Earliest Charge Effective Date: December 1, 2013.

Estimated Charge Expiration Date: April 1, 2020.

Classes of Air Carriers Not Required To Collect PFCs: (1) Part 135 air taxi/commercial operators filing FAA Form 1800–31; (2) commuters and small certificated air carriers filing Department of Transportation Research and Special Programs Administration (RSPA) Form T–100 for non-scheduled enplanements; and (3) large certificated route air carriers filing RSPA Form T–100 for non-scheduled enplanements.

Determination: Approved. Based on information contained in the public agency's application, the FAA has determined that each proposed class accounts for less than 1 percent of the total annual enplanements at Lubbock–Preston Smith International Airport.

Brief Description of Projects Approved for Collection and Use:

Runway 8/26 improvements—phase I

Runway 8/26 improvements—phase II.

Replace passenger loading bridges.

Decision Date: August 12, 2010.

For Further Information Contact: Steven Cooks, Texas Airports Development Office, (817) 222–5600.

Amendments to PFC Approvals:

Amendment No. City, State	Amendment approved date	Original approved net PFC revenue	Amended approved net PFC revenue	Original estimated charge exp. date	Amended estimated charge exp. date
98–05–C–05–MCO Orlando, FL	08/03/10	$119,178,876	$114,471,533	10/01/00	10/01/00
06–06–C–02–SAV Savannah, GA	08/04/10	4,480,700	4,490,100	03/01/13	03/01/13
03–04–C–03–PIH Pocatello, ID	08/10/10	294,313	302,926	04/01/08	04/01/08

Issued in Washington, DC on September 3, 2010.

Joe Hebert,

Manager, Financial Analysis and Passenger Facility Charge Branch.

[FR Doc. 2010–22959 Filed 9–15–10; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2010–0081]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel SEA SENORA.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket MARAD–2010–0081 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388 (68 FR 23084; April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

DATES: Submit comments on or before October 18, 2010.

ADDRESSES: Comments should refer to docket number MARAD–2010–0081. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov/submit/.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., *e.t.,* Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue, SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel SEA SENORA is:

Intended commercial use of vessel: "Sport Fishing Charter, Fish caught will not be sold commercially."

GEOGRAPHIC REGION: "Texas."

Privacy Act

Anyone is able to search the electronic form of all 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 DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By order of the Maritime Administrator.

Dated: September 9, 2010.

Christine Gurland,

Secretary, Maritime Administration.

[FR Doc. 2010–23136 Filed 9–15–10; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2010–0080]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel RAMBLIN ROSE.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket MARAD–2010–0080 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR Part 388 (68 FR 23084; April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR Part 388.

DATES: Submit comments on or before October 18, 2010.

ADDRESSES: Comments should refer to docket number MARAD–2010–0080. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.govhttp://smses.dot.gov/submit/.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue, SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel RAMBLIN ROSE is:

Intended Commercial Use of Vessel: "to carry passengers only."

Geographic Region: "U.S. coastal waters of Florida."

Privacy Act

Anyone is able to search the electronic form of all 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 DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

Dated: September 9, 2010.

By order of the Maritime Administrator.

Christine Gurland,

Secretary, Maritime Administration.

[FR Doc. 2010–23134 Filed 9–15–10; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8879–EX

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 8879–EX, IRS e-file Signature Authorization for Forms 720, 2290, and 8849.

DATES: Written comments should be received on or before November 15, 2010 to be assured of consideration.

ADDRESSES: Direct all written comments to Gerald J. Shields, Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for copies of the form and instructions should be directed to R. Joseph Durbala, at (202) 622–3634, or 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: IRS e-file Signature Authorization for Forms 720, 2290, and 8849.

OMB Number: 1545–2081.

Form Number: 8879–EX.

Abstract: The Form 8879–EX, IRS *e-file* Signature Authorization for Forms 720, 2990, and 8849, will be used in the Modernized e-File program. Form 8879–EX authorizes a taxpayer and an electronic return originator (ERO) to use a personal identification number (PIN) to electronically sign an electronic excise tax return and, if applicable, authorize an electronic funds withdrawal.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a previously approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 10,000.

Estimated Time per Respondent: 3 hours, 7 minutes.

Estimated Total Annual Burden Hours: 46,800.

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: September 10, 2010.

R. Joseph Durbala,

IRS Tax Analyst.

[FR Doc. 2010–23041 Filed 9–15–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for REG–159824–04

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 REG–159824–04, Regulations governing Practice Before the Internal Revenue Service.

DATES: Written comments should be received on or before November 15, 2010 to be assured of consideration.

ADDRESSES: Direct all written comments to Gerald J. Shields, 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:* Regulations governing Practice Before the Internal Revenue Service.

OMB Number: 1545–1916.

Form Number: REG–159824–04.

Abstract: This collection of information is necessary to ensure practitioners comply with minimum standards when writing a State or local bond opinion. A practitioner may provide a single opinion or may provide a combination of documents, but only if the documents, taken together, satisfy the requirements of 31 CFR 10.39. In addition, the collection of information will assist the Commissioner, through the Office of Professional Responsibility, to ensure that practitioners properly advise taxpayers regarding State or local bonds.

Current Actions: There is no change in the paperwork burden previously approved by OMB. This form is being submitted for renewal purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals and Households.

Estimated Number of Respondents: 1,500.

Estimated Time per Respondent: 2 hours.

Estimated Total Annual Burden Hours: 30,000.

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: September 7, 2010.

R. Joseph Durbala,

IRS Tax Analyst.

[FR Doc. 2010–23040 Filed 9–15–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Cognitive and Psychological Research Coordinated by Statistics of Income on Behalf of All IRS Operations Functions

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 Cognitive and Psychological Research Coordinated by Statistics of Income on Behalf of All IRS Operations Functions.

DATES: Written comments should be received on or before November 15, 2010 to be assured of consideration.

ADDRESSES: Direct all written comments to Gerald J. Shields, 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:* Cognitive and Psychological Research Coordinated by Statistics of Income on Behalf of All IRS Operations Functions.

OMB Number: 1545–1349.

Abstract: The proposed research will improve the quality of data collection by examining the psychological and cognitive aspects of methods and procedures such as: Interviewing processes, forms redesign, survey and tax collection technology and operating procedures (internal and external in nature). *Current Actions:* We will be conducting different opinion surveys, focus group sessions, think-aloud interviews, and usability studies regarding cognitive research surrounding forms submission or IRS system/product development.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals and businesses or other for-profit organizations.

Estimated Number of Respondents: 225,000.

Estimated Time per Respondent: 30 minutes.

Estimated Total Annual Burden Hours: 112,500.

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: September 7, 2010.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. 2010–23033 Filed 9–15–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[REG–209830–96]

Proposed Collection; Comment Request for Regulation Project

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 an existing final regulation, REG–209830–96 (TD 8779), Estate and Gift Tax Marital Deduction.

DATES: Written comments should be received on or before November 15, 2010 to be assured of consideration.

ADDRESSES: Direct all written comments to Gerald J. Shields, Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to R. Joseph Durbala at Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 622–3634, or through the Internet at *RJoseph.Durbala@irs.gov*.

SUPPLEMENTARY INFORMATION: *Title:* Estate and Gift Tax Marital Deduction.

OMB Number: 1545–1612. *Regulation Project Number:* REG–209830–96 (TD 8779–final).

Abstract: The information requested in regulation section 20.2056(b)–7(d)(3)(ii) is necessary to provide a method for estates of decedents whose estate tax returns were due on or before February 18, 1997, to obtain an extension of time to make the qualified terminable interest property (QTIP) election under section 2056(b)(7)(B)(v).

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Individual or households.

Estimated Number of Respondents: 1.

Estimated Time per Respondent: 1 minute.

Estimated Total Annual Burden Hours: 1.

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: September 7, 2010.

R. Joseph Durbala,

IRS Tax Analyst.

[FR Doc. 2010–23035 Filed 9–15–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[TD 9057, TD 9154, TD 9187]

Proposed Collection: Comment Request for Regulation Project

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 an existing notice of proposed rulemaking and temporary regulation, REG–135898–04 (TD 9154), Extension of Time to Elect Method for Determining Allowable Loss; REG–152524–02 (TD 9057), Guidance Under Section 1502, Amendment of Waiver of Loss Carryovers from Separate Return Limitation Years; REG–123305–02, REG–102740–02 (TD 9187), Loss Limitation Rules.

DATES: Written comments should be received on or before November 15, 2010 to be assured of consideration.

ADDRESSES: Direct all written comments to Gerald Shields, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulation should be directed to R. Joseph Durbala, at (202) 622–3634, or 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: REG–135898–04 (TD 9154), Extension of Time to Elect Method for Determining Allowable Loss; REG–152524–02 (TD 9057), Guidance Under Section 1502, Amendment of Waiver of Loss Carryovers from Separate Return Limitation Years; REG–123305–02, REG–102740–02 (TD 9187), Loss Limitation Rules.

OMB Number: 1545–1774.

Regulation Project Number: TD 9057, TD 9154, and TD 9187.

Abstract: The information is necessary to allow the taxpayer to make certain elections to determine the amount of allowable loss under § 1.337(d)–2T, § 1.1502–20 as currently in effect or under § 1.1502–20 as modified; to allow the taxpayer to waive loss carryovers up to the amount of the § 1.1502–20(g) election; and to ensure that loss is not disallowed under § 1.337(d)–2T and basis is not reduced under § 1.337(d)–2T to the extent the taxpayer establishes that the loss or basis is not attributable to the recognition of built in gain on the disposition of an asset. With respect to § 1.1502–20T, the information also is necessary to allow the common parent of the selling group to reapportion a separate, subgroup or consolidated section 382 limitation when the acquiring group amends its § 1.1502–32(b)(4) election. Furthermore, regarding § 1.1502–32(b)(4), the information also is necessary to allow the taxpayer that acquired a subsidiary of a consolidated group to amend its election under § 1.1502–32(b)(4), so that the acquiring group can use the acquired subsidiary's losses to offset its income. The information also is necessary to allow the taxpayer to make certain elections to determine the amount of allowable loss pursuant to a new due date, and to amend or revoke certain prior elections to determine the amount of allowable loss.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of OMB approval.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 18,360.

Estimated Time per Respondent: 2 hours.

Estimated Total Annual Hours: 36,720.

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: September 7, 2010.

R. Joseph Durbala,

IRS Tax Analyst.

[FR Doc. 2010–23038 Filed 9–15–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[PS–268–82]

Proposed Collection; Comment Request for Regulation Project

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 an existing final regulation, PS–268–82 (TD 8696), Definitions Under Subchapter S of the Internal Revenue Code (Section 1.1377–1).

DATES: Written comments should be received on or before November 15, 2010 to be assured of consideration.

ADDRESSES: Direct all written comments to Gerald Shields, Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulation should be directed to R. Joseph Durbala (202) 622–3634, Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224 or at *RJoseph.Durbala@irs.gov.*

SUPPLEMENTARY INFORMATION: *Title:* Definitions Under Subchapter S of the Internal Revenue Code.

OMB Number: 1545–1462.

Regulation Project Number: PS–268–82.

Abstract: Section 1.1377–1(b)(4) of the regulation provides that an S corporation making a terminating election under Internal Revenue Code section 1377(a)(2) must attach a statement to its timely filed original or amended return required to be filed under Code section 6037(a). The statement must provide information concerning the events that gave rise to the election and declarations of consent from the S corporation shareholders.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of OMB approval.

Affected Public: Business or other for-profit organizations, and individuals.

Estimated Number of Respondents: 4,000.

Estimated Time per Respondent: 15 hours.

Estimated Total Annual Burden Hours: 1,000.

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: September 7, 2010.

R. Joseph Durbala,

IRS Tax Analyst.

[FR Doc. 2010–23036 Filed 9–15–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Removal of an Alias of an Existing Specially Designated National Listing

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control ("OFAC") is amending an existing Specially Designated National's listing to remove an alias.

DATES: The alias removal is effective September 10, 2010.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, 1500 Pennsylvania Avenue, NW. (Treasury Annex), Washington, DC 20220, Tel.: 202/622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

Additional information concerning OFAC is available from OFAC's Web site (*http://www.treas.gov/ofac)* or via facsimile through a 24-hour fax-on-demand service, Tel.: 202/622–0077.

Background to Removal of Alias

The Office of Foreign Assets Control is removing an alias from Steven Law's listing on the Department of the Treasury's List of Specially Designated Nationals and Blocked Persons. The entry has been amended as:

LAW, Steven (a.k.a. CHUNG, Lo Ping; a.k.a. LAW, Stephen; a.k.a. LO, Ping Han; a.k.a. LO, Ping Hau; a.k.a. LO, Ping Zhong; a.k.a. LO, Steven; a.k.a. NAING, Htun Myint; a.k.a. NAING, Tun Myint; a.k.a. NAING, U Myint), 330 Strand Rd., Latha Township, Rangoon, Burma; 61–62 Bahosi Development Housing, Wadan St., Lanmadaw Township, Rangoon, Burma; No. 124 Insein Road, Ward (9), Hlaing Township, Rangoon, Burma; 3 Shenton Way, #10–01 Shenton House, Singapore 068805, Singapore; 8A Jalan Teliti, Singapore, Singapore; DOB 16 May 1958; alt. DOB 27 Aug 1960; POB Lashio, Burma; citizen Burma; Passport 937174 (Burma) (individual) [BURMA]

Dated: September 10, 2010.

Barbara Hammerle,

Acting Director, Office of Foreign Assets Control.

[FR Doc. 2010–23157 Filed 9–15–10; 8:45 am]

BILLING CODE 4811–42–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0099]

Agency Information Collection (Dependent's Request for Change of Program or Place of Training) Activity Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before *October 18, 2010.*

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov;* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503, (202) 395–7316. Please refer to "OMB Control No. 2900–0099" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 273–0443 or e-mail *denise.mclamb@va.gov.* Please refer to "OMB Control No. 2900–0099."

SUPPLEMENTARY INFORMATION:

Title: Dependent's Request for Change of Program or Place of Training, (Under Provisions of Chapter 35, Title 38, U.S.C.), VA Form 22–5495.

OMB Control Number: 2900–0099.

Type of Review: Extension of a currently approved collection.

Abstract: Spouses, surviving spouses, or children of veterans who are eligible

for Dependent's Educational Assistance, complete VA Form 22–5495 to change their program of education and/or place of training. VA uses the information collected to determine if the new program selected is suitable to their abilities, aptitudes, and interests and to verify that the new place of training is approved for benefits.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on July 9, 2010, at page 39619.

Affected Public: Individuals or households.

Estimated Annual Burden: 13,034 hours.

Estimated Average Burden per Respondent: 20 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 52,135.

Dated: September 10, 2010.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2010–23050 Filed 9–15–10; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0703]

Agency Information Collection (Dependents' Educational Assistance (DEA) Election Request) Activity; Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before October 18, 2010.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov;* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to "OMB Control No. 2900–0703" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 273–0443 or e-mail *denise.mclamb@va.gov.*

SUPPLEMENTARY INFORMATION: *Title:* Dependents' Educational Assistance (DEA) Election Request, VA Form Letter 22–909.

OMB Control Number: 2900–0703.

Type of Review: Extension of a currently approved collection.

Abstract: VA must notify eligible dependents of veterans receiving DEA benefits of their option to elect a beginning date to start their DEA benefits. VA will use the data collected on VA Form Letter 22–909 to determine the appropriate amount of benefit payable to the claimant.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on July 9, 2010, at page 39620.

Affected Public: Individuals or households.

Estimated Annual Burden: 188 hours.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: One-time.

Estimated Annual Responses: 753.

Dated: September 10, 2010.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2010–23049 Filed 9–15–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0317]

Agency Information Collection (Request for Identifying Information Re: Veteran's Loan Records) Activity Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before October 18, 2010.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov*; or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to "OMB Control No. 2900–0317" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 273–0443 or e-mail *denise.mclamb@va.gov.* Please refer to "OMB Control No. 2900–0317."

SUPPLEMENTARY INFORMATION: *Title:* Request for Identifying Information Re: Veteran's Loan Records, VA Form Letter 26–626.

OMB Control Number: 2900–0317.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 26–626 is used to notify a correspondent that additional information is needed to determine if a veteran's loan guaranty benefits are involved and if so, to obtain the necessary information to identify and associate the correspondence with the correct veteran's loan application or record. If such information is not received within one year form the date of such notification, benefits will not be paid or furnished by reason of an incomplete application.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on July 9, 2010, at pages 39618–39619.

Affected Public: Individuals or households.

Estimated Annual Burden: 200 hours.

Estimated Average Burden per Respondent: 5 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 2,400.

Dated: September 10, 2010.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2010–23051 Filed 9–15–10; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0002]

Agency Information Collection (Income-Net Worth and Employment Statement) Activity Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before October 18, 2010.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to "OMB Control No. 2900–0002" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 273–0443 or e-mail *denise.mclamb@va.gov.* Please refer to "OMB Control No. 2900–0002."

SUPPLEMENTARY INFORMATION:

Title: Income-Net Worth and Employment Statement, VA Form 21–527.

OMB Control Number: 2900–0002.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 21–527 is completed by claimants who previously filed a claim for compensation and/or pension and wish to file a new claim for disability pension or reopen a previously denied claim for disability pension.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on July 9, 2010, at pages 39621–39622.

Affected Public: Individuals or households.

Estimated Annual Burden: 104,440 hours.

Estimated Average Burden per Respondent: 60 minutes.

Frequency of Response: One-time.

Estimated Number of Respondents: 104,440.

Dated: September 10, 2010.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2010–23047 Filed 9–15–10; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0652]

Agency Information Collection (Request for Nursing Home Information in Connection With Claim for Aid and Attendance) Activity Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before October 18, 2010.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to "OMB Control No. 2900–0652" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 273–0443 or e-mail *denise.mclamb@va.gov.* Please refer to "OMB Control No. 2900–0652."

SUPPLEMENTARY INFORMATION: *Title:* Request for Nursing Home Information in Connection with Claim for Aid and Attendance, VA Form 21–0779.

OMB Control Number: 2900–0652.

Type of Review: Extension of a currently approved collection.

Abstract: The data collected on VA Form 21–0779 is used to determine veterans residing in nursing homes eligibility for pension and aid and attendance. Parents and surviving spouses entitled to service-connected death benefits and spouses of living veterans receiving service connected compensation at 30 percent or higher are also entitled to aid and attendance based on status as nursing home patients.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on July 9, 2010, at pages 39622.

Affected Public: Business or other for-profit.

Estimated Annual Burden: 8,333 hours.

Estimated Average Burden per Respondent: 10 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 50,000.

Dated: September 10, 2010.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2010–23048 Filed 9–15–10; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0252]

Proposed Information Collection (Application for Authority To Close Loans on an Automatic Basis—Nonsupervised Lenders) Activity: Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain

information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments for information needed to authorize nonsupervised lenders to close loans on an automatic basis.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before November 15, 2010.

ADDRESSES: Submit written comments on the collection of information through the Federal Docket Management System (FDMS) at *http://www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail *nancy.kessinger@va.gov.* Please refer to "OMB Control No. 2900–0252" in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 461–9769 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden 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 through the use of automated collection techniques or the use of other forms of information technology.

Title: Application for Authority To Close Loans on an Automatic Basis—Nonsupervised Lenders, VA Form 26–8736.

OMB Control Number: 2900–0252.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 26–8736 is used by nonsupervised lenders requesting approval to close loans on an automatic basis. Automatic lending privileges eliminate the requirement for submission of loans to VA for prior approval. Lending institutions with automatic loan privileges may process and disburse such loans and subsequently report the loan to VA for issuance of guaranty. The form requests information considered crucial for VA to make acceptability determinations as to lenders who shall be approved for this privilege.

Affected Public: Business or other for-profit.

Estimated Annual Burden: 50 hours.

Estimated Average Burden per Respondent: 25 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 120.

Dated: September 10, 2010.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2010–23052 Filed 9–15–10; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0051]

Agency Information Collection (Quarterly Report of State Approving Agency Activities); Activity Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration, Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before October 18, 2010.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov*; or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503, (202) 395–7316. Please refer to "OMB Control No. 2900–0051" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 273–0443 or e-mail *denise.mclamb@va.gov*. Please refer to "OMB Control No. 2900–0051."

SUPPLEMENTARY INFORMATION: *Title:* Quarterly Report of State Approving Agency Activities.

OMB Control Number: 2900–0051.

Type of Review: Extension of a currently approved collection.

Abstract: VA reimburses State Approving Agencies (SAAs) for expenses incurred in the approval and supervision of education and training programs. SAAs are required to report their activities to VA quarterly and provide notices regarding which courses, training programs and tests were approved, disapproved or suspended.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The Federal Register Notice with a 60-day comment period soliciting comments on this collection of information was published on July 9, 2010, at pages 39619–39620.

Affected Public: State, Local or Tribal Government.

Estimated Annual Burden: 228 hours.

Estimated Average Burden per Respondent: 1 hour.

Frequency of Response: Quarterly.

Estimated Number of Respondents: 57.

Estimated Number of Responses: 228.

Dated: September 10, 2010.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2010–23054 Filed 9–15–10; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0696]

Agency Information Collection (Availability of Educational, Licensing, and Certifications Records) Activity Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995

(44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before October 18, 2010.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to "OMB Control No. 2900–0696" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 273–0443 or e-mail *denise.mclamb@va.gov.* Please refer to "OMB Control No. 2900–0696."

SUPPLEMENTARY INFORMATION:

Title: Availability of Educational, Licensing, and Certifications Records; 38 CFR 21.4209.

OMB Control Number: 2900–0696.

Type of Review: Extension of a currently approved collection.

Abstract: Educational institutions offering approved courses and licensing and certification organizations offering approved tests are required to make their records and accounts pertaining to eligible claimants available to VA. The data collected will be used to ensure benefits paid under the education programs are correct.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on July 9, 2010, at page 39621.

Affected Public: Not-for-profit institutions.

Estimated Annual Burden: 6,000 hours.

Frequency of Response: On occasion.

Estimated Average Burden per Respondent: 5 hours.

Estimated Annual Responses: 3,000.

Dated: September 10, 2010.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2010–23046 Filed 9–15–10; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0060]

Proposed Information Collection (Claim for One Sum Payment (Government Life Insurance)); Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to process beneficiaries claims for payment of insurance proceeds.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before November 15, 2010.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *http://www.Regulations.gov;* or to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail *nancy.kessinger@va.gov.* Please refer to "OMB Control No. 2900–0060, in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 461–9769 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden 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 through the use of automated collection techniques or the use of other forms of information technology.

Titles:

a. Claim for One Sum Payment (Government Life Insurance), VA Form 29–4125.

b. Claim for Monthly Payments (National Service Life Insurance), VA Form 29–4125a.

c. Claim for Monthly Payments (United States Government Life Insurance (USGLI)), VA Form 29–4125k.

OMB Control Number: 2900–0060.

Type of Review: Extension of a currently approved collection.

Abstract: Beneficiaries of deceased veterans must complete VA Form 29–4125 to apply for proceeds of the veteran's Government Insurance policies. If the beneficiary desires monthly installment in lieu of one lump payment he or she must complete VA Forms 29–4125a and 29–4125k. VA uses the information to determine the claimant's eligibility for payment of insurance proceeds and to process monthly installment payments.

Affected Public: Individuals or households.

Estimated Annual Burden: 8,787 hours.

a. VA Form 29–4125—8,200 hours.
b. VA Form 29–4125a—462 hours.
c. VA Form 4125k—125 hours.

Estimated Average Burden per Respondent:

a. VA Form 29–4125—6 minutes.
b. VA Form 29–4125a—15 minutes.
c. VA Form 4125k—15 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 84,350.

a. VA Form 29–4125—82,000.
b. VA Form 29–4125a—1,850.
c. VA Form 4125k—500.

Dated: September 10, 2010.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2010–23053 Filed 9–15–10; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on Disability Compensation; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that the Advisory Committee on Disability Compensation will meet on September 27, 2010, in the Astor Ballroom at the St. Regis Hotel, 923 16th Street, NW., Washington, DC, from 7:30 a.m. to 3 p.m. The meeting is open to the public.

The purpose of the Committee is to advise the Secretary of Veterans Affairs on the maintenance and periodic readjustment of the VA Schedule for Rating Disabilities. The Committee is to assemble and review relevant information relating to the nature and character of disabilities arising from service in the Armed Forces, provide an ongoing assessment of the effectiveness of the rating schedule, and give advice on the most appropriate means of responding to the needs of Veterans relating to disability compensation.

The Committee will receive briefings on issues related to compensation for Veterans with service-connected disabilities and other VA benefits programs. Time will be allocated for receiving public comments in the afternoon. Public comments will be limited to three minutes each. Individuals wishing to make oral statements before the Committee will be accommodated on a first-come, first-served basis. Individuals who speak are invited to submit 1–2 page summaries of their comments at the time of the meeting for inclusion in the official meeting record.

The public may submit written statements for the Committee's review to Robert Watkins, Designated Federal Officer, Department of Veterans Affairs, Veterans Benefits Administration, Compensation and Pension Service, Regulation Staff (211D), 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail at *Robert.Watkins2@va.gov.* Any member of the public wishing to attend the meeting or seeking additional information should contact Mr. Watkins at (202) 461–9214.

Dated: September 10, 2010.

By Direction of the Secretary.

Vivian Drake,

Acting Committee Management Officer.

[FR Doc. 2010–23060 Filed 9–15–10; 8:45 am]

BILLING CODE P

Federal Register

Thursday,
September 16, 2010

Part II

Securities and Exchange Commission

17 CFR Parts 200, 232, 240 and 249
Facilitating Shareholder Director Nominations; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR PARTS 200, 232, 240 and 249

[Release Nos. 33–9136; 34–62764; IC–29384; File No. S7–10–09]

RIN 3235–AK27

Facilitating Shareholder Director Nominations

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: We are adopting changes to the Federal proxy rules to facilitate the effective exercise of shareholders' traditional State law rights to nominate and elect directors to company boards of directors. The new rules will require, under certain circumstances, a company's proxy materials to provide shareholders with information about, and the ability to vote for, a shareholder's, or group of shareholders', nominees for director. We believe that these rules will benefit shareholders by improving corporate suffrage, the disclosure provided in connection with corporate proxy solicitations, and communication between shareholders in the proxy process. The new rules apply only where, among other things, relevant state or foreign law does not prohibit shareholders from nominating directors. The new rules will require that specified disclosures be made concerning nominating shareholders or groups and their nominees. In addition, the new rules provide that companies must include in their proxy materials, under certain circumstances, shareholder proposals that seek to establish a procedure in the company's governing documents for the inclusion of one or more shareholder director nominees in the company's proxy materials. We also are adopting related changes to certain of our other rules and regulations, including the existing solicitation exemptions from our proxy rules and the beneficial ownership reporting requirements.

DATES: *Effective Date:* November 15, 2010.

Compliance Dates: November 15, 2010, except that companies that qualify as "smaller reporting companies" (as defined in 17 CFR 240.12b–2) as of the effective date of the rule amendments will not be subject to Rule 14a–11 until three years after the effective date.

FOR FURTHER INFORMATION CONTACT: Lillian Brown, Tamara Brightwell, or Ted Yu, Division of Corporation Finance, at (202) 551–3200, or, with regard to investment companies, Kieran G. Brown, Division of Investment Management, at (202) 551–6784, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are adding new Rule 82a of Part 200 Subpart D—Information and Requests,[1] and new Rules 14a–11,[2] and 14a–18,[3] and new Regulation 14N[4] and Schedule 14N,[5] and amending Rule 13[6] of Regulation S–T,[7] Rules 13a–11,[8] 13d–1,[9] 14a–2,[10] 14a–4,[11] 14a–5,[12] 14a–6,[13] 14a–8,[14] 14a–9,[15] 14a–12,[16] and 15d–11,[17] Schedule 13G,[18] Schedule 14A,[19] and Form 8–K,[20] under the Securities Exchange Act of 1934.[21] Although we are not amending Schedule 14C[22] under the Exchange Act, the amendments will affect the disclosure provided in Schedule 14C, as Schedule 14C requires disclosure of some items contained in Schedule 14A.

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[1] 17 CFR 200.82a.
[2] 17 CFR 240.14a–11.
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[4] 17 CFR 240.14n *et seq.*
[5] 17 CFR 240.14n–101.
[6] 17 CFR 232.13.
[7] 17 CFR 232.10 *et seq.*
[8] 17 CFR 240.13a–11.
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[16] 17 CFR 240.14a–12.
[17] 17 CFR 240.15d–11.
[18] 17 CFR 240.13d–102.
[19] 17 CFR 240.14a–101.
[20] 17 CFR 249.308.
[21] 15 U.S.C. 78a *et seq.* (the "Exchange Act"). Part 200 Subpart D—Information and Requests and Regulation S–T are also promulgated under the Securities Act of 1933 [15 U.S.C. 77a *et seq.*] (the "Securities Act").
[22] 17 CFR 240.14c–101.

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I. Background and Overview of Amendments

A. Background

On June 10, 2009, we proposed a number of changes to the Federal proxy rules designed to facilitate shareholders' traditional State law rights to nominate and elect directors. Our proposals sought to accomplish this goal in two ways: (1) By facilitating the ability of shareholders with a significant, long-term stake in a company to exercise their rights to nominate and elect directors by establishing a minimum standard for including disclosure concerning, and enabling shareholders to vote for, shareholder director nominees in company proxy materials; and (2) by narrowing the scope of the Commission rule that permitted companies to exclude shareholder proposals that sought to establish a procedure for the inclusion of shareholder nominees in company proxy materials.[23] We recognized at that time that the financial crisis that the nation and markets had experienced heightened the serious concerns of many shareholders about the accountability and responsiveness of some companies and boards of directors to shareholder interests, and that these concerns had resulted in a loss of investor confidence. These concerns also led to questions about whether boards were exercising appropriate oversight of management, whether boards were appropriately focused on shareholder interests, and whether boards need to be more accountable for their decisions regarding issues such as compensation structures and risk management.

A principal way that shareholders can hold boards accountable and influence matters of corporate policy is through the nomination and election of directors. The ability of shareholders to effectively use their power to nominate and elect directors is significantly affected by our proxy regulations because, as has long been recognized, a federally-regulated corporate proxy solicitation is the primary way for public company shareholders to learn about the matters to be decided by the shareholders and to make their views known to company management.[24] As discussed in detail below, in light of these concerns, we reviewed our proxy regulations to determine whether they should be revised to facilitate shareholders' ability to nominate and elect directors. We have taken into consideration the comments received on the proposed amendments as well as subsequent congressional action[25] and are adopting final rules that will, for the first time, require company proxy materials, under certain circumstances, to provide shareholders with information about, and the ability to vote for a shareholder's, or group of shareholders', nominees for director. We also are amending our proxy rules to provide shareholders the ability to include in company proxy materials, under certain circumstances, shareholder proposals that seek to establish a procedure in the company's governing documents for the inclusion of one or more shareholder director

[23] *See Facilitating Shareholder Director Nominations,* Release No. 33–9046, 34–60089 (June 10, 2009) [74 FR 29024] ("Proposal" or "Proposing Release"). The Proposing Release was published for comment in the Federal Register on June 18, 2009, and the initial comment period closed on August 17, 2009. The Commission re-opened the comment period as of December 18, 2009 for thirty days to provide interested persons the opportunity to comment on additional data and related analyses that were included in the public comment file at or following the close of the original comment period. In total, the Commission received approximately 600 comment letters on the proposal. The public comments we received are available on our Web site at *http://www.;sec.gov/comments/s7-10-09/s71009.shtml.* Comments also are available for Web site viewing and copying 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.

[24] *See, e.g.,* Securit[ies] and Exchange Commission Proxy Rules: Hearings on H.R. 1493, H.R. 1821, and H.R. 2019 Before the House Comm. on Interstate and Foreign Commerce, 78th Cong., 1st Sess., at 17–19 (1943) (Statement of the Honorable Ganson Purcell, Chairman, Securities and Exchange Commission) (explaining the initial Commission rules requiring the inclusion of shareholder proposals in company proxy materials: "We give [a stockholder] the right in the rules to put his proposal before all of his fellow stockholders along with all other proposals * * * so that they can see then what they are and vote accordingly. * * * The rights that we are endeavoring to assure to the stockholders are those rights that he has traditionally had under State law, to appear at the meeting; to make a proposal; to speak on that proposal at appropriate length; and to have his proposal voted on. But those rights have been rendered largely meaningless through the process of dispersion of security ownership through[out] the country. * * * [T]he assurance of these fundamental rights under State laws which have been, as I say, completely ineffective * * * because of the very dispersion of the stockholders' interests throughout the country[;] whereas formerly * * * a stockholder might appear at the meeting and address his fellow stockholders[, t]oday he can only address the assembled proxies which are lying at the head of the table. The only opportunity that the stockholder has today of expressing his judgment comes at the time he considers the execution of his proxy form, and we believe * * * that this is the time when he should have the full information before him and ability to take action as he sees fit."); *see also* S. Rep. 792, 73d Cong., 2d Sess., 12 (1934) ("[I]t is essential that [the stockholder] be enlightened not only as to the financial condition of the corporation, but also as to the major questions of policy, which are decided at stockholders' meetings.").

[25] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, § 971, 124 Stat. 1376 (2010) ("Dodd-Frank Act").

nominees in the company's proxy materials.

Regulation of the proxy process was one of the original responsibilities that Congress assigned to the Commission as part of its core functions in 1934. The Commission has actively monitored the proxy process since receiving this authority and has considered changes when it appeared that the process was not functioning in a manner that adequately protected the interests of investors.[26] One of the key tenets of the Federal proxy rules on which the Commission has consistently focused is whether the proxy process functions, as nearly as possible, as a replacement for an actual in-person meeting of shareholders.[27] This is important because the proxy process represents shareholders' principal means of participating effectively at an annual or special meeting of shareholders.[28] In our Proposal we noted our concern that the Federal proxy rules may not be facilitating the exercise of shareholders' State law rights to nominate and elect directors. Without the ability to effectively utilize the proxy process, shareholder nominees do not have a realistic prospect of being elected because most, if not all, shareholders return their proxy cards in advance of the shareholder meeting and thus, in essence, cast their votes before the meeting at which they may nominate directors. Recognizing that this failure of the proxy process to facilitate shareholder nomination rights has a practical effect on the right to elect directors, the new rules will enable the proxy process to more closely approximate the conditions of the shareholder meeting. In addition, because companies will be required to include shareholder-nominated candidates for director in company proxy materials, shareholders will receive additional information upon which to base their voting decisions. Finally, we believe these changes will significantly enhance the confidence of shareholders who link the recent financial crisis to a lack of responsiveness of some boards to shareholder interests.[29]

The Commission has, on a number of prior occasions, considered whether its proxy rules needed to be amended to facilitate shareholders' ability to nominate directors by having their nominees included in company proxy materials.[30] Most recently, in June 2009, we proposed amendments to the proxy rules that included both a new proxy rule, Exchange Act Rule 14a–11, that would require a company's proxy materials to provide shareholders with information about, and the ability to vote for, candidates for director nominated by long-term shareholders or groups of long-term shareholders with significant holdings, and amendments to Rule 14a–8(i)(8) to prohibit exclusion of certain shareholder proposals seeking to establish a procedure in the company's governing documents for the inclusion of one or more shareholder director nominees in the company's proxy materials. We received significant comment on the proposed amendments. Overall, commenters were sharply divided on the necessity for, and the workability of, the proposed amendments. Supporters of the amendments generally believed that, if adopted, they would facilitate shareholders' ability to exercise their State law right to nominate directors and provide meaningful opportunities to effect changes in the composition of the board.[31] These commenters predicted that the amendments would lead to more accountable, responsive, and effective boards.[32] Many commenters saw a link between the recent economic crisis and shareholders' inability to have nominees included in a company's proxy materials.[33]

Commenters opposed to our Proposal believed that recent corporate governance developments, including increased use of a majority voting standard for the election of directors and certain State law changes, already provide shareholders with meaningful opportunities to participate in director elections.[34] These commenters viewed

[26] For example, the Commission has considered changes to the proxy rules related to the election of directors in recent years. *See Security Holder Director Nominations,* Release No. 34–48626 (October 14, 2003) [68 FR 60784] ("2003 Proposal"); *Shareholder Proposals,* Release No. 34–56160 (July 27, 2007) [72 FR 43466] ("Shareholder Proposals Proposing Release"); *Shareholder Proposals Relating to the Election of Directors,* Release No. 34–56161 (July 27, 2007) [72 FR 43488] ("Election of Directors Proposing Release"); and *Shareholder Proposals Relating to the Election of Directors,* Release No. 34–56914 (December 6, 2007) [72 FR 70450] ("Election of Directors Adopting Release"). When we refer to the "2007 Proposals" and the comments received in 2007, we are referring to the Shareholder Proposals Proposing Release and the Election of Directors Proposing Release and the comments received on those proposals, unless otherwise specified.

[27] Professor Karmel has described the Commission's proxy rules as having the purpose "to make the proxy device the closest practicable substitute for attendance at the [shareholder] meeting." Roberta S. Karmel, *The New Shareholder and Corporate Governance: Voting Power Without Responsibility or Risk: How Should Proxy Reform Address the De-Coupling of Economic and Voting Rights?,* 55 Vill. L. Rev. 93, 104 (2010).

[28] Historically, a shareholder's voting rights generally were exercised at a shareholder meeting. As discussed in the Proposing Release, in passing the Exchange Act, Congress understood that the securities of many companies were held through dispersed ownership, at least in part facilitated by stock exchange listing of shares. Although voting rights in public companies technically continued to be exercised at a meeting, the votes cast at the meeting were by proxy and the voting decision was made during the proxy solicitation process. This structure continues to this day.

[29] *See* letters from American Federation of Labor and Congress of Industrial Organizations ("AFL–CIO"); California Public Employees' Retirement System ("CalPERS"); Council of Institutional Investors ("CII"); Lynne L. Dallas ("L. Dallas"); Los Angeles County Employees Retirement Association ("LACERA"); Laborers' International Union of North America ("LIUNA"); The Nathan Cummings Foundation ("Nathan Cummings Foundation"); Pax World Management Corp. ("Pax World"); Pershing Square Capital Management, L.P. ("Pershing Square"); Relational Investors, LLC ("Relational"); RiskMetrics Group, Inc. ("RiskMetrics"); Shareowner Education Network and Shareowners.org ("Shareowners.org"); Social Investment Forum ("Social Investment Forum"); State of Wisconsin Investment Board ("SWIB"); International Brotherhood of Teamsters ("Teamsters"); Trillium Asset Management Corporation ("Trillium"); Universities Superannuation Scheme—UK ("Universities Superannuation"); Washington State Investment Board ("WSIB").

[30] For a discussion of the Commission's previous actions in this area, *see* the Proposing Release and the 2003 Proposal.

[31] *See* letters from CII; Colorado Public Employees' Retirement Association ("COPERA"); CtW Investment Group ("CtW Investment Group"); L. Dallas; Thomas P. DiNapoli ("T. DiNapoli"); Florida State Board of Administration ("Florida State Board of Administration"); International Corporate Governance Network ("ICGN"); Denise L. Nappier ("D. Nappier"); Ohio Public Employees Retirement System ("OPERS"); Pax World; Teamsters.

[32] *Id.*

[33] *See* letters from AFL–CIO; CalPERS; California State Teachers' Retirement System ("CalSTRS"); CII; L. Dallas; LACERA; LIUNA; Nathan Cummings Foundation; Pax World; Pershing Square; Relational; RiskMetrics; Shareowners.org; Social Investment Forum; SWIB; Teamsters; Trillium; Universities Superannuation; WSIB.

[34] *See* letters from Group of 26 Corporate Secretaries and Governance Professionals ("26 Corporate Secretaries"); 3M Company ("3M"); Advance Auto Parts, Inc. ("Advance Auto Parts"); The Allstate Corporation ("Allstate"); Avis Budget Group, Inc. ("Avis Budget"); American Express Company ("American Express"); Anadarko Petroleum Corporation ("Anadarko"); Association of Corporate Counsel ("Association of Corporate Counsel"); AT&T Inc. ("AT&T"); Lawrence Behr ("L. Behr"); Best Buy Co., Inc. ("Best Buy"); The Boeing Company ("Boeing"); Business Roundtable ("BRT"); Robert N. Burt ("R. Burt"); State Bar of California, Corporations Committee of Business Law Section ("California Bar"); Sean F. Campbell ("S. Campbell"); Carlson ("Carlson"); Caterpillar Inc. ("Caterpillar"); U.S. Chamber of Commerce Center for Capital Markets Competitiveness ("Chamber of Commerce/CMCC"); Chevron Corporation ("Chevron"); CIGNA Corporation ("CIGNA"); W. Don Cornwell ("W. Cornwell"); CSX Corporation ("CSX"); Cummins Inc. ("Cummins"); Davis Polk & Wardwell LLP ("Davis Polk"); Dewey & LeBoeuf ("Dewey"); E.I. du Pont de Nemours and Company ("DuPont"); Eaton Corporation ("Eaton"); Michael Eng ("M. Eng"); FedEx Corporation ("FedEx"); FMC Corporation ("FMC Corp."); FPL Group, Inc. ("FPL Group"); Frontier Communications Corporation ("Frontier"); General Electric Company ("GE"); General Mills, Inc. ("General Mills"); Charles O. Holliday, Jr. ("C. Holliday"); Honeywell International Inc. ("Honeywell"); Constance J.

the amendments as inappropriately intruding into matters traditionally governed by State law or imposing a "one size fits all" rule for all companies and expressed concerns about "special interest" directors, forcing companies to focus on the short-term rather than the creation of long-term shareholder value, and other perceived negative effects of the amendments, if adopted, on boards and companies.[35] Finally, commenters worried about the impact of the proposed amendments on small businesses.[36]

After considering the comments and weighing the competing interests of facilitating shareholders' ability to exercise their State law rights to nominate and elect directors against potential disruption and cost to companies, we are convinced that adopting the proposed amendments to the proxy rules serves our purpose to regulate the proxy process in the public interest and on behalf of investors. We are not persuaded by the arguments of some commenters that the provisions of Rule 14a–11 are unnecessary.[37] Those commenters argued that changes in corporate governance over the past six years have obviated the need for a Federal rule to allow shareholders to place their nominees in company proxy materials and that shareholders should be left to determine whether, on a company-by-company basis, such a rule is necessary at any particular company.

While we recognize that some states, such as Delaware,[38] have amended their state corporate law to enable companies to adopt procedures for the inclusion of shareholder director nominees in company proxy materials,[39] as was

Horner ("C. Horner"); International Business Machines Corporation ("IBM"); Jones Day ("Jones Day"); Keating Muething & Klekamp PLL ("Keating Muething"); James M. Kilts ("J. Kilts"); Reatha Clark King, Ph.D. ("R. Clark King"); Ned C. Lautenbach ("N. Lautenbach"); MeadWestvaco Corporation ("MeadWestvaco"); MetLife, Inc. ("MetLife"); Motorola, Inc. ("Motorola"); O'Melveny & Myers LLP ("O'Melveny & Myers"); Office Depot, Inc. ("Office Depot"); Pfizer Inc. ("Pfizer"); Protective Life Corporation ("Protective"); Sullivan & Cromwell LLP ("S&C"); Safeway Inc. ("Safeway"); Sara Lee Corporation ("Sara Lee"); Shearman & Sterling LLP ("Shearman & Sterling"); The Sherwin-Williams Company ("Sherwin-Williams"); Sidley Austin LLP ("Sidley Austin"); Simpson Thacher & Bartlett LLP ("Simpson Thacher"); Tesoro Corporation ("Tesoro"); Textron Inc. ("Textron"); Texas Instruments Corporation ("TI"); Gary L. Tooker ("G. Tooker"); UnitedHealth Group Incorporated ("UnitedHealth"); Unitrin, Inc. ("Unitrin"); U.S. Bancorp ("U.S. Bancorp"); Wachtell, Lipton, Rosen & Katz ("Wachtell"); Wells Fargo & Company ("Wells Fargo"); West Chicago Chamber of Commerce & Industry ("West Chicago Chamber"); Weyerhaeuser Company ("Weyerhaeuser"); Xerox Corporation ("Xerox"); Yahoo! ("Yahoo").

[35] *See* letters from 26 Corporate Secretaries; American Bar Association ("ABA"); ACE Limited ("ACE"); Advance Auto Parts; AGL Resources ("AGL"); Aetna Inc. ("Aetna"); Allstate; Alston & Bird LLP ("Alston & Bird"); American Bankers Association ("American Bankers Association"); The American Business Conference ("American Business Conference"); American Electric Power Company, Inc. ("American Electric Power"); Anadarko; Applied Materials, Inc. ("Applied Materials"); Artistic Land Designs LLC ("Artistic Land Designs"); Association of Corporate Counsel; Avis Budget; Atlantic Bingo Supply, Inc. ("Atlantic Bingo"); L. Behr; Best Buy; Biogen Idec Inc. ("Biogen"); James H. Blanchard ("J. Blanchard"); Boeing; Tammy Bonkowski ("T. Bonkowski"); BorgWarner Inc. ("BorgWarner"); Boston Scientific Corporation ("Boston Scientific"); The Brink's Company ("Brink's"); BRT; Burlington Northern Santa Fe Corporation ("Burlington Northern"); R. Burt; California Bar; Callaway Golf Company ("Callaway"); S. Campbell; Carlson; Carolina Mills ("Carolina Mills"); Caterpillar; Chamber of Commerce/CMCC; Chevron; Rebecca Chicko ("R. Chicko"); CIGNA; Comcast Corporation ("Comcast"); Competitive Enterprise Institute's Center for Investors and Entrepreneurs ("Competitive Enterprise Institute"); W. Cornwell; CSX; Edwin Culwell ("E. Culwell"); Cummins; Darden Restaurants, Inc. ("Darden Restaurants"); Daniels Manufacturing Corporation ("Daniels Manufacturing"); Davis Polk; Delaware State Bar Association ("Delaware Bar"); Tom Dermody ("T. Dermody"); Devon Energy Corporation ("Devon"); DTE Energy Company ("DTE Energy"); Eaton; The Edison Electric Institute ("Edison Electric Institute"); Eli Lilly and Company ("Eli Lilly"); Emerson Electric Co. ("Emerson Electric"); M. Eng; Erickson Retirement Communities, LLC ("Erickson"); ExxonMobil Corporation ("ExxonMobil"); FedEx; Financial Services Roundtable ("Financial Services Roundtable"); Flutterby Kissed Unique Treasures ("Flutterby"); FPL Group; Frontier; GE; Allen C. Goolsby ("A. Goolsby"); C. Holliday; IBM; Investment Company Institute ("ICI"); Intelect Corporation ("Intelect"); JPMorgan Chase & Co. ("JPMorgan Chase"); Jones Day; R. Clark King; Leggett & Platt Incorporated ("Leggett"); Teresa Liddell ("T. Liddell"); Little Diversified Architectural Consulting ("Little"); McDonald's Corporation ("McDonald's"); MeadWestvaco; MedFaxx, Inc. ("MedFaxx"); Medical Insurance Services ("Medical Insurance"); MetLife; Mary S. Metz ("M. Metz"); Microsoft Corporation ("Microsoft"); John R. Miller ("J. Miller"); Marcelo Moretti ("M. Moretti"); Motorola; National Association of Corporate Directors ("NACD"); National Association of Manufacturers ("NAM"); National Investor Relations Institute ("NIRI"); O'Melveny & Myers; Office Depot; Omaha Door & Window ("Omaha Door"); The Procter & Gamble Company ("P&G"); PepsiCo, Inc. ("PepsiCo"); Pfizer; Realogy Corporation ("Realogy"); Jared Robert ("J. Robert"); Marissa Robert ("M. Robert"); RPM International Inc. ("RPM"); Ryder System, Inc. ("Ryder"); Safeway; Ralph S. Saul ("R. Saul"); Shearman & Sterling; Sherwin-Williams; Raymond F. Simoneau ("R. Simoneau"); Society of Corporate Secretaries and Governance Professionals, Inc. ("Society of Corporate Secretaries"); The Southern Company ("Southern Company"); Southland Properties, Inc. ("Southland"); The Steele Group ("Steele Group"); Style Crest Enterprises, Inc. ("Style Crest"); Tesoro; Textron; Theragenics Corporation ("Theragenics"); TI; Richard Trummel ("R. Trummel"); Terry Trummel ("T. Trummel"); Viola Trummel ("V. Trummel"); tw telecom inc. ("tw telecom"); Laura D'Andrea Tyson ("L. Tyson"); United Brotherhood of Carpenters and Joiners of America ("United Brotherhood of Carpenters"); UnitedHealth; U.S. Bancorp; VCG Holding Corporation ("VCG"); Wachtell; The Way to Wellness ("Wellness"); Wells Fargo; Whirlpool Corporation ("Whirlpool"); Xerox; Yahoo; Jeff Young ("J. Young").

[36] *See* letters from ABA; American Mailing Service ("American Mailing"); All Cast, Inc. ("All Cast"); Always N Bloom ("Always N Bloom"); American Carpets ("American Carpets"); John Arquilla ("J. Arquilla"); Beth Armburst ("B. Armburst"); Artistic Land Designs; Charles Atkins ("C. Atkins"); Book Celler ("Book Celler"); Kathleen G. Bostwick ("K. Bostwick"); Brighter Day Painting ("Brighter Day Painting"); Colletti and Associates ("Colletti"); Commercial Concepts ("Commercial Concepts"); Complete Home Inspection ("Complete Home Inspection"); Debbie Courtney ("D. Courtney"); Sue Crawford ("S. Crawford"); Crespin's Cleaning, Inc. ("Crespin"); Don's Tractor Repair ("Don's"); Theresa Ebreo ("T. Ebreo"); M. Eng; eWareness, Inc. ("eWareness"); Evans Real Estate Investments, LLC ("Evans"); Fluharty Antiques ("Fluharty"); Flutterby; Fortuna Italian Restaurant & Pizza ("Fortuna Italian Restaurant"); Future Form Inc. ("Future Form Inc."); Glaspell Goals ("Glaspell"); Cheryl Gregory ("C. Gregory"); Healthcare Practice Management, Inc. (Healthcare Practice"); Brian Henderson ("B. Henderson"); Sheri Henning ("S. Henning"); Jaynee Herren ("J. Herren"); Ami Iriarte ("A. Iriarte"); Jeremy J. Jones ("J. Jones"); Juz Kidz Nursery and Preschool ("Juz Kidz"); Kernan Chiropractic Center ("Kernan"); LMS Wine Creators ("LMS Wine"); Tabitha Luna ("T. Luna"); Mansfield Children's Center, Inc. ("Mansfield Children's Center"); Denise McDonald ("D. McDonald"); Meister's Landscaping ("Meister"); Merchants Terminal Corporation ("Merchants Terminal"); Middendorf Bros. Auctioneers and Real Estate ("Middendorf"); Mingo Custom Woods ("Mingo"); Moore Brothers Auto Truck Repair ("Moore Brothers"); Mouton's Salon ("Mouton"); Doug Mozack ("D. Mozack"); Ms. Dee's Lil Darlins Daycare ("Ms. Dee"); Gavin Napolitano ("G. Napolitano"); NK Enterprises ("NK"); Hugh S. Olson ("H. Olson"); Parts and Equipment Supply Co. ("PESC"); Pioneer Heating & Air Conditioning ("Pioneer Heating & Air Conditioning"); RC Furniture Restoration ("RC"); RTW Enterprises Inc. ("RTW"); Debbie Sapp ("D. Sapp"); Southwest Business Brokers ("SBB"); Security Guard IT&T Alarms, Inc. ("SGIA"); Peggy Sicilia ("P. Sicilia"); Slycers Sandwich Shop ("Slycers"); Southern Services ("Southern Services"); Steele Group; Sylvron Travels ("Sylvron"); Theragenics; Erin White Tremaine ("E. Tremaine"); Wagner Health Center ("Wagner"); Wagner Industries ("Wagner Industries"); Wellness; West End Auto Paint & Body ("West End"); Y.M. Inc. ("Y.M."); J. Young.

[37] *See, e.g.,* letters from 26 Corporate Secretaries; 3M; Advance Auto Parts; Allstate; Avis Budget; American Express; Anadarko; Association of Corporate Counsel; AT&T; L. Behr; Best Buy; Boeing; BRT; R. Burt; California Bar; S. Campbell; Carlson; Caterpillar; Chamber of Commerce/CMCC; Chevron; CIGNA; W. Cornwell; CSX; Cummins; Davis Polk; Dewey; DuPont; Eaton; M. Eng; FedEx; FMC Corp.; FPL Group; Frontier; GE; General Mills; Joseph A. Grundfest, Stanford Law School (July 24, 2009) ("Grundfest"); C. Holliday; Honeywell; C. Horner; IBM; Jones Day; Keating Muething; J. Kilts; R. Clark King; N. Lautenbach; MeadWestvaco; Metlife; Motorola; O'Melveny & Myers; Office Depot; Pfizer; Protective; S&C; Safeway; Sara Lee; Shearman & Sterling; Sherwin-Williams; Sidley Austin; Simpson Thacher; Tesoro; Textron; TI; G. Tooker; UnitedHealth; Unitrin; U.S. Bancorp; Wachtell; Wells Fargo; West Chicago Chamber; Weyerhaeuser; Xerox; Yahoo.

[38] We refer to Delaware law frequently because of the large percentage of public companies incorporated under that law. The Delaware Division of Corporations reports that over 50% of U.S. public companies are incorporated in Delaware. *See http://www.corp.delaware.gov.*

[39] Del. Code Ann. tit. 8, § 112. In December 2009, the Committee on Corporate Laws of the American Bar Association Section of Business Law Committee adopted amendments to the Model Act that explicitly authorize bylaws that prescribe

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highlighted by a number of commenters, other states have not.[40] These commenters noted that, as a result, companies not incorporated in Delaware could frustrate shareholder efforts to establish procedures for shareholders to place board nominees in the company's proxy materials by litigating the validity of a shareholder proposal establishing such procedures, or possibly repealing shareholder-adopted bylaws establishing such procedures. In addition, due to the difficulty that shareholders could have in establishing such procedures, we believe that it would be inappropriate to rely solely on an enabling approach to facilitate shareholders' ability to exercise their State law rights to nominate and elect directors. Even if bylaw amendments to permit shareholders to include nominees in company proxy materials were permissible in every state, shareholder proposals to so amend company bylaws could face significant obstacles.

We also considered whether the move by many companies away from plurality voting to a general policy of majority voting in uncontested director elections should lead to a conclusion that our actions are unnecessary or whether we should premise our actions on the failure of a company to adopt majority voting.[41] We agree with commenters[42] who argued that a majority voting standard in director elections does not address the need for a rule to facilitate the inclusion of shareholder nominees for director in company proxy materials. While majority voting impacts shareholders' ability to elect candidates put forth by management, it does not affect shareholders' ability to exercise their right to nominate candidates for director.

We also do not believe that the recent amendments to New York Stock Exchange (NYSE) Rule 452, which eliminated brokers' discretionary voting authority in director elections, negate the need for the rule. Certain commenters specifically noted their concurrence with us on this point.[43] The amendments to NYSE Rule 452 address who exercises the right to vote rather than shareholders' ability to have their nominees put forth for a vote. While these and other changes have been important events, they bolster shareholders' ability to elect directors who are already on the company's proxy card, not their ability to affect who appears on that card. We therefore are convinced that the Federal proxy rules should be amended to better facilitate the exercise of shareholders' rights under State law to nominate directors.

We also considered whether we should amend Rule 14a–8 to narrow the "election exclusion," without also adopting Rule 14a–11. We note that a significant number of commenters supported the proposed amendments to Rule 14a–8(i)(8).[44] We concluded, however, as certain commenters pointed out, that adopting only the proposed amendments to Rule 14a–8(i)(8), without Rule 14a–11, would not achieve the Commission's stated objectives.[45]We believe that the amendments to Rule 14a–8(i)(8) will provide shareholders with an important mechanism for including in company proxy materials proposals that would address the inclusion of shareholder director nominees in the company's proxy materials in ways that supplement Rule 14a–11, such as with a lower ownership threshold, a shorter holding period, or to allow for a greater number of nominees if shareholders of a company support such standards.

We recognize that many commenters advocated that shareholders' ability to include nominees in company proxy materials should be determined *exclusively* by what individual companies or their shareholders affirmatively choose to provide, or that companies or their shareholders should be able to opt out of Rule 14a–11 or otherwise alter its terms for individual companies (the "private ordering" arguments).[46] After careful consideration of the numerous comments advocating this perspective,[47] we believe that the arguments in favor of this perspective are flawed for several reasons.

First, corporate governance is not merely a matter of private ordering. Rights, including shareholder rights, are artifacts of law, and in the realm of corporate governance some rights cannot be bargained away but rather are imposed by statute. There is nothing novel about mandated limitations on private ordering in corporate governance.[48]

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shareholder access to company proxy materials or reimbursement of proxy solicitation expenses. *See* ABA Press Release, "Corporate Laws Committee Adopts New Model Business Corporation Act Amendments to Provide For Proxy Access And Expense Reimbursement," December 17, 2009, *available at http://www.abanet.org/abanet/media/release/news_release.cfm?releaseid=848.*

In addition, in 2007, North Dakota amended its corporate code to permit 5% shareholders to provide a company notice of intent to nominate directors and require the company to include each such shareholder nominee in its proxy statement and form of proxy. N.D. Cent. Code § 10–35–08 (2009); *see* North Dakota Publicly Traded Corporations Act, N.D. Cent. Code § 10–35 *et al.* (2007).

[40] *See* letters from American Federation of State, County and Municipal Employees ("AFSCME"); AllianceBernstein L.P. ("AllianceBernstein"); Amalgamated Bank LongView Funds ("Amalgamated Bank"); Association of British Insurers ("British Insurers"); CalPERS; CII; The Corporate Library ("Corporate Library"); L. Dallas; Florida State Board of Administration; ICGN; LIUNA; D. Nappier; Paul M. Neuhauser ("P. Neuhauser"); Comment Letter of Nine Securities and Governance Law Firms ("Nine Law Firms"); Pax World; Pershing Square; *theRacetotheBottom.org* ("RacetotheBottom"); RiskMetrics; Schulte Roth & Zabel LLP ("Schulte Roth & Zabel"); Sodali ("Sodali"); Teachers Insurance and Annuity Association of America and College Retirement Equities Fund ("TIAA–CREF"); United States Proxy Exchange ("USPE"); ValueAct Capital, LLC ("ValueAct Capital").

[41] Despite the rate of adoption of a majority voting standard for director elections by companies in the S&P 500, only a small minority of firms in the Russell 3000 index have adopted them. *See* discussion in footnote 69 in the Proposing Release.

[42] *See* letters from AFSCME; AllianceBernstein; CalPERS; CII; L. Dallas; D. Nappier; P. Neuhauser; RiskMetrics; TIAA–CREF. One commenter characterized a majority voting standard as a mechanism for "registering negative sentiment" about an incumbent board nominee, not a mechanism to ensure board accountability. *See* letter from AFSCME.

[43] *See* letters from CII; Sodali; USPE.

[44] For a list of these commenters, *see* footnotes 677, 678, and 679 below.

[45] *See* letters from CII; USPE.

[46] *See* letters from 26 Corporate Secretaries; ABA; ACE; Advance Auto Parts; AGL; Aetna; Allstate; Alston & Bird; American Bankers Association; American Business Conference; American Electric Power; Anadarko; Applied Materials; Artistic Land Designs; Association of Corporate Counsel; Avis Budget; Atlantic Bingo; L. Behr; Best Buy; Biogen; J. Blanchard; Boeing; T. Bonkowski; BorgWarner; Boston Scientific; Brink's; BRT; Burlington Northern; R. Burt; California Bar; Callaway; S. Campbell; Carlson; Carolina Mills; Caterpillar; Chamber of Commerce/CMCC; Chevron; R. Chicko; CIGNA; Comcast; Competitive Enterprise Institute; W. Cornwell; CSX; E. Culwell; Cummins; Darden Restaurants; Daniels Manufacturing; Davis Polk; Delaware Bar; T. Dermody; Devon; DTE Energy; Eaton; Edison Electric Institute; Eli Lilly; Emerson Electric; M. Eng; Erickson; ExxonMobil; FedEx; Financial Services Roundtable; Flutterby; FPL Group; Frontier; GE; A. Goolsby; Grundfest; C. Holliday; IBM; ICI; Intelect; JPMorgan Chase; Jones Day; R. Clark King; Leggett; T. Liddell; Little; McDonald's; MeadWestvaco; MedFaxx; Medical Insurance; Metlife; M. Metz; Microsoft; J. Miller; M. Moretti; Motorola; NACD; NAM; NIRI; O'Melveny & Myers; Office Depot; Omaha Door; P&G; PepsiCo; Pfizer; Realogy; J. Robert; M. Robert; RPM; Ryder; Safeway; R. Saul; Shearman & Sterling; Sherwin-Williams; R. Simoneau; Society of Corporate Secretaries; Southern Company; Southland; Steele Group; Style Crest; Tesoro; Textron; Theragenics; TI; R. Trummel; T. Trummel; V. Trummel; tw telecom; L. Tyson; United Brotherhood of Carpenters; UnitedHealth; U.S. Bancorp; VCG; Wachtell; Wellness; Wells Fargo; Whirlpool; Xerox; Yahoo; J. Young.

[47] *See id.*

[48] For example, quite a few aspects of Delaware corporation law are mandatory (*i.e.,* not capable of modification by agreement or provision in the certificate of incorporation or bylaws), including: (i) The requirement to hold an annual election of directors (Del. Code Ann., tit. 8, § 211(b); *Jones Apparel Group* v. *Maxwell Shoe Co.,* 883 A.2d 837,

Second, the argument that there is an inconsistency between mandating inclusion of shareholder nominees in company proxy materials and our concern for the rights of shareholders under the Federal securities laws [49] mistakenly assumes that basic protections of, and rights of, particular shareholders provided under the Federal proxy rules should be able to be abrogated by "the shareholders" of a particular corporation, acting in the aggregate. The rules we adopt today provide individual shareholders the ability to have director nominees included in the corporate proxy materials if State law [50] and governing corporate documents permit a shareholder to nominate directors at the shareholder meeting and the requirements of Rule 14a–11 are satisfied. Those rules similarly facilitate the right of individual shareholders to vote for those nominated, whether by management or another shareholder, if the shareholder has voting rights under State law and the company's governing documents. The rules we adopt today reflect our judgment that the proxy rules should better facilitate shareholders' effective exercise of their traditional State law rights to nominate directors and cast their votes for nominees. When the Federal securities laws establish protections or create rights for security holders, they do so individually, not in some aggregated capacity. No provision of the Federal securities laws can be waived by referendum. A rule that would permit some shareholders (even a majority) to restrict the Federal securities law rights of other shareholders would be without precedent and, we believe, a fundamental misreading of basic premises of the Federal securities laws. In addition, allowing some shareholders to impair the ability of other shareholders to have their director nominees included in company proxy materials cannot be reconciled with the purpose of the rules we are adopting today. In our view, it would be no more appropriate to subject a Federal proxy rule that provides the ability to include nominees in the company proxy statement to a shareholder vote than it would be to subject any other aspect of the proxy rules—including the other required disclosures—to abrogation by shareholder vote.

Third, the net effect of our rules will be to expand shareholder choice, not limit it. Our rules will result in a greater number of nominees appearing on a proxy card. Shareholders will continue to have the opportunity to vote solely for management candidates, but our rules will also give shareholders the opportunity to vote for director candidates who otherwise might not have been included in company proxy materials.

In addition to these basic conclusions, we note that there are other significant concerns raised by a private ordering approach. A company-by-company shareholder vote on the applicability of Rule 14a–11 would involve substantial direct and indirect, market-wide costs, and it is possible that boards of directors, or shareholders acting with their explicit or implicit encouragement, might seek such shareholder votes, perhaps repeatedly, at no financial cost to themselves but at considerable cost to the company and its shareholders. Another concern relates to the nature of the shareholder vote on whether to opt out of Rule 14a–11: Specifically, in that context management can draw on the full resources of the corporation to promote the adoption of an opt-out, while disaggregated shareholders have no similarly effective platform from which to advocate against an opt-out.

In addition, the path to shareholder adoption of a procedure to include nominees in company proxy materials is by no means free of obstructions. While shareholders may ordinarily have the State law right to adopt bylaws providing for inclusion of shareholder nominees in company proxy materials even in the absence of an explicit authorizing statute like Delaware's, the existence of that right in the absence of such a statute may be challenged. Moreover, we understand that under Delaware law, the board of directors is ordinarily free, subject to its fiduciary duties, to amend or repeal any shareholder-adopted bylaw.[51] In addition, not all state statutes confer upon shareholders the power to adopt and amend bylaws, and even where shareholders have that power it is frequently limited by requirements in the company's governing documents that bylaw amendments be approved by a supermajority shareholder vote.[52]

After careful consideration of the options that commenters have suggested, we have determined that the most effective way to facilitate shareholders' exercise of their traditional State law rights to nominate and elect directors would be through Rule 14a–11 and the related amendments to the proxy rules that we proposed in June 2009. We have concluded that the ability to include shareholder nominees in company proxy materials pursuant to Rule 14a–11 [53] must be available to shareholders who are entitled under State law to nominate and elect directors, regardless of any provision of State law or a company's governing documents that purports to waive or prohibit the use of Rule 14a–11. In this regard, we note that although the rules we are adopting do not permit a company or its shareholders to opt out of or alter the application of Rule 14a–11, the amendments do contemplate that any additional ability to include shareholder nominees in the company's proxy materials that may be established in a company's governing documents will be permissible under our rules. Moreover, our amendments to Rule 14a–8 will facilitate the presentation of proposals by shareholders to adopt company-

848–849 (Del. Ch. 2004) *citing Rohe* v. *Reliance Training Network, Inc.,* 2000 Del. Ch. LEXIS 108 at *10–*11 (Del. Ch. July 21, 2000)); (ii) the limitation against dividing the board of directors into more than three classes (Del. Code Ann., tit. 8, § 141(d); *see also Jones Apparel*); (iii) the entitlement of stockholders to inspect the list of stockholders and other corporate books and records (Del. Code Ann., tit. 8, §§ 219(a) and 220(b); *Loew's Theatres, Inc.* v. *Commercial Credit Co.,* 243 A.2d 78, 81 (Del. Ch. 1968)); (iv) the right of stockholders to vote as a class on certain amendments to the certificate of incorporation (Del. Code Ann., tit. 8, § 242(b)(2)); (v) appraisal rights (Del. Code Ann., tit. 8, § 262(b)); and (vi) fiduciary duties of corporate directors (*Siegman* v. *Tri-Star Pictures, Inc.,* C.A. No. 9477 (Del. Ch. May 5, 1989, *revised* May 30, 1989), reported at 15 Del. J. Corp. L. 218, 236 (1990); *cf.* Del. Code Ann., tit. 8, § 102(b)(7), permitting elimination of director liability for monetary damages for breach of the duty of care). *See also* Edward P. Welch and Robert S. Saunders, *What We Can Learn From Other Statutory Schemes: Freedom And Its Limits In The Delaware General Corporation Law,* 33 Del. J. Corp. L. 845, 857–859 (2008); Jeffrey N. Gordon, *Contractual Freedom In Corporate Law: Articles & Comments; The Mandatory Structure Of Corporate Law,* 89 Colum. L. Rev. 1549, 1554 n.16 (1989) (identifying several of these and other mandatory aspects of Delaware corporation law).

[49] *See* letters from Grundfest; Form Letter Type A. *Cf.* letter from Nine Law Firms.

[50] In the case of a non-U.S. domiciled issuer that does not qualify as a foreign private issuer (as defined in Exchange Act Rule 3b–4), we will look to the underlying law of the jurisdiction of organization. *See* Rule 14a–11(a).

[51] It has been argued to us, as a basis for excluding a shareholder proposal under Rule 14a–8, that Delaware law does not permit a bylaw to deprive the board of directors of the power to amend or repeal it, where the corporation's certificate of incorporation confers upon the board the power to adopt, amend and repeal bylaws. *See, e.g., CVS Caremark Corp.,* No-Action Letter (March 9, 2010). *See also* Del. Code Ann., tit. 8, § 109(b) and *Centaur Partners, IV* v. *National Intergroup, Inc.,* 582 A.2d 923, 929 (Del. 1990).

[52] *See* Beth Young, The Corporate Library, "The Limits of Private Ordering: Restrictions on Shareholders' Ability to Initiate Governance Change and Distortions of the Shareholder Voting Process" (November 2009), *available at http://www.sec.gov/comments/s7-10-09/s71009-568.pdf. See, e.g.,* Ind. Code § 23–1–39–1; Okla. Stat., tit. 18, § 18–1013.

[53] Throughout this release, when we refer to "a nomination pursuant to Rule 14a–11," a "Rule 14a–11 nomination," or other similar statement, we are referring to a nomination submitted for inclusion in a company's proxy materials pursuant to Rule 14a–11.

specific procedures for including shareholder nominees for director in company proxy materials, and our adoption of new Exchange Act Rule 14a–18 (which requires disclosure concerning the nominating shareholder or group and the nominee or nominees that generally is consistent with that currently required in an election contest) will help assure that investors are adequately informed about shareholder nominations made through such procedures.

In contrast, if State law [54] or a provision of the company's governing documents were ever to prohibit a shareholder from making a nomination (as opposed to including a validly nominated individual in the company's proxy materials), Rule 14a–11 would not require the company to include in its proxy materials information about, and the ability to vote for, any such nominee. The rule defers entirely to State law as to whether shareholders have the right to nominate directors and what voting rights shareholders have in the election of directors.

While we have concluded that we should provide shareholders the means to have nominees included in proxy materials in certain circumstances, we also are mindful that to accomplish this goal the regulatory structure must arrive at a solution that ultimately is workable. Accordingly, we are adopting a number of significant changes to the rules we proposed in order to address the many thoughtful and constructive comments we received on the specifics of our proposed amendments. The changes that we are making to the amendments are described in detail throughout this release. There also were a number of suggested changes that we considered and decided not to adopt, as detailed below.

B. Our Role in the Proxy Process

Several commenters challenged our authority to adopt Rule 14a–11.[55] We considered those comments carefully but continue to believe that we have the authority to adopt Rule 14a–11 under Section 14(a) as originally enacted.[56] In any event, Congress confirmed our authority in this area and removed any doubt that we have authority to adopt a rule such as Rule 14a–11.[57] As described more fully below, Rule 14a–11 is necessary and appropriate in the public interest and for the protection of investors.[58] Additionally, as explained below, the terms and conditions of Rule 14a–11 are also in the interests of shareholders and for the protection of investors.[59] Therefore, this challenge is now moot.

Although our statutory authority to adopt Rule 14a–11 is no longer at issue, the constitutionality of Rule 14a–11 also has been challenged by commenters. We disagree with their arguments.[60] Proxy regulations do not infringe on corporate First Amendment rights both because "management has no interest in corporate property except such interest as derives from the shareholders," and because such regulations "govern speech by a corporation *to itself*" and therefore "do not limit the range of information that the corporation may contribute to the public debate." [61] Even if statements in proxy materials are viewed as more than merely internal communications, this communication is of a commercial—not political—nature, and regulation of such statements through Rule 14a–11 is consistent with applicable First Amendment standards.[62]

C. Summary of the Final Rules

As noted above, we carefully considered the comments and have decided to adopt new Exchange Act Rule 14a–11 with significant modifications in response to the comments. We believe that the new rule will benefit shareholders and protects investors by improving corporate suffrage, the disclosure provided in connection with corporate proxy solicitations, and communication between shareholders in the proxy process. Consistent with the Proposal, Rule 14a–11 will apply only when applicable State law or a company's governing documents do not prohibit shareholders from nominating a candidate for election as a director. In addition, as adopted, the rule will apply to a foreign issuer that is otherwise subject to our proxy rules only when applicable foreign law does not prohibit shareholders from making such nominations. Also consistent with the Proposal, companies may not "opt out" of the rule—either in favor of a different framework for inclusion of shareholder director nominees in company proxy materials or no framework. In addition, as was proposed, the rule will apply regardless of whether any specified event has occurred to trigger the rule and will apply regardless of whether the company is subject to a concurrent proxy contest.[63] Also as proposed, the final rule will apply to companies that are subject to the Exchange Act proxy rules, including investment companies and controlled companies, but will not apply to "debt-only" companies. The rule will apply to smaller reporting companies, but we have decided to delay the rule's application to these companies for three years. We believe that a delayed effective date for smaller reporting companies should allow those companies to observe how the rule operates for other companies and should allow them to better prepare for implementation of the rules. Delayed implementation for these companies also will allow us to evaluate the implementation of Rule 14a–11 by larger companies and provide us with the additional opportunity to consider whether adjustments to the rule would be appropriate for smaller reporting companies before the rule becomes applicable to them. To use Rule 14a–11, a nominating shareholder or group will be required to satisfy an ownership threshold of at least 3% of the voting power of the company's securities entitled to be voted at the meeting. Shareholders will be able to aggregate their shares to meet the threshold. The

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[54] In the case of a non-U.S. domiciled issuer that does not qualify as a foreign private issuer, we will look to the underlying law of the jurisdiction of organization. *See* footnote 50 above.

[55] *See* letters from Ameriprise; AT&T; L. Behr; BRT; Burlington Northern; CMCC; Dewey; M. Eng; FedEx; Grundfest; Keating Muething; OPLP; Sidley Austin.

[56] When it adopted Section 14(a) of the Exchange Act, Congress determined that the exercise of shareholder voting rights via the corporate proxy is a matter of Federal concern, and the statute's grant of authority is not limited to regulating disclosure. *Roosevelt* v. *E.I. DuPont de Nemours & Co.,* 958 F.2d 416, 421–422 (D.C. Cir. 1992) (Congress "did not narrowly train [S]ection 14(a) on the interest of stockholders in *receiving information* necessary to the intelligent exercise of their" State law rights; Section 14(a) also "shelters use of the proxy solicitation process as a means by which stockholders * * * may *communicate with each other.*"); *see also, e.g., TSC Indus., Inc.* v. *Northway, Inc.,* 426 U.S. 438, 449 n.10 (1976) (Section 14(a) is a grant of "broad statutory authority"). The adoption of Rule 14a–11 reflects our continuing purpose to ensure that proxies are used as a means to enhance the ability of shareholders to make informed choices, especially on the critical subject of who sits on the board of directors.

[57] Dodd-Frank Act § 971(a) and (b). These provisions expressly provide that the Commission may issue rules permitting shareholders to use an issuer's proxy solicitation materials for the purpose of nominating individuals to membership on the board of directors of the issuer.

[58] Exchange Act § 14(a) and Investment Company Act § 20(a).

[59] Dodd-Frank Act § 971(b).

[60] *See* letter from BRT.

[61] *Pacific Gas and Electric Company* v. *Public Utilities Comm'n of California,* 475 U.S. 1, 14 n.10 (1986) (emphasis in original).

[62] Nor does Rule 14a–11 violate the Fifth Amendment, as it does not constitute a regulatory taking. *See, e.g., Lingle* v. *Chevron U.S.A.,* 544 U.S. 528, 546–47 (2005); *Penn Central Transp. Co.* v. *City of New York,* 438 U.S. 104 (1978).

[63] Throughout this release, the terms "proxy contest," "election contest," and "contested election" refer to any election of directors in which another party commences a solicitation in opposition subject to Exchange Act Rule 14a–12(c).

required ownership threshold has been modified from the Proposal, which would have required that a nominating shareholder or group hold 1%, 3%, or 5% of the company's securities entitled to be voted on the election of directors, depending on accelerated filer status or, in the case of registered investment companies, depending on the net assets of the company. The final rule requires that a nominating shareholder or group must hold both investment and voting power, either directly or through any person acting on their behalf, of the securities. In calculating the ownership percentage held, under certain conditions, a nominating shareholder or member of the nominating shareholder group would be able to include securities loaned to a third party in the calculation of ownership. In determining the total voting power held by the nominating shareholder or any member of the nominating shareholder group, securities sold short (as well as securities borrowed that are not otherwise excludable) must be deducted from the amount of securities that may be counted towards the required ownership threshold. In addition, a nominating shareholder (or in the case of a group, each member of the group) will be required to have held the qualifying amount of securities continuously for at least three years as of the date the nominating shareholder or group submits notice of its intent to use Rule 14a–11 (on a filed Schedule 14N), rather than for one year, as was proposed. Consistent with the proposed amendments, we are adopting a requirement that the nominating shareholder or members of the group must continue to own the qualifying amount of securities through the date of the meeting at which directors are elected and provide disclosure concerning their intent with regard to continued ownership of the securities after the election of directors. In addition, the nominating shareholder (or where there is a nominating shareholder group, any member of the nominating shareholder group) may not be holding the company's securities with the purpose, or with the effect, of changing control of the company or to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the company could be required to include under Rule 14a–11, and may not have a direct or indirect agreement with the company regarding the nomination of the nominee or nominees prior to filing the Schedule 14N.

The nominating shareholder or group must provide notice to the company of its intent to use Rule 14a–11 no earlier than 150 days prior to the anniversary of the mailing of the prior year's proxy statement and no later than 120 days prior to this date. The final rule differs from the Proposal, which would have required the nominating shareholder or group to provide notice to the company no later than 120 days prior to the anniversary of the mailing of the prior year's proxy statement or in accordance with the company's advance notice provision, if applicable. As was proposed, under the final rule the nominating shareholder or group will be required to file on EDGAR and transmit to the company its notice on Schedule 14N on the same date.

The rule also includes certain requirements applicable to the shareholder nominee. Consistent with the Proposal, the final rule provides that the company will not be required to include any nominee whose candidacy or, if elected, board membership would violate controlling state or Federal law, or the applicable standards of a national securities exchange or national securities association, except with regard to director independence requirements that rely on a subjective determination by the board, and such violation could not be cured during the provided time period.[64] In addition, the rule we are adopting provides that a company will not be required to include any nominee whose candidacy or, if elected, board membership would violate controlling foreign law. As we proposed, the rule does not include any restrictions on the relationships between the nominee and the nominating shareholder or group.

As was proposed, under Rule 14a–11, a company will not be required to include more than one shareholder nominee, or a number of nominees that represents up to 25% of the company's board of directors, whichever is greater. Where there are multiple eligible nominating shareholders, the nominating shareholder or group with the highest percentage of the company's voting power would have its nominees included in the company's proxy materials, rather than the nominating shareholder or group that is first to submit a notice on Schedule 14N, as we had proposed. We also have clarified in the final rule that when a company has a classified (staggered) board, the 25% calculation would still be based on the total number of board seats. In addition, in response to public comment, we have added a provision to the rule designed to prevent the potential unintended consequences of discouraging dialogue and negotiation between company management and nominating shareholders. Under this provision, shareholder nominees of an eligible nominating shareholder or group with the highest qualifying voting power percentage that a company agrees to include as company nominees after the filing of the Schedule 14N would count toward the 25%.

The notice on Schedule 14N will be required to include:

- Disclosure concerning:
  - The amount and percentage of voting power of the company's securities entitled to be voted by the nominating shareholder or group and the length of ownership of those securities;
  - Biographical and other information about the nominating shareholder or group and the shareholder nominee or nominees, similar to the disclosure currently required in a contested election;
  - Whether or not the nominee or nominees satisfy the company's director qualifications, if any (as provided in the company's governing documents);
- Certifications that, after reasonable inquiry and based on the nominating shareholder's or group's knowledge, the:
  - Nominating shareholder (or where there is a nominating shareholder group, each member of the nominating shareholder group) is not holding any of the company's securities with the purpose, or with the effect, of changing control of the company or to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the company could be required to include under Rule 14a–11;
  - Nominating shareholder or group otherwise satisfies the requirements of Rule 14a–11, as applicable; and
  - Nominee or nominees satisfy the requirements of Rule 14a–11, as applicable;
- A statement that the nominating shareholder or group members will continue to hold the qualifying amount of securities through the date of the meeting and a statement with regard to the nominating shareholder's or group member's intended ownership of the securities following the election of directors (which may be contingent on the

[64] In the case of an investment company, the nominee may not be an "interested person" of the company as defined in Section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(19)). *See* Section II.B.3.b. for a more detailed discussion of the applicability of Rule 14a–11 to registered investment companies.

results of the election of directors); and

- A statement in support of each shareholder nominee, not to exceed 500 words per nominee (the statement would be at the option of the nominating shareholder or group).

These requirements for Schedule 14N are largely consistent with the Proposal, with some modifications made in response to comments. Among the modifications is the new disclosure requirement concerning whether, to the best of the nominating shareholder's or group's knowledge, the nominee or nominees satisfy the company's director qualifications, if any (as provided in the company's governing documents). We also have revised the certifications to require certification not only with regard to control intent, but also with regard to the other nominating shareholder and nominee eligibility requirements.

A company that receives a notice on Schedule 14N from an eligible nominating shareholder or group will be required to include in its proxy statement disclosure concerning the nominating shareholder or group and the shareholder nominee or nominees, and include on its proxy card the names of the shareholder nominees. The nominating shareholder or group will be liable for any statement in the notice on Schedule 14N which, at the time and in light of the circumstances under which it is made, is false or misleading with respect to any material fact or that omits to state any material fact necessary to make the statements therein not false or misleading, including when that information is subsequently included in the company's proxy statement. The company will not be responsible for this information. These liability provisions are included in the final rules largely as proposed, but with two changes in response to comments. Final Rule 14a–9(c) makes clear that the nominating shareholder or group will be liable for any statement in the Schedule 14N or any other related communication that is false or misleading with respect to any material fact, or that omits to state any material fact necessary to make the statements therein not false or misleading, regardless of whether that information is ultimately included in the company's proxy statement. In addition, consistent with the existing approach in Rule 14a–8, under Rule 14a–11 as adopted, a company will not be responsible for any information provided by the nominating shareholder or group and included in the company's proxy statement. Under the Proposal, a company would not have been responsible for any information provided by the nominating shareholder or group except where the company knows or has reason to know that the information is false or misleading.

A company will not be required to include a nominee or nominees if the nominating shareholder or group or the nominee fails to satisfy the eligibility requirements of Rule 14a–11. A company that determines it may exclude a nominee or nominees must provide a notice to the Commission regarding its intent to exclude the nominee or nominees. The company also may submit a request for the staff's informal view with respect to the company's determination that it may exclude the nominee or nominees (commonly referred to as "no-action" requests). In addition, a company could exclude a nominating shareholder's or group's statement of support if the statement exceeds 500 words per nominee and could seek a no-action letter from the staff with regard to this determination if it so desired. In the event that a nominating shareholder or group or nominee withdraws or is disqualified prior to the time the company commences printing the proxy materials, under certain circumstances companies will be required to include a substitute nominee if there are other eligible nominees. Therefore, companies seeking a no-action letter from the staff with respect to their decision to exclude any Rule 14a–11 nominee or nominees would need to seek a no-action letter on all nominees that they believe they can exclude at the outset.

We also have adopted two new exemptions, slightly modified from the Proposal, to the proxy rules for solicitations in connection with a Rule 14a–11 nomination. The first exemption applies to written and oral solicitations by shareholders who are seeking to form a nominating shareholder group. Reliance on this new exemption will require:

- That the shareholder not be holding the company's securities with the purpose, or with the effect, of changing control of the company or to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the registrant could be required to include under Rule 14a–11;
- Limiting the content of written communications to certain information specified in the rule;
- Filing all written soliciting materials sent to shareholders in reliance on the exemption with the Commission or, in the case of oral communications, a filing under cover of Schedule 14N with the appropriate box checked before or at the same time as the first solicitation in reliance on the new exemption; and
- No solicitations in connection with the subject election of directors other than pursuant to the provisions of Rule 14a–11 and the new exemption described below.

Shareholders that do not want to rely on this new exemption could opt to rely on other exemptions from the proxy rules (*e.g.,* Rule 14a–2(b)(2), which is limited to solicitations of not more than 10 persons).

The second new exemption applies to written and oral solicitations by or on behalf of a nominating shareholder or group whose nominee or nominees are or will be included in the company's proxy materials pursuant to Rule 14a–11 in favor of shareholder nominees or for or against company nominees. Reliance on this new exemption will require:

- That the nominating shareholder or group does not seek the power to act as a proxy for another shareholder;
- Disclosing certain information (including the identity of the nominating shareholder or group, and a prominent legend about availability of the proxy materials) in all written communications;
- Filing all written soliciting materials sent to shareholders in reliance on the exemption with the Commission under cover of Schedule 14N with the appropriate box checked; and
- No solicitations in connection with the subject election of directors other than pursuant to the provisions of Rule 14a–11 and this new exemption.

Consistent with the Proposal, we also are amending our beneficial ownership reporting rules so that shareholders relying on Rule 14a–11 would not become ineligible to file a Schedule 13G, in lieu of filing a Schedule 13D, solely as a result of activities in connection with inclusion of a nominee under Rule 14a–11. Also consistent with the proposed amendments, we are not adopting an exclusion from Exchange Act Section 16 for activities in connection with a nomination under Rule 14a–11 that may trigger a filing requirement by nominating shareholders. In addition, after considering the comments, we are not adopting a specific exclusion from the definition of affiliate for nominating shareholders.

Finally, consistent with the Proposal, we are narrowing the scope of the exclusion in Rule 14a–8(i)(8) relating to the election of directors. The revised rule will provide that companies must include in their proxy materials, under

certain circumstances, shareholder proposals that seek to establish a procedure in the company's governing documents for the inclusion of one or more shareholder director nominees in a company's proxy materials.

As we proposed, the final rules provide that a nominating shareholder that is relying on a procedure under State law or a company's governing documents to include a nominee in a company's proxy materials would be required to provide disclosure concerning the nominating shareholder and nominee or nominees to the company on Schedule 14N and file the Schedule 14N on EDGAR. In response to comment, we have clarified that the disclosure also would be required for nominations made pursuant to foreign law.[65] The disclosure requirements on Schedule 14N for nominations made pursuant to a procedure under state or foreign law, or a company's governing documents largely mirror those for a Rule 14a–11 nomination. As with Rule 14a–11 nominees, a company would include in its proxy materials disclosure concerning the nominating shareholder or group and shareholder nominee similar to the disclosure currently required in a contested election. The nominating shareholder or group would have liability for any statement in the notice on Schedule 14N or in information otherwise provided to the company and included in the company's proxy materials which, at the time and in light of the circumstances under which it is made, is false or misleading with respect to any material fact or that omits to state any material fact necessary to make the statements therein not false or misleading. The company would not be responsible for the information provided to the company and required to be included in the company proxy statement.

II. Changes to the Proxy Rules

A. Introduction

After careful consideration of the comments received on the Proposal, we are adopting amendments to the proxy rules to facilitate the effective exercise of shareholders' traditional State law rights to nominate and elect directors to company boards of directors. Under the new rules, shareholders meeting certain requirements will have two ways to more fully exercise their right to nominate directors. First, we are adopting a new proxy rule, Rule 14a–11, which will, under certain circumstances, require companies to provide shareholders with information about, and the ability to vote for, a shareholder's, or group of shareholders', nominees for director in the companies' proxy materials. This requirement will apply unless State law, foreign law,[66] or a company's governing documents[67] prohibits shareholders from nominating directors.[68] In addition to the standards provided in new Rule 14a–11, provisions under State law, foreign law, or a company's governing documents[69] could provide an additional avenue for shareholders to submit nominees for inclusion in company proxy materials, but would not act as a substitute for Rule 14a–11. Thus, Rule 14a–11 will continue to be available to shareholders regardless of whether they also can avail themselves of a provision under State law, foreign law, or a company's governing documents.

Second, we are amending Rule 14a–8(i)(8) to preclude companies from relying on Rule 14a–8(i)(8) to exclude from their proxy materials shareholder proposals by qualifying shareholders that seek to establish a procedure under a company's governing documents for the inclusion of one or more shareholder director nominees in the company's proxy materials. A company must include such a shareholder proposal under the final rules as long as the procedural requirements of Rule 14a–8 are met and the proposal is not subject to exclusion under one of the other substantive bases. In this regard, a shareholder proposal seeking to limit or remove the availability of Rule 14a–11 would be subject to exclusion under Rule 14a–8.[70]

As described throughout this release, we have made many changes to the final rules in response to comments received. We believe the final rules reflect a careful balancing of the policy, workability, and other comments we received on the Proposal.

B. Exchange Act Rule 14a–11

1. Overview

Based on the comments received in response to our solicitation of public input on the Proposal and on prior releases and in roundtables,[71] we understand that shareholders face significant obstacles to effectively exercising their rights to nominate and elect directors to corporate boards. We have received significant public comment supporting the view that including shareholder nominees for director in company proxy materials would be the most direct and effective method of facilitating shareholders' rights in connection with the nomination and election of directors.[72]

On the other hand, many commenters have expressed concern that mandating shareholder access to company proxy materials would lead to more proxy contests or "politicized elections,"[73] which would be distracting, expensive, time-consuming, and inefficient for companies, boards, and management.[74]

[65] *See* Section II.C.5. below.

[66] *See* discussion in footnote 50 above.

[67] Under State law, a company's governing documents may have various names. When we refer to governing documents throughout the release and rule text, we generally are referring to a company's charter, articles of incorporation, certificate of incorporation, declaration of trust, and/or bylaws, as applicable.

[68] We are not aware of any law in any state or in the District of Columbia or in any country that currently prohibits shareholders from nominating directors. Nonetheless, should any such law be enacted in the future, Rule 14a–11 will not apply.

[69] *See* discussion in Section II.C.5. below.

[70] As would currently be the case if a State law permitted a company to prohibit shareholders from nominating candidates for director, a shareholder proposal seeking to prohibit shareholder nominations for director generally or, conversely, to allow shareholder nominations for director, would not be excludable pursuant to Rule 14a–8(i)(8).

[71] *See* the Proposing Release; the 2003 Proposal; the Election of Directors Proposing Release; and the Shareholder Proposals Proposing Release. *See also* the Roundtable on the Federal Proxy Rules and State Corporation Law and the Roundtable on Proposals of Shareholders *available at http://www.sec.gov/spotlight/proxyprocess.htm.*

[72] *See* letters from CII; COPERA; CtW Investment Group; L. Dallas; T. DiNapoli; Florida State Board of Administration; ICGN; D. Nappier; OPERS; Pax World; Teamsters.

[73] *See* letters from ABA; Advance Auto Parts; Atlas Industries, Inc. ("Atlas"); J. Blanchard; Samuel W. Bodman ("S. Bodman"); Boeing; Brink's; BRT; Burlington Northern; Callaway; Cargill ("Cargill"); Carlson; Carolina Mills; Chamber of Commerce/CMCC; Jaime Chico ("J. Chico"); Consolidated Edison, Inc. ("Con Edison"); Anthony Conte ("A. Conte"); W. Cornwell; Crown Battery Manufacturing Co. ("Crown Battery"); CSX; Darden Restaurants; Eaton; FedEx; FPL Group; Frontier; Hickory Furniture Mart ("Hickory Furniture"); IBM; Keating Muething; Little; Louisiana Agencies LLC ("Louisiana Agencies"); Massey Services, Inc. ("Massey Services"); John B. McCoy ("J. McCoy"); D. McDonald; MedFaxx; Metlife; M. Metz; Norfolk Southern Corporation ("Norfolk Southern"); O3 Strategies, Inc. ("O3 Strategies"); Office Depot; Victor Pelson ("V. Pelson"); PepsiCo; Pfizer; Ryder; Sidley Austin; Southland; Style Crest; Tenet Healthcare Corporation ("Tenet"); TI; tw telecom; L. Tyson; United Brotherhood of Carpenters; T. White.

[74] *See* letters from ABA; Anonymous letter dated June 26, 2009 ("Anonymous #2"); Atlas; AT&T; Book Celler; Carlson; Carolina Mills; Chamber of Commerce/CMCC; Chevron; Crespin; M. Eng; Erickson; ExxonMobil; Fenwick & West LLP ("Fenwick"); GE; General Mills; Glass, Lewis & Co., LLC ("Glass Lewis"); Glaspell Goals ("Glaspell"); Intelect; R. Clark King; Koppers Inc. ("Koppers"); MCO Transport, Inc. ("MCO"); MeadWestvaco; MedFaxx; Medical Insurance; Merchants Terminal; Dana Meriatt ("D. Meriatt"); NAM; NIRI; NK; O3 Strategies; Roppe Holding Company ("Roppe"); Rosen Hotels and Resorts ("Rosen"); Safeway; Sara Lee; Schneider National, Inc. ("Schneider"); Southland; Style Crest; Tenet; TI; tw telecom; Rick VanEngelenhoven ("R. VanEngelenhoven"); Wachtell; Wells Fargo; Weyerhaeuser; Yahoo.

Commenters also opined that the increased likelihood of a contested election could discourage experienced and capable individuals from serving on boards, making it more difficult for companies to recruit qualified directors or create boards with the proper mix of experience, skills, and characteristics.[75] The current filing and other requirements applicable to shareholders who wish to propose an alternate slate are, in the view of these commenters, more appropriate than including shareholder nominees for director in company proxy materials.[76]

As we also noted in the Proposing Release, we recognize that there are long-held and deeply felt views on every side of these issues. To the extent shareholders have the right to nominate directors at meetings of shareholders, the Federal proxy rules should facilitate the exercise of this right. We believe the rules we are adopting today will better accomplish this goal and will further our mission of investor protection.

New Rule 14a–11 will require companies to include information about shareholder nominees for director in company proxy statements, and the names of the nominee or nominees as choices on company proxy cards, under specified conditions.[77] The rule will permit companies to exclude a nominee or nominees from the company's proxy materials under certain circumstances, such as when a nominating shareholder or group fails to satisfy the eligibility requirements of the rule. In the following sections we describe, in detail, the final rules, comments received on the Proposal, and changes made in response to the comments.

2. When Rule 14a–11 Will Apply

In this section, we address the rule's application, including when there are conflicting or overlapping provisions under state or foreign law or a company's governing documents, during concurrent proxy contests, and in the absence of any specific triggering events. We also address the reasons why neither an opt-in nor opt-out provision is necessary or appropriate.

a. Interaction With State or Foreign Law

While we are not aware of any law in any state or in the District of Columbia that prohibits shareholders from nominating directors, consistent with the Proposal, a company to which the rule would otherwise apply will not be subject to Rule 14a–11 if applicable State law or the company's governing documents prohibit shareholders from nominating candidates for the board of directors. The final rule also clarifies that, in the case of a non-U.S. domiciled issuer that does not meet the definition of foreign private issuer under the Federal securities laws, the rule will not apply if applicable foreign law prohibits shareholders from nominating a candidate for election as a director.[78] If a company's governing documents prohibit shareholder nominations, shareholders could seek to amend the provision by submitting a shareholder proposal under Rule 14a–8.[79]

Consistent with the Proposal, Rule 14a–11 will apply regardless of whether state or foreign law or a company's governing documents prohibit inclusion of shareholder director nominees in company proxy materials or set share ownership or other terms that are more restrictive than Rule 14a–11 under which shareholder director nominees will be included in company proxy materials. For example, if applicable state or foreign law or a company's governing documents were to require that shareholder nominees be included in company proxy materials only if submitted by a 10% shareholder of the company, a shareholder who does not meet the 10% threshold but does meet the requirements of Rule 14a–11, including the 3% ownership threshold described below, would be able to submit their nominee or nominees for inclusion in the company's proxy materials pursuant to Rule 14a–11. If, on the other hand, applicable state or foreign law or a company's governing documents sets the ownership threshold lower than the 3% ownership threshold required under Rule 14a–11, then Rule 14a–11 would not be available to holders with ownership below the Rule 14a–11 threshold. Those shareholders meeting the lower ownership threshold would have the ability to have their nominees included in the company's proxy materials to whatever extent is provided under applicable state or foreign law or the company's governing documents. In this instance, new Exchange Act Rule 14a–18, discussed in Section II.C.5. below, would require specified disclosures concerning the nominating shareholder or group and the shareholder nominee or nominees.

There also may be situations where applicable state or foreign law or a company's governing documents are more permissive in certain respects, and more restrictive in other respects, than Rule 14a–11. For example, applicable state or foreign law or a company's governing documents could require 10% ownership to have a nominee or nominees included in a company's proxy materials, but allow a shareholder that owns 10% to have nominees up to the full number of board seats included in a company's proxy materials or to otherwise have a change in control intent. While Rule 14a–11 would continue to be available in that case for a shareholder that is eligible to use it, a shareholder could choose to proceed under the alternate procedure and standards. In this instance, a shareholder would be required to clearly evidence its intent to rely either on Rule 14a–11 or on the applicable state or foreign law or company's governing documents, and then meet all of the requirements of whichever procedure it selects.[80] A shareholder could not "pick and choose" different aspects of different procedures. If a shareholder chooses to rely on a provision under applicable state or foreign law or a company's governing documents to include a nominee in a company's proxy materials, it would be required to satisfy the disclosure requirements of new Rule 14a–18.

b. Opt-In Not Required

In the Proposing Release, we requested comment on whether Rule 14a–11 should apply only if shareholders of a company elect to have it apply at their company. While commenters did not specifically address the possibility of shareholders opting into Rule 14a–11, many commenters opposed the Commission's Proposal on the basis that it would create a "one size fits all" Federal rule that intrudes into matters that traditionally have been the province of state or local law.[81] Those

[75] *See* letters from 3M; ABA; American Electric Power; Atlantic Bingo; AT&T; Avis Budget; Biogen; Boeing; BRT; Burlington Northern; Callaway; Carlson; Chamber of Commerce/CMCC; CIGNA; Columbine Health Plan ("Columbine"); Cummins; CSX; John T. Dillon ("J. Dillon"); Emerson Electric; Erickson; ExxonMobil; FedEx; Headwaters Incorporated ("Headwaters"); C. Holliday; IBM; Intelect; R. Clark King; Lange Transport ("Lange"); Louisiana Agencies; MetLife; NIRI; O3 Strategies; V. Pelson; PepsiCo; Pfizer; Roppe; Rosen; Ryder; Sara Lee; Sidley Austin; tw telecom; Wachtell; Wells Fargo; Weyerhaeuser; Yahoo.

[76] *See* letters from Ameriprise; Anonymous #2; Artistic Land Designs; Chamber of Commerce/CMCC; Crown Battery; Evelyn Y. Davis ("E. Davis"); Kernan; Medical Insurance; Mouton; Unitrin; R. VanEngelenhoven; Wells Fargo.

[77] *See* new Exchange Act Rule 14a–11.

[78] *See* letters from S&C; Curtis, Mallet-Prevost, Colt & Mosle LLP ("Curtis").

[79] *See* footnote 70 above.

[80] New Schedule 14N, which is described further in Section II.B.8. below, includes check boxes where a nominating shareholder or group must specify whether it is seeking to include the nominee or nominees in the company's proxy materials under Rule 14a–11 or pursuant to a provision in State law, foreign law, or a company's governing documents.

[81] *See* letters from 26 Corporate Secretaries; ABA; ACE; Advance Auto Parts; AGL; Aetna; Allstate; Alston & Bird; American Bankers Association;

commenters asked the Commission to permit private ordering so that companies and shareholders could devise, if they chose to, a process for the inclusion of shareholder director nominees in company proxy materials that best suits their particular circumstances. Commenters also expressed fears that the Commission's Proposal, if adopted, would stifle future innovations relating to inclusion of shareholder director nominees in company proxy materials and corporate governance in general.[82] On the other hand, some commenters expressed general support for uniform applicability of proposed Rule 14a–11, unless State law or the company's governing documents prohibit shareholders from nominating candidates to the board.[83]

Though we considered commenters' views concerning a private ordering approach, as discussed in Section I.A. above, we have concluded that our rules should provide shareholders the ability to include director nominees in company proxy materials without the need for shareholders to bear the burdens of overcoming the substantial obstacles to creating that ability on a company-by-company basis. Rule 14a–11 is designed to facilitate the effective exercise of shareholder director nomination and election rights. Requiring shareholders to persuade other shareholders to opt into a system that better facilitates such State law rights would frustrate the benefits that our new rule seeks to promote.

c. No Opt-Out

In the Proposing Release, we sought comment on whether Rule 14a–11 should be inapplicable where a company has or adopts a provision in its governing documents that provides for, or prohibits, the inclusion of shareholder director nominees in the company's proxy materials. We also sought comment on whether Rule 14a–11 should apply in various circumstances, such as where shareholders approve provisions in the governing documents that are more or less restrictive than Rule 14a–11.

Commenters were divided on whether companies and shareholders should be permitted to adopt alternative requirements for shareholder director nominations, or to completely opt out of Rule 14a–11. Many commenters generally supported a provision that would permit companies and shareholders to adopt alternative requirements for shareholder director nominations that could be either more restrictive or less restrictive than those of Rule 14a–11.[84] Among these commenters, some argued that creating a "one-size-fits-all" rule that cannot be altered by companies and shareholders conflicts with the traditional enabling approach of state corporation laws and denies shareholder choice.[85] Some commenters advocated allowing companies to opt out of Rule 14a–11 through a shareholder-approved bylaw (including through a Rule 14a–8 shareholder proposal), with some suggesting that Rule 14a–11 apply initially only to companies that have not opted out through a shareholder-approved process by the time of the first annual meeting held after the adoption of the proposed rules.[86]

On the other hand, several commenters expressed support for the uniform applicability of Rule 14a–11.[87] These commenters expressed general support for the Commission's Proposal that Rule 14a–11 apply to all companies subject to the Federal proxy rules unless State law or the company's governing documents prohibit shareholders from nominating candidates to the board.[88] Several commenters stated they oppose a provision that would permit companies to opt out of Rule 14a–11.[89] Some commenters expressed a general concern that if companies are allowed to opt out of the rule, boards would adopt provisions in a company's governing documents that are so restrictive that it would be impossible for shareholders to have their candidates included in company proxy materials,[90] with one commenter noting that the laws of most states would allow a board to adopt such provisions in a company's bylaws without a shareholder vote.[91] Further, a commenter warned that boards would use corporate funds to defeat shareholders' attempts to change such board-adopted provisions through shareholder proposals.[92] One commenter argued that the "idea that individual corporations should be given the right to 'opt out' of the proposed regulations through bylaws or otherwise is contrary to the Commission's entire regulatory scheme" and referred to Section 14 of the Securities Act,[93] which voids "[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this

American Business Conference; American Electric Power; Anadarko; Applied Materials; Artistic Land Designs; Association of Corporate Counsel; Avis Budget; Atlantic Bingo; L. Behr; Best Buy; Biogen; J. Blanchard; Boeing; T. Bonkowski; BorgWarner; Boston Scientific; Brink's; BRT; Burlington Northern; R. Burt; California Bar; Callaway; S. Campbell; Carlson; Carolina Mills; Caterpillar; Chamber of Commerce/CMCC; Chevron; R. Chicko; CIGNA; Comcast; Competitive Enterprise Institute; W. Cornwell; CSX; E. Culwell; Cummins; Darden Restaurants; Daniels Manufacturing; Davis Polk; Delaware Bar; T. Dermody; Devon; DTE Energy; Eaton; Edison Electric Institute; Eli Lilly; Emerson Electric; M. Eng; Erickson; ExxonMobil; FedEx; Financial Services Roundtable; Flutterby; FPL Group; Frontier; GE; A. Goolsby; Grundfest; C. Holliday; IBM; ICI; Intelect; JPMorgan Chase; Jones Day; R. Clark King; Leggett; T. Liddell; Little; McDonald's; MeadWestvaco; MedFaxx; Medical Insurance; MetLife; M. Metz; Microsoft; J. Miller; M. Moretti; Motorola; NACD; NAM; NIRI; O'Melveny & Myers; Office Depot; Omaha Door; P&G; PepsiCo; Pfizer; Realogy; J. Robert; M. Robert; RPM; Ryder; Safeway; R. Saul; Shearman & Sterling; Sherwin-Williams; R. Simoneau; Society of Corporate Secretaries; Southern Company; Southland; Steele Group; Style Crest; Tesoro; Textron; Theragenics; TI;. R. Trummel; T. Trummel; V. Trummel; tw telecom; L. Tyson; United Brotherhood of Carpenters; UnitedHealth; U.S. Bancorp; VCG; Wachtell; Wellness; Wells Fargo; Whirlpool; Xerox; Yahoo; J. Young.

[82] *See* letters from ABA; BRT; Davis Polk; Delaware Bar; Frontier; IBM; Protective.

[83] *See* letters from 13D Monitor ("13D Monitor"); AFL–CIO; CalPERS; CFA Institute Centre for Market Integrity ("CFA Institute"); CII; Florida State Board of Administration; ICGN; LIUNA; D. Nappier; P. Neuhauser; OPERS; Pax World; RiskMetrics; SWIB; Teamsters; USPE.

[84] *See* letters from ABA; Advance Auto Parts; Aetna; American Bankers Association; American Electric Power; American Express; Applied Materials; Association of Corporate Counsel; Best Buy; BRT; California Bar; Carlson; J. Chico; Cleary Gottlieb Steen & Hamilton LLP ("Cleary"); Comcast; Con Edison; CSX; Cummins; L. Dallas; Davis Polk; Devon; Dupont; ExxonMobil; Financial Services Roundtable; FPL Group; IBM; JPMorgan Chase; Keating Muething; Koppers; Alexander Krakovsky ("A. Krakovsky"); Group of 10 Harvard Business School and Harvard Law School Professors ("Lorsch *et al.*"); Brett H. McDonnell ("B. McDonnell"); Motorola; O'Melveny & Myers; P&G; Pfizer; S&C; Sara Lee; Group of Seven Law Firms ("Seven Law Firms"); Shearman & Sterling; Securities Industry and Financial Markets Association ("SIFMA"); Society of Corporate Secretaries; Southern Company; U.S. Bancorp; Wachtell.

[85] *See* letters from ABA; BRT; Delaware Bar.

[86] *See* letters from DTE Energy (endorsing the opt-out approach described in the letter submitted by the Society of Corporate Secretaries); JPMorgan Chase; P&G; Seven Law Firms; Society of Corporate Secretaries; U.S. Bancorp.

[87] *See* letters from 13D Monitor; AFL–CIO; CalPERS; CFA Institute; CII; Florida State Board of Administration; ICGN; LIUNA; D. Nappier; P. Neuhauser; Pax World; OPERS; RiskMetrics; SWIB; Teamsters; USPE.

[88] *See* letters from 13D Monitor; AFL–CIO; CalPERS; CFA Institute; CII; Florida State Board of Administration; ICGN; LIUNA; D. Nappier; P. Neuhauser; Pax World; OPERS; RiskMetrics; SWIB; Teamsters; USPE.

[89] *See* letters from AFL–CIO; Amalgamated Bank; William Baker ("W. Baker"); Florida State Board of Administration; International Association of Machinists and Aerospace Workers ("IAM"); The Marco Consulting Group ("Marco Consulting"); P. Neuhauser; Nine Law Firms; Norges Bank Investment Management ("Norges Bank"); Relational; Shamrock Capital Advisors, Inc. ("Shamrock"); TIAA–CREF; USPE; ValueAct Capital.

[90] *See* letters from Florida State Board of Administration; P. Neuhauser; Shamrock.

[91] *See* letter from Shamrock.

[92] *See* letter from P. Neuhauser.

[93] Letter from Nine Law Firms.

title or of the rules and regulations of the Commission* * *."[94]

After carefully considering the comments, we have determined that Rule 14a–11 should not provide an exemption for companies that have or adopt a provision in their governing documents that provides for or prohibits the inclusion of shareholder director nominees in the company's proxy materials. Thus, regardless of whether a company has a provision for the inclusion of shareholder nominees in its proxy materials, Rule 14a–11 will apply. As noted, the only exception is if state or foreign law or a company's governing documents prohibits shareholders from making director nominations.

We believe the rights to nominate and elect directors are traditional State law rights of all shareholders and we believe the current proxy rules could better facilitate the effective exercise of these State law rights. We do not believe that it is appropriate for our rules to permit a company's board or a majority of shareholders to elect to opt out of Rule 14a–11 and thus deprive other shareholders of an effective means to exercise their State law right to nominate directors and to freely exercise their franchise rights. Thus, allowing a vote to opt out of the rule would contravene a fundamental rationale of Rule 14a–11—improving the degree to which shareholders participating through the proxy process are able "to control the corporation as effectively as they might have by attending a shareholder meeting."[95]

When shareholders have the right to nominate candidates for director at a shareholder meeting, we believe shareholder choice is enhanced if our rules facilitate the ability of shareholders to nominate candidates for director through the proxy process. Allowing a company or a majority of its shareholders to opt out of the rule would diminish the rights of shareholders who participate by proxy by preventing shareholder nominees from being included in company proxy materials, thus reducing shareholder choice in the critical area of director elections. Similarly, allowing a company or a majority of its shareholders to opt out of the rule would diminish the ability of shareholders to vote for nominees put forth by other shareholders.

In addition, companies and their shareholders do not have the option to elect to opt out of other Federal proxy rules and we do not believe they should have the ability to do so with this rule. In our view, shareholders' electoral rights through the proxy process should not be impaired by a unilateral act of the board of directors, or even by a shareholder vote supported by management. Further, as we describe above, allowing some portion of shareholders to alter the application of Rule 14a–11 would effectively reduce choices for shareholders who do not favor that decision.[96]

Finally, we considered the objections of some commenters to a "one-size-fits-all" rule and concerns that for some companies with various capital structures the rule may raise more complex issues.[97] As we have noted, no Federal proxy rule allows shareholders or boards to alter how the rules apply to companies. The concept that our rules are not subject to company-by-company variation is entirely consistent with our mandate to protect all investors. In this regard, we are not persuaded that we should allow our rules to be altered by shareholders or boards to the potential detriment of other shareholders. We believe that having a uniform standard that applies to all companies subject to the rule will simplify use of the rule for shareholders and allowing different procedures and requirements to be adopted by each company could add significant complexity and cost for shareholders and undermine the purposes of our new rule. While other procedures and standards could be adopted by companies or shareholders to supplement Rule 14a–11, shareholders would benefit from the predictability of the uniform application of Rule 14a–11 at all companies.

It is important to note that while Rule 14a–11 facilitates the existing rights of shareholders and we do not believe the rule should be altered, it is not the exclusive way by which a candidate other than a management nominee may be put to a shareholder vote. Shareholders may continue to choose to conduct traditional proxy contests. Regardless of whether a shareholder uses Rule 14a–11 or conducts a traditional proxy contest to nominate a candidate for director, a company concerned about how such a shareholder nominee fits into its particular capital structure or other unique fact patterns presumably would address that concern in its proxy materials.

d. No Triggering Events

Under the Commission's 2003 Proposal, a company would have been subject to the shareholder director nomination requirements after the occurrence of one or both of two possible triggering events. The first triggering event was that at least one of the company's nominees for the board of directors for whom the company solicited proxies received withhold votes from more than 35% of the votes cast at an annual meeting of shareholders at which directors were elected.[98] The second triggering event was that a shareholder proposal submitted under Rule 14a–8 providing that a company become subject to the proposed shareholder nomination procedure was submitted for a vote of

[94] 15 U.S.C. 77n.

[95] *Business Roundtable* v. *SEC,* 905 F.2d 406, 410 (D.C. Cir. 1990).

[96] Our view in this regard has been sharply criticized. *E.g.,* Joseph A. Grundfest, *The SEC's Proposed Proxy Access Rules: Politics, Economics, and the Law,* 65 Bus. Law. 361, 370 (2010) (this article also was included as an attachment to the January 18, 2010 letter from Joseph A. Grundfest ("Grundfest II")) ("there is no intellectually credible argument that shareholders are * * * competent to elect directors but incompetent to determine the rules governing the election of directors. There is also no support for the proposition that shareholders can be trusted to relax the mandatory minimum standards established by the Commission, but not to strengthen them."). In our view, these assertions are flawed. This is not an issue of shareholder competence. It is, instead, a recognition that permitting a company or a group of shareholders to prevent shareholders from effectively participating in governing the corporation through participation in the proxy process is fundamentally inconsistent with the goal of Federal proxy regulation. *See Business Roundtable,* 905 F.2d at 410.

[97] *See* letters from 26 Corporate Secretaries; ABA; ACE; Advance Auto Parts; AGL; Aetna; Allstate; Alston & Bird; American Bankers Association; American Business Conference; American Electric Power; Anadarko; Applied Materials; Artistic Land Designs; Association of Corporate Counsel; Avis Budget; Atlantic Bingo; L. Behr; Best Buy; Biogen; J. Blanchard; Boeing; T. Bonkowski; BorgWarner; Boston Scientific; Brink's; BRT; Burlington Northern; R. Burt; California Bar; Callaway; S. Campbell; Carlson; Carolina Mills; Caterpillar; Chamber of Commerce/CMCC; Chevron; R. Chicko; CIGNA; Comcast; Competitive Enterprise Institute; W. Cornwell; CSX; E. Culwell; Cummins; Darden Restaurants; Daniels Manufacturing; Davis Polk; Delaware Bar; T. Dermody; Devon; DTE Energy; Eaton; Edison Electric Institute; Eli Lilly; Emerson Electric; M. Eng; Erickson; ExxonMobil; FedEx; Financial Services Roundtable; Flutterby; FPL Group; Frontier; GE; A. Goolsby; C. Holliday; IBM; ICI; Intelect; JPMorgan Chase; Jones Day; R. Clark King; Leggett; T. Liddell; Little; McDonald's; MeadWestvaco; MedFaxx; Medical Insurance; Metlife; M. Metz; Microsoft; J. Miller; M. Moretti; Motorola; NACD; NAM; NIRI; O'Melveny & Myers; Office Depot; Omaha Door; P&G; PepsiCo; Pfizer; Realogy; J. Robert; M. Robert; RPM; Ryder; Safeway; R. Saul; Shearman & Sterling; Sherwin-Williams; R. Simoneau; Society of Corporate Secretaries; Southern Company; Southland; Steele Group; Style Crest; Tesoro; Textron; Theragenics; TI;. R. Trummel; T. Trummel; V. Trummel; tw telecom; L. Tyson; United Brotherhood of Carpenters; UnitedHealth; U.S. Bancorp; VCG; Wachtell; Wellness; Wells Fargo; Whirlpool; Xerox; Yahoo; J. Young.

[98] This triggering event could not occur in a contested election to which Rule 14a–12(c) would apply or an election to which the proposed shareholder nomination procedure would have applied.

shareholders at an annual meeting by a shareholder or group of shareholders that held more than 1% of the company's securities entitled to vote on the proposal and the shareholder or group of shareholders held those securities for one year as of the date the proposal was submitted, and the proposal received more than 50% of the votes cast on that proposal at the meeting.[99] In 2003, these triggering events were included because they were believed to be indications that a company had a demonstrated corporate governance issue, such that shareholders should have the opportunity to include director nominees in the company's proxy materials.

Unlike the 2003 Proposal, our current proposal did not include a triggering event requirement in Rule 14a–11. As noted in the Proposing Release, we did not include such a requirement because we were concerned that the Federal proxy rules may be impeding the exercise of shareholders' ability under State law to nominate and elect directors at all companies, not just those with demonstrated governance issues. In addition, we noted our concern, and the concern expressed by commenters on the 2003 Proposal, that the inclusion of triggering events would result in unnecessary complexity and would delay the operation of the rule. However, we solicited comment about whether triggers for the application of Rule 14a–11 would be appropriate.

Many commenters opposed the inclusion of a triggering event requirement,[100] with some commenters expressing concern that triggering events would cause significant delays and introduce undue complexity into the rule.[101] On the other hand, other commenters supported the inclusion of a triggering event requirement, believing that such a requirement would serve as a useful indicator of the companies with demonstrated governance issues (*e.g.,* companies that do not act within a certain time period on a shareholder proposal that received majority support).[102]

We remain concerned that the Federal proxy rules may not be facilitating the exercise of shareholders' ability under State law to nominate and elect directors and this concern is not limited to shareholders' ability to nominate directors at companies with demonstrated governance issues. Indeed, allowing shareholders to include nominees in company proxy materials before there are demonstrated governance failures could have the benefit of increasing director responsiveness and avoiding future governance failures. In addition, we share the concerns of some commenters that inclusion of triggering events would introduce undue complexity to the rule. Therefore, we are adopting the rule as proposed, without a triggering event requirement.

e. Concurrent Proxy Contests

As proposed, Rule 14a–11 would apply regardless of whether a company is engaged in, or anticipates being engaged in, a concurrent proxy contest; however, we requested comment on whether a company should be exempted from complying with Rule 14a–11 if another party commences or evidences its intent to commence a solicitation in opposition subject to Rule 14a–12(c). Of the commenters that responded, a few stated that shareholders of a company that is the subject of a traditional proxy contest should be allowed to use Rule 14a–11 to have nominees included in the company's proxy materials,[103] and others stated that shareholders of a company engaged in a traditional proxy contest should not be allowed to use Rule 14a–11 to have nominees included in the company's proxy materials.[104]

In support of enabling shareholders to use Rule 14a–11 during a traditional proxy contest, one commenter argued that exempting companies subject to a traditional proxy contest from Rule 14a–11 would be inconsistent with the Commission's objective of changing the proxy process to better reflect the rights shareholders would have at a shareholder meeting, and that dissatisfied shareholders who are not seeking a change in control and who otherwise meet the eligibility criteria under Rule 14a–11 would be disenfranchised.[105] The commenter stated that dissatisfied shareholders should not be forced to make a choice between a change in control or "business as usual." Another commenter stated that contested elections have been conducted successfully with more than two slates.[106]

On the other hand, commenters that sought a limitation on use of Rule 14a–11 during a traditional proxy contest were concerned that Rule 14a–11 could have the effect of facilitating a change in control of the company.[107] Commenters noted that under certain staff positions,[108] as well as the Commission's discussion of Rule 14a–4(d)(4), as set forth in the *Proxy Disclosure and Solicitation Enhancements* proposing release,[109] a dissident shareholder could "round out" its short-slate proxy card by seeking authority to vote for Rule 14a–11 shareholder nominees, thereby facilitating a change in control.[110] Further, commenters believed that under the Proposal shareholders that submit nominees in reliance on Rule 14a–11 would not be barred from actively soliciting for the nominees of a shareholder using a traditional proxy contest and, conversely, a shareholder using a traditional proxy contest could actively engage in soliciting activities for Rule 14a–11 shareholder nominees.[111] Commenters also worried that multiple groups of shareholders who simultaneously propose different directors for different purposes could lead to substantial confusion for other shareholders.[112] Commenters warned that shareholder confusion would increase if there are two or more proxy cards with more than twice the number

[99] Only votes for and against a proposal would have been included in the calculation of the shareholder vote.

[100] *See* letters from AFSCME; CalSTRS; CFA Institute; CII; COPERA; T. DiNapoli; Florida State Board of Administration; ICGN; N. Lautenbach; LIUNA; D. Nappier; Nathan Cummings Foundation; OPERS; Pax World; Relational; Sodali; SWIB; TIAA–CREF; G. Tooker; USPE; ValueAct Capital.

[101] *See* letters from AFSCME; CFA Institute; CII; T. DiNapoli; LIUNA.

[102] *See* letters from Automatic Data Processing, Inc. ("ADP"); Alaska Air Group, Inc. ("Alaska Air"); Allstate; American Electric Power; Anadarko; AT&T; Avis Budget; Barclays Global Investors ("Barclays"); Biogen; Boeing; BRT; Burlington Northern; R. Burt; Callaway; Chevron; CIGNA; CNH Global N.V. ("CNH Global"); Comcast; Cummins; Deere & Company ("Deere"); Eaton; ExxonMobil; FedEx; FMC Corp.; FPL Group; Frontier; General Mills; C. Holliday; IBM; ITT Corporation ("ITT"); J. Kilts; Ellen J. Kullman ("E.J. Kullman"); N. Lautenbach; McDonald's; J. Miller; Motorola; Office Depot; O'Melveny & Myers; P&G; PepsiCo; Pfizer; Protective; Ryder; Sara Lee; Sherwin-Williams; Theragenics; TI; tw telecom; G. Tooker; UnitedHealth; Xerox.

[103] *See* letters from CII; Florida State Board of Administration; Sodali; USPE.

[104] *See* letters from ABA; American Express; Biogen; BorgWarner; BRT; Davis Polk; Dewey; Eli Lilly; Fenwick; Honeywell; JPMorgan Chase; Leggett; PepsiCo; Seven Law Firms; Society of Corporate Secretaries; Tenet; U.S. Bancorp; Verizon; Wachtell.

[105] *See* letter from CII.

[106] *See* letter from Florida State Board of Administration.

[107] *See* letters from ABA; BRT; Davis Polk; Eli Lilly; Seven Law Firms; Society of Corporate Secretaries.

[108] *See Eastbourne Capital LLC* No-Action Letter (March 30, 2009) and *Icahn Associates Corp.* No-Action Letter (March 30, 2009).

[109] Release No. 33–9052, 34–60280 (July 10, 2009) [74 FR 35076].

[110] *See* letters from ABA; Eli Lilly; JPMorgan Chase; Society of Corporate Secretaries.

[111] *See* letters from ABA; Society of Corporate Secretaries.

[112] *See* letters from ABA; BRT; Davis Polk; Eli Lilly; PepsiCo; Seven Law Firms; Society of Corporate Secretaries.

of nominees than available slots.[113] According to these commenters, further confusion would result from any assumption by shareholders that the Rule 14a–11 slate is allied with the insurgent slate, despite the Rule 14a–11 representation regarding the lack of control intent.[114] One commenter also argued that, despite the Rule 14a–11 representation regarding the lack of control intent, it is "easy to imagine that in some contested elections, a [R]ule 14a–11 nominee would be the swing vote, tipping the majority of the board and thus control of the company."[115] Citing these same concerns, another commenter recommended that when a company's board receives notice of a traditional proxy contest, the company should be permitted to exclude Rule 14a–11 nominees from the company's proxy materials (and, if the proxy materials have already been distributed, to issue supplemental proxy materials eliminating these nominees from the company's materials).[116]

Finally, some commenters argued that Rule 14a–11 is unnecessary when a company is engaged in a traditional proxy contest because the company's shareholders are already effectively exercising their rights under State law to nominate and elect directors.[117] One commenter stated that if the Commission decides not to prohibit a concurrent vote on Rule 14a–11 nominees and nominees presented through a traditional proxy contest, it should at least provide that the nominees presented through the traditional proxy contest be counted against the number of permissible Rule 14a–11 nominees to reduce the likelihood of a change in control.[118] The commenter stated that if Rule 14a–11 could be used concurrently with a traditional proxy contest, the nominating shareholder should not be allowed to be a "participant" (as defined under Schedule 14A) in the traditional proxy contest or to engage in any soliciting activity for a nominee of another shareholder. The commenter also suggested that dissidents in a traditional proxy contest be precluded from including Rule 14a–11 nominees on their proxy card. Acknowledging the possibility of collusion, shareholder confusion, and change in control, one commenter expressed support for reasonable limitations on a Rule 14a–11 nomination if there is a simultaneous proxy contest.[119]

While we appreciate commenters' concerns, we do not believe that our efforts to facilitate the exercise of shareholders' State law right to nominate directors should be limited by the activities of other persons engaged in a traditional proxy contest. We also believe that, as described below, Rule 14a–11 and the related rule amendments, together with our staff review process, can adequately address concerns about investor confusion and potential abuse of the process by those seeking a change in control. Therefore, we are adopting the rule as proposed, without an exception for companies that are subject to or anticipate being subject to a concurrent proxy contest. In this regard, we agree with those commenters that opposed including a limitation because to do so would be inconsistent with the goals of our rulemaking, which are not limited by the nomination activities of other persons. In addition, we note that there is no current limitation in the Federal proxy rules on the number of proxy contests that can take place simultaneously and we do not believe that there is sufficient reason to provide such a limitation in this circumstance. Companies and shareholders have been able, to date, to successfully navigate multiple slates on those occasions when more than one person undertakes a proxy contest. In addition, we believe that a company can address commenters' concerns through disclosure in its proxy materials. For example, the company may disclose in its proxy statement potential effects of electing non-management nominees (whether those nominees are included in the company's materials or in other soliciting persons' materials), such as the potential to cause the company to violate law or the independence requirements of the exchange listing standards, and allow shareholders to consider that information when making their voting decisions. Similarly, we believe that appropriate disclosure in the company's proxy materials, as well as the dissident's proxy materials, could serve to potentially avoid shareholder confusion about how many nominees a shareholder may vote for and how to mark the card.

We also have not revised Rule 14a–11, as suggested by commenters, to count nominees put forth by persons outside of Rule 14a–11 for purposes of the calculation of the maximum number of nominees required to be included in the company's proxy materials pursuant to Rule 14a–11. We believe that to do so would, like an outright exception, be inconsistent with the goal of our rulemaking—to change the proxy process to better reflect the rights shareholders would have at a shareholder meeting, which are not limited by the nomination activities of other persons.

While we are not adopting an exception from the rule for companies that are, or anticipate being, subject to a concurrent proxy contest, we do understand concerns about the possibility of confusion and abuse in this area absent clear guidance.[120] Accordingly, we have made clear in our discussion, in Section II.B.10. below, that a nominating shareholder or group relying on new Rule 14a–2(b)(7) or (8) to engage in an exempt solicitation to form a nominating shareholder group or in connection with a nomination included in the company's proxy materials pursuant to Rule 14a–11 would lose the exemption if they engage in a non-Rule 14a–11 solicitation for directors or another person's solicitation with regard to the election of directors. In addition, we are adopting an instruction to Rule 14a–11[121] to make clear that, in order to rely on Rule 14a–11 to have a nominee or nominees included in a company's proxy materials, a nominating shareholder or group or any member of the nominating shareholder or group may not be a member of any other group with persons engaged in solicitations or other nominating activities in connection with the subject election of directors; may not separately conduct a solicitation in connection with the subject election of directors other than a Rule 14a–2(b)(8) exempt solicitation in relation to those nominees it has nominated pursuant to Rule 14a–11 or for or against the company's nominees; and may not act as a participant in another person's solicitation in connection with the subject election of directors.

3. Which Companies Are Subject to Rule 14a–11

a. General

In this section, we discuss which companies will be subject to new Rule 14a–11, including the rule's application to investment companies, controlled companies, "debt-only" companies, voluntary registrants, and smaller reporting companies.

New Rule 14a–11 will apply to companies that are subject to the Exchange Act proxy rules, including

[113] *See* letters from ABA; Davis Polk.

[114] *See* Section II.B.4. below for a further discussion of change in control intent and the certifications required by the new rules.

[115] Letter from Davis Polk.

[116] *See* letter from Society of Corporate Secretaries.

[117] *See* letters from BRT; Verizon.

[118] *See* letter from ABA.

[119] *See* letter from P. Neuhauser.

[120] *See, e.g.,* letters from ABA; Seven Law Firms.

[121] *See* Instruction to Rule 14a–11(b).

investment companies registered under Section 8 of the Investment Company Act of 1940.[122] The rule also will apply to controlled companies and those companies that choose to voluntarily register a class of securities under Section 12(g). Smaller reporting companies will be subject to the rule, but on a delayed basis. Consistent with the Proposal, we have excepted from the rule's application companies that are subject to the proxy rules solely because they have a class of debt registered under Section 12 of the Exchange Act. In addition, foreign private issuers are exempt from the Commission's proxy rules with respect to solicitations of their shareholders, so the rule will not apply to these issuers.[123]

b. Investment Companies

Under the Proposal, Rule 14a–11 would apply to registered investment companies. We sought comment on whether Rule 14a–11 should apply to these companies.[124]

Several commenters supported including registered investment companies in the rule.[125] Commenters noted that investment company boards, like other boards, must be responsive and accountable to their shareholders;[126] that some investment company boards are "too cozy" with the company's investment adviser;[127] and that the proposed rule will add competition to the board nomination process, which may create some traction in board negotiations with the company's investment adviser.[128] A number of commenters did not believe that the rule would result in unreasonable cost or an excessive number of contested elections.[129] One commenter suggested that investment company shareholders would use the rule infrequently and then only if the investment company is experiencing a real governance or other failure.[130]

On the other hand, a number of commenters, largely from the investment company industry, opposed the inclusion of registered investment companies in the rule.[131] Commenters asserted that the Commission had not presented any empirical evidence of governance problems with respect to investment companies that would support extending the rule to them and that the trend for investment company boards is to have strong governance practices.[132] Commenters also argued that investment companies are subject to a unique regulatory regime under the Investment Company Act that provides additional protection to investors, such as the requirement to obtain shareholder approval to engage in certain transactions or activities,[133] and that investment companies and their boards have very different functions from non-investment companies and their boards.[134] One commenter noted that the Proposal would be inappropriate and not particularly useful for most open-end management investment companies, because open-end management investment company shares are held on a short-term basis and open-end management investment companies are not typically required to hold annual meetings under State law.[135]

Commenters also were concerned about the costs of the Proposal, particularly for fund complexes that utilize a "unitary" board consisting of one group of individuals who serve on the board of every fund in the complex, or "cluster" boards consisting of two or more groups of individuals that each oversee a different set of funds in the complex.[136] Commenters noted that if a

[122] 15 U.S.C. 80a *et seq.* Registered investment companies currently are required to comply with the proxy rules under the Exchange Act when soliciting proxies, including proxies relating to the election of directors. *See* Investment Company Act Rule 20a–1 [17 CFR 270.20a–1] (requiring registered investment companies to comply with regulations adopted pursuant to Section 14(a) of the Exchange Act that would be applicable to a proxy solicitation if it were made in respect of a security registered pursuant to Section 12 of the Exchange Act).

[123] Exchange Act Rule 3a12–3 [17 CFR 240.3a12–3] exempts securities of certain foreign issuers from Section 14(a) of the Exchange Act.

[124] The Commission has considered the impact of this issue on investment companies on prior occasions. *See, e.g.,* 2003 Proposal.

[125] *See, e.g.,* letters from AFSCME; CalPERS; CII; Mutual Fund Directors Forum ("MFDF"); Julian Reid ("J. Reid"); Jennifer S. Taub ("J. Taub"); TIAA–CREF.

[126] *See* letter from MFDF.

[127] Letter from J. Reid.

[128] *See* letter from J. Taub.

[129] *See, e.g.,* letters from AFSCME; J. Taub.

[130] *See* letter from J. Taub.

[131] *See, e.g.,* letters from ABA; American Bar Association (September 18, 2009) ("ABA II"); Barclays; ICI; Investment Company Institute and Independent Directors Counsel ("ICI/IDC"); Independent Directors Council ("IDC"); S&C; T. Rowe Price Associates, Inc. ("T. Rowe Price"); The Vanguard Group, Inc. ("Vanguard"). One commenter opposed the inclusion of business development companies in the rule for the same reasons that it opposed including registered investment companies in the rule. *See* letter from ICI. Business development companies are a category of closed-end investment companies that are not registered under the Investment Company Act, but are subject to certain provisions of that Act. *See* Sections 2(a)(48) and 54–65 of the Investment Company Act [15 U.S.C. 80a–2(a)(48) and 80a–53–64]. We are including business development companies in the rule for the same reasons provided below with respect to registered investment companies.

[132] *See* letters from ICI; ICI/IDC; IDC; T. Rowe Price; S&C. Among other things, commenters noted that 90% of fund complexes have boards that are 75% or more comprised of independent directors and the vast majority of fund boards have an independent director serving as chairman or as lead independent director. *See* letters from ICI/IDC; IDC. Two letters also cited a 1992 report by Commission staff that observed that the governance model embodied by the Investment Company Act is sound and should be retained with limited modifications. *See* letters from ICI; ICI/IDC.

[133] One joint comment letter noted that the Investment Company Act requires investment companies to obtain shareholder approval of contracts with the company's investment adviser and distributor and to change from an open-end, closed-end, or diversified company; to borrow money; to issue senior securities; to underwrite securities issued by other persons; to purchase or sell real estate or commodities; to make loans to other persons, except in accordance with the policy in the company's registration statement; to change the nature of its business so as to cease to be an investment company; or to deviate from a stated policy with respect to concentration of investments in an industry or industries, from any investment policy which is changeable only by shareholder vote, or from any stated fundamental policy. The commenters also noted that investment company shareholders have the right to bring an action against the company's investment adviser for breach of fiduciary duty with respect to receipt of compensation. *See* letter from ICI/IDC.

[134] *See* letters from ABA; Barclays; ICI; ICI/IDC; IDC; T. Rowe Price; S&C; Vanguard. However, we note that, in response to the 2003 Proposal, ABA and ICI indicated that there were no reasons to treat investment companies differently from non-investment companies. *See* letter from Investment Company Institute (December 22, 2003) on File No. S7–19–03; letter from American Bar Association (January 7, 2004) on File No. S7–19–03.

[135] *See* letter from ABA. *See also* letter from S&C (urging that at a minimum Rule 14a–11 should not apply to open-end investment companies, "which do not generally hold regular meetings and for which compliance would be particularly burdensome"). An open-end management investment company is an investment company, other than a unit investment trust or face-amount certificate company, that offers for sale or has outstanding any redeemable security of which it is the issuer. *See* Sections 4 and 5(a)(1) of the Investment Company Act [15 U.S.C. 80a–4 and 80a–5(a)(1)].

[136] *See* letters from ABA; ICI; ICI/IDC; IDC; MFDF; S&C; T. Rowe Price; Vanguard. Commenters noted that a recent survey of fund complexes representing 93% of the industry's total net assets indicated that 83% of fund complexes had a unitary board structure and 17% of fund complexes had a cluster board structure. *See* letters from ICI/IDC; IDC. However, one comment letter included materials noting that, while the average number of registered investment companies per fund complex is five, the median number of registered investment companies per fund complex is one. *See* letter from ICI/IDC. In cases where the fund complex consists of only one company, commenters' concerns about the loss of the unitary board would not be present.

Commenters also noted that among fund complexes that use unitary or cluster boards there are other aspects of board organization that vary from complex to complex. *See* letter from ICI/IDC. For example, one board may oversee all of the open-end funds in the complex and all but three of its closed-end funds, while a second board oversees the other closed-end funds. Alternatively, one board may oversee the open-end and closed-end fixed income funds advised by one particular adviser, while a second board oversees the open-end and closed-end equity and international funds advised by a second adviser, etc. However, the commenters did not note any specific issues that would be raised by the use of different structures among fund complexes using unitary or cluster boards if the Proposal were to be adopted.

shareholder-nominated director were to be elected to a unitary or cluster board, the investment companies in the fund complex would incur significant additional administrative costs and burdens (*e.g.,* the shareholder-nominated director would have to leave during discussions that pertain to the other investment companies in the complex, board materials would have to be customized for the director, and the fund complex would face challenges in preserving the status of privileged information) and the benefits of the unitary or cluster board that result in the increased effectiveness of such boards would be lost.[137] One commenter also stated that if a shareholder nomination causes an election to be "contested" under rules of the New York Stock Exchange, brokers would not be able to vote client shares on a discretionary basis, making it difficult and more expensive for investment companies to achieve a quorum for a meeting.[138]

After considering these comments, we agree with the commenters who believe that Rule 14a–11 should apply to registered investment companies, as was proposed. The purpose of Rule 14a–11 is to facilitate the exercise of shareholders' traditional State law rights to nominate and elect directors to boards of directors and thereby enable shareholders to participate more meaningfully in the nomination and election of directors at the companies in which they invest. These State law rights apply to the shareholders of investment companies, including each investment company in a fund complex, regardless of whether or not the fund complex utilizes a unitary or cluster board.[139] Moreover, although investment companies and their boards may have different functions from non-investment companies and their boards, investment company boards, like the boards of other companies, have significant responsibilities in protecting shareholder interests, such as the approval of advisory contracts and fees.[140] Therefore, we are not persuaded that exempting registered investment companies would be consistent with our goals. We also do not believe that the regulatory protections offered by the Investment Company Act (including requirements to obtain shareholder approval to engage in certain transactions and activities), the trend asserted by commenters for investment companies to have good governance practices, or the fact that open-end management investment companies are not required by State law to hold annual meetings serves to decrease the importance of the rights that are granted to shareholders under State law.[141] In fact, the separate regulatory regime to which investment companies are subject emphasizes the importance of investment company directors in dealing with the conflicts of interest created by the external management structure of most investment companies.[142] We also note that some commenters have raised governance concerns regarding the relationship between boards and investment advisers.[143]

We are cognizant of the fact that the rule will impose some costs on investment companies. We believe, however, that policy goals and the benefits of the rule justify these costs. As discussed above, we believe that facilitating the exercise of traditional State law rights to nominate and elect directors is as much of a concern for investment company shareholders as it is for shareholders of non-investment companies. We continue to believe that parts of the proxy process may frustrate the exercise of shareholders' rights to nominate and elect directors arising under State law, and thereby fail to provide fair corporate suffrage. The new rules seek to facilitate shareholders' effective exercise of their rights under State law to both nominate and elect directors. In this regard, we note that commenters have stated that interest in mutual fund governance has increased in recent years.[144]

We recognize that it may be more costly for investment companies to achieve a quorum at shareholder meetings if a shareholder director nomination causes an election to be "contested" under rules of the New York Stock Exchange and brokers cannot vote customer shares on a discretionary basis. Furthermore, for fund complexes that utilize unitary or cluster boards, the election of a shareholder director nominee may, in some circumstances, increase costs and potentially decrease the efficiency of the boards.

We note, however, that these costs are associated with the State law right to nominate and elect directors, and are not costs incurred for including shareholder nominees in the company's proxy statement. With respect to fund complexes utilizing unitary or cluster boards, we note that any increased costs and decreased efficiency of an investment company's board as a result of the fund complex no longer having a unitary or cluster board would occur, if at all, only in the event that investment company shareholders elect the shareholder nominee. Investment companies may include information in the proxy materials making investors aware of the company's views on the perceived benefits of a unitary or cluster board and the potential for increased

[137] Commenters noted that unitary and cluster boards can result in enhanced board efficiency and greater board knowledge of the many aspects of fund operations that are complex-wide in nature. *See, e.g.,* letters from ABA; ICI; ICI/IDC; IDC; MFDF; S&C; T. Rowe Price; Vanguard. For instance, commenters noted that many of the same regulatory, valuation, compliance, disclosure, accounting, and business issues may arise for all of the funds that the unitary or cluster board oversees and that consistency among funds in the complex greatly enhances both board efficiency and shareholder protection. *See, e.g.,* letter from ICI/IDC. One joint comment letter also suggested that "[b]ecause they are negotiating on behalf of multiple funds, unitary and cluster boards have a greater ability than single fund boards to negotiate with management over matters such as fund expenses; the level of resources devoted to technology; and compliance and audit functions." *See id.*

[138] *See* letter from S&C.

[139] We note that "unitary" or "cluster" boards are not required by State law.

[140] *See Jones v. Harris Assocs.,* 130 S.Ct. 1418, 1423, 176 L. Ed. 2d 265, 273–274 (2010). *See also* S. Rep. No. 91–184; 91st Congress 1st Session; S. 2224 (1969) ("This section is not intended to authorize a court to substitute its business judgment for that of the mutual fund's board of directors in the area of management fees. * * * The directors of a mutual fund, like directors of any other corporation will continue to have * * * overall fiduciary duties as directors for the supervision of all of the affairs of the fund."); letter from ICI/IDC ("The Investment Company Act of 1940 and the rules under it impose significant responsibilities on fund directors in addition to the duties of loyalty and care to which directors are typically bound under State law.").

[141] In the 1992 report cited by two comment letters in footnote 132 above, the Commission staff also observed that the Investment Company Act "establishes a comprehensive regulatory framework predicated upon principles of corporate democracy" and was intended to provide an additional safeguard for investors by according "voting powers to investment company shareholders *beyond those required by State corporate law.*" Division of Investment Management, U.S. Securities and Exchange Commission, *Protecting Investors: A Half Century of Investment Company Regulation,* at pp. 251–52, 260 (May 1992) (emphasis added).

[142] *See, e.g.,* Commission Guidance Regarding the Duties and Responsibilities of Investment Company Boards of Directors with Respect to Investment Adviser Portfolio Trading Practices, Release No. IC–28345 (July 30, 2008) [73 FR 45646, 45649 (August 6, 2008)] ("In addition to statutory and common law obligations, fund directors are also subject to specific fiduciary obligations relating to the special nature of funds under the Investment Company Act. * * * A fund board has the responsibility, among other duties, to monitor the conflicts of interest facing the fund's investment adviser and determine how the conflicts should be managed to help ensure that the fund is being operated in the best interest of the fund's shareholders.") (footnotes omitted); Interpretive Matters Concerning Independent Directors of Investment Companies, Release No. IC–24083 (October 14, 1999) [64 FR 59877, 59877–78 (November 3, 1999)] (listing various duties and responsibilities of the independent directors of an investment company and noting that "Each of these duties and responsibilities is vital to the proper functioning of fund operations and, ultimately, the protection of fund shareholders.").

[143] *See* letters from J. Reid; J. Taub.

[144] *See* letters from AFSCME; J. Taub.

costs and decreased efficiency if the shareholder nominees are elected. Moreover, we note that a fund complex can take steps to minimize the cost and burden of a shareholder-nominated director by, for example, entering into a confidentiality agreement in order to preserve the status of confidential information regarding the fund complex.[145]

We believe that the costs imposed on investment companies will be less significant than the costs imposed on other companies for three reasons. First, to the extent investment companies do not hold annual meetings as permitted by State law, investment company shareholders will have less opportunity to use the rule.[146] Second, even when investment company shareholders do have the opportunity to use the rule, the disproportionately large and generally passive retail shareholder base of investment companies will probably mean that the rule will be used less frequently than will be the case with non-investment companies.[147] Third, because we have sought to limit the cost and burden on all companies, including investment companies, by limiting use of Rule 14a–11 to shareholders who have maintained significant continuous holdings in the company for at least three years, and because many funds, such as money market funds, are held by shareholders on a short-term basis,[148] we believe that the situations where shareholders will meet the eligibility requirements will be limited.

Although commenters argued that the election of a shareholder-nominated director to a unitary or cluster board will necessarily result in decreased effectiveness of the board, we disagree. In this regard, one commenter argued that competition in the board nomination process may improve efficiency by providing additional leverage for boards in negotiations with the investment adviser.[149] In any event, we believe that investment company shareholders should have a more meaningful opportunity to exercise their traditional State law rights to elect a non-unitary or non-cluster board if they so choose.

c. Controlled Companies

As proposed, Rule 14a–11 would allow eligible shareholders to submit director nominees at all companies subject to the Exchange Act proxy rules other than companies that are subject to the proxy rules solely because they have a class of debt registered under Section 12 of the Exchange Act. We sought comment on whether Rule 14a–11 also should provide an exception for controlled companies.

In response to our request for comment, one commenter argued that controlled companies should not be excluded from Rule 14a–11,[150] acknowledging that while there may be no mathematical possibility of a shareholder nominee submitted pursuant to Rule 14a–11 being elected at a controlled company, in a controlled company there could be an even greater need for non-controlling shareholders to express their concerns. The commenter noted that a large—even if not a majority—vote by non-controlling shareholders could send an important message to the board. Other commenters noted that controlled companies are commonly structured with dual classes of stock, which allows shareholders of the non-controlling class of stock to elect a set number of directors that is less than the full board.[151] Another commenter noted that dual-class companies with supervoting stock often can benefit the most from having the interests of non-controlling shareholders better represented in the boardroom.[152] This commenter encouraged the Commission to include some means by which minority shareholders of dual-class and parent-controlled companies could meaningfully avail themselves of the rule, even if a different set of eligibility or disclosure requirements is determined to be more appropriate in these cases.

On the other hand, several commenters argued that controlled companies should be excluded from Rule 14a–11.[153] According to these commenters, providing shareholders the ability to include nominees in company proxy materials in this context would be ineffective and needlessly disruptive and costly because there is no prospect that a shareholder nominee would be elected.[154] Two of these commenters also noted that subjecting these companies to Rule 14a–11 would possibly cause investor confusion.[155] These commenters remarked that shareholders would continue to have other avenues to express their views to the company, such as through the Rule 14a–8 process. Commenters who supported an exclusion for controlled companies suggested that for purposes of the exclusion the definition of "controlled company" should be similar to the definition used by the national securities exchanges in connection with director independence requirements.[156] Some commenters suggested that if Rule 14a–11 excluded controlled companies using the same definition as the national securities exchanges in connection with director independence requirements, then the rule should contain an instruction providing that whether more than 50% of the voting power of a company is held by an individual, group, or other company would be determined by any schedules filed under Section 13(d) of the Exchange Act.[157]

After considering the issue further, we are persuaded that Rule 14a–11 should apply to controlled companies, as we proposed. As commenters noted, it is common for companies structured with dual classes of stock to allow shareholders of the non-controlling class to elect a set number of directors that is less than the full board. In that situation, it may be useful for non-controlling shareholders to be able to include shareholder nominations in company proxy materials with respect to the directors the non-controlling class is entitled to elect. In addition, though applying Rule 14a–11 to controlled companies would be unlikely to result in the election of shareholder-nominated directors in cases in which these are not directors elected exclusively by the non-controlling shareholders, we appreciate that shareholders at controlled companies

[145] Two commenters argued in a joint comment letter that there are a number of practical and legal issues that prevent confidentiality agreements from being sufficient to address the issues that arise when a shareholder-nominated director is elected to the board of an investment company in a fund complex using a unitary or cluster board. *See* letter from ICI/IDC. We emphasize that entering into a confidentiality agreement is only one method of preserving the confidentiality of information revealed in board meetings attended by the shareholder-nominated director. The fund complex can have separate meetings and board materials for the board with the shareholder-nominated director, especially if particularly sensitive legal or other matters will be discussed or to protect attorney-client privilege. For a further discussion of this comment, *see* Section IV.E.1.

[146] *See* letters from ABA; MFDF.

[147] *See* letter from J. Taub.

[148] *See* letter from ABA.

[149] *See* letter from J. Taub.

[150] *See* letter from P. Neuhauser.

[151] *See* letters from ABA; Duane Morris; Media General, Inc. ("Media General"); The New York Times Company ("New York Times").

[152] *See* letter from T. Rowe Price.

[153] *See* letters from ABA; AllianceBernstein; Cleary; Seven Law Firms; Duane Morris LLP ("Duane Morris"); Sidley Austin.

[154] *See* letters from ABA; AllianceBernstein; Cleary; Seven Law Firms; Duane Morris; Sidley Austin.

[155] *See* letters from ABA; Seven Law Firms.

[156] *See* letters from ABA; AllianceBernstein; Cleary; Seven Law Firms; Duane Morris; Sidley Austin. *See, e.g.,* New York Stock Exchange Rule 303A.00 and NASDAQ Stock Market LLC Rule 5615(c) (defining "controlled companies" as a company of which more than 50% of the voting power for the election of directors is held by an individual, group or another company).

[157] *See* letters from AllianceBernstein; Duane Morris.

may have other reasons for nominating candidates for director.[158]

d. "Debt Only" Companies

As proposed, Rule 14a–11 would allow eligible shareholders to submit director nominees at all companies subject to the Exchange Act proxy rules other than companies that are subject to the proxy rules solely because they have a class of debt securities registered under Section 12 of the Exchange Act. We sought comment on whether this exclusion from Rule 14a–11 was appropriate.

Commenters that specifically addressed this question agreed with our approach and stated generally that Rule 14a–11 should not apply to companies subject to the Federal proxy rules solely because they have a class of debt securities registered under Exchange Act Section 12.[159] Most of these commenters stated that the ability to submit nominees for inclusion in a company's proxy materials should be limited to holders of equity securities registered under the Exchange Act.[160] One commenter warned that subjecting companies with a registered class of debt securities to Rule 14a–11 would deter private companies from accessing the public debt market and, in any case, private companies typically have shareholder agreements and other arrangements in place that address the election of directors.[161]

We are adopting this exclusion as proposed. We note that this approach was supported by investor and corporate commenters. We believe that Rule 14a–11 should not apply to companies that are subject to the Federal proxy rules solely because they have a class of debt securities registered under Section 12 of the Exchange Act.

e. Application of Exchange Act Rule 14a–11 to Companies That Voluntarily Register a Class of Securities Under Exchange Act Section 12(g)

In the Proposing Release, we noted that Rule 14a–11 would apply to companies that have voluntarily registered a class of equity securities pursuant to Exchange Act Section 12(g); however, we solicited comment on whether Rule 14a–11 should apply to these companies.[162] We also asked whether nominating shareholders of these companies should be subject to the same ownership eligibility thresholds as those shareholders of companies that were required to register a class of equity securities pursuant to Section 12, or whether we should adjust any other aspects of Rule 14a–11 for these companies.

Three commenters stated that Rule 14a–11 should apply to companies that voluntarily register a class of equity securities under Exchange Act Section 12(g).[163] One explained that investors in securities registered under Section 12 should be provided some assurance that the company is subject to various rules safeguarding their interests, such as the proposed rule, and expressed concern that less than uniform application could lead to investor confusion.[164] One commenter stated that nominating shareholders of voluntarily-registered companies should be subject to the same ownership thresholds as shareholders of companies that were required to register a class of securities under Exchange Act Section 12.[165]

We agree with the commenters that Rule 14a–11 generally should apply to those companies that choose to avail themselves of the obligations and benefits of Section 12(g) registration. As Section 12 registrants, these companies are subject to the full panoply of the Exchange Act, including Section 14(a), and their shareholders receive proxy materials in connection with annual and special meetings of shareholders in accordance with the proxy rules. We believe disparate treatment among these Section 12 registrants is unwarranted and shareholders of these companies should enjoy the same protections generally available to shareholders of other companies with a class of equity securities registered pursuant to Section 12. Accordingly, Rule 14a–11 will apply to companies that have voluntarily registered a class of equity securities pursuant to Exchange Act Section 12(g), with the same ownership eligibility thresholds as those of companies that were required to register a class of equity securities pursuant to Section 12.

f. Smaller Reporting Companies

Under the Proposal, Rule 14a–11 would apply to all companies subject to the proxy rules, other than companies that are subject to the proxy rules solely because they have a class of debt registered under Exchange Act Section 12. Thus, Rule 14a–11, as proposed, would apply to smaller reporting companies. We sought comment in the Proposal on what effect, if any, the application of Rule 14a–11 would have on any particular group of companies, and in particular, smaller reporting companies.[166]

A number of commenters stated generally that Rule 14a–11 should not apply to small businesses.[167] One commenter argued that Rule 14a–11 should be limited to accelerated filers and that there should possibly be a transition period where the rule was only applicable to large accelerated filers.[168] That commenter believed that

[158] We note that controlled companies are not excluded from Rule 14a–8 despite the same improbability that a shareholder proposal will receive the approval of the majority of the votes cast at a controlled company. Shareholders may use Rule 14a–8 to submit a proposal to the board even though controlling shareholders may vote against the proposal and prevent it from being approved.

[159] *See* letters from ABA; CII; Cleary; S&C.

[160] *See* letters from ABA; Cleary; S&C.

[161] *See* letter from S&C. This commenter also stated that Rule 14a–11 should not apply to those reporting companies who voluntarily continue to file Exchange Act reports while they are not required to do so under Exchange Act Section 13(a) or Section 15(d). It argued that these voluntary filers should be treated the same as companies with Exchange Act reporting obligations relating solely to debt securities. We note that Rule 14a–11 will not apply to a company filing Exchange Act reports when neither Exchange Act Section 13(a) nor Section 15(d) requires that it do so (for example, to comply with a covenant contained in an indenture relating to outstanding debt securities).

[162] A company must register a class of equity securities under Section 12(g) if, on the last day of its fiscal year, the class of equity securities is held by 500 or more record holders and the company has total assets of more than $10 million. An issuer may, however, register any class of equity securities under Section 12(g) even if these thresholds have not been met. Reporting after this form of voluntary registration is distinguished from a company that continues to file Exchange Act reports when neither Exchange Act Section 13(a) nor Section 15(d) requires that it do so. *See* footnote 161 above.

[163] *See* letters from ABA; CII; USPE.

[164] *See* letter from USPE.

[165] *See* letter from ABA.

[166] The Commission has considered this issue on prior occasions. *See, e.g.,* 2003 Proposal; Division of Corporation Finance, Briefing Paper for Roundtable Discussion on the Proposed Security Holder Director Nominations Rules, February 25, 2004, *available at http://www.sec.gov/spotlight/dir-nominations/dir-nom-briefing.htm.*

[167] *See* letters from ABA; American Mailing; All Cast; Always N Bloom; American Carpets; J. Arquilla; B. Armburst; Artistic Land Designs; C. Atkins; Book Celler; K. Bostwick; Brighter Day Painting; Colletti; Commercial Concepts; Complete Home Inspection; D. Courtney; S. Crawford; Crespin; Don's; T. Ebreo; M. Eng; eWareness; Evans; Fluharty; Flutterby; Fortuna Italian Restaurant; Future Form; Glaspell; C. Gregory; Healthcare Practice; B. Henderson; S. Henning; J. Herren; A. Iriarte; J. Jones; Juz Kidz; Kernan; LMS Wine; T. Luna; Mansfield Children's Center; D. McDonald; Meister; Merchants Terminal; Middendorf; Mingo; Moore Brothers; Mouton; D. Mozack; Ms. Dee; G. Napolitano; NK; H. Olson; PESC; Pioneer Heating & Air Conditioning; RC; RTW; D. Sapp; SBB; SGIA; P. Sicilia; Slycers Sandwich Shop; Southern Services; Steele Group; Sylvron; Theragenics; E. Tremaine; Wagner; Wagner Industries; Wellness; West End; Y.M.; J. Young.

[168] *See* letter from ABA. A large accelerated filer is an issuer that, as of the end of its fiscal year, had an aggregate worldwide market value of voting and non-voting common equity held by its non-affiliates of $700 million or more, as of the last business day of the issuer's most recently completed second fiscal quarter; has been subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act for at least 12 calendar months; has filed at least one annual report pursuant to Section 13(a) or 15(d) of the Act; and is not eligible to use

smaller companies would have trouble recruiting directors because the pool of qualified directors is already small for smaller companies, and directors would not want to risk the exposure to a proxy contest. Another commenter argued that we should implement Rule 14a–11 on a pilot basis for large accelerated filers for two years and then revisit whether application of the rule would be appropriate for smaller companies.[169]

Other commenters stated that smaller reporting companies should not be excluded from the application of Rule 14a–11.[170] One commenter agreed with the Commission that exempting small entities would be inconsistent with the stated goals of the Proposal and the costs and burden for such entities would be minimal.[171] Other commenters believed that small companies are "just as likely" to have poorly functioning boards as their larger counterparts.[172] Another commenter argued that Rule 14a–11 would not impose a material burden on any company subject to the proxy rules because companies already have to distribute proxy cards and it would not be an imposition if they were required to add additional nominees to those cards.[173]

In the recently enacted Dodd-Frank Act, Congress confirmed our authority to require inclusion of shareholder nominees for director in company proxy materials.[174] In addition, in Section 971(c) of the Dodd-Frank Act Congress specifically provided the Commission with the authority to exempt an issuer or class of issuers from requirements adopted for the inclusion of shareholder director nominations in company proxy materials. In doing so, this provision instructs the Commission to take into account whether such requirement for the inclusion of shareholder nominees for director in company proxy materials disproportionately burdens small issuers.[175]

After considering the comments, amended Section 14(a), and Section 971(c) of the Dodd-Frank Act, we continue to believe that Rule 14a–11 should apply regardless of company size, as was proposed. As noted above, the purpose of Rule 14a–11 is to facilitate the exercise of shareholders' traditional State law rights to nominate and elect directors to company boards of directors and thereby enable shareholders to participate more meaningfully in the nomination and election of directors at the companies in which they invest. We are not persuaded that exempting smaller reporting companies would be consistent with these goals. As stated above, we expect the rule changes will further investor protection by facilitating shareholder rights to nominate and elect directors and providing shareholders a greater voice in the governance of the companies in which they invest. We believe shareholders of smaller reporting companies should be afforded these same protections.

Nonetheless, we recognize that smaller reporting companies may have had less experience with existing forms of shareholder involvement in the proxy process (*e.g.,* Rule 14a–8 proposals), and thus may have less developed infrastructures for managing these matters. We believe that a delayed effective date for smaller reporting companies should allow those companies to observe how the rule operates for other companies and should allow them to better prepare for implementation of the rules. We also believe that delayed implementation for these companies will allow us to evaluate the implementation of Rule 14a–11 by larger companies and provide us with the additional opportunity to consider whether adjustments to the rule would be appropriate for smaller reporting companies before the rule becomes applicable to them. Therefore, we are delaying implementation for companies that meet the definition of smaller reporting company in Exchange Act Rule 12b–2.[176] New Rule 14a–11 will become effective for these companies three years after the date that the rules become effective for companies other than smaller reporting companies. In addition, as discussed below, in an effort to limit the cost and burden on all companies subject to the rule, including smaller reporting companies, we have limited use of Rule 14a–11 to nominations by shareholders who have maintained significant continuous holdings in the company for an extended period of time. As discussed further below, we have extended the required holding period to at least three years at the time the notice of nomination is filed with the Commission and transmitted to the company. In addition, we have made modifications to the ownership threshold that, in combination with the three-year holding period, we believe should facilitate shareholders' ability to exercise their State law rights to nominate and elect directors without unduly burdening companies, including smaller reporting companies. We proposed a tiered ownership threshold that included a 5% ownership threshold for non-accelerated filers; however, we are adopting a 3% ownership threshold for all companies subject to the rule. In adopting the uniform 3% ownership threshold, we carefully considered, among other factors, the potential that

the requirements for smaller reporting companies for its annual and quarterly reports. *See* Exchange Act Rule 12b–2(2).

[169] *See* letter from Theragenics. *See also* letter from Alston & Bird, recommending that we consider adopting a phase-in approach, whereby companies would be permitted to follow a phase-in schedule for mandatory compliance based on their size, similar to the Commission's rules regarding internal controls reporting and XBRL. *See Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports,* Release No. 33–8238; 34–47968 [69 FR 9722] (June 5, 2003) and *Interactive Data to Improve Financial Reporting,* Release No. 33–9002; 34–59324 [74 FR 6776] (Jan. 30, 2009).

[170] *See* letters from AFSCME; CII; D. Nappier.

[171] *See* letter from CII.

[172] *See* letters from AFSCME; D. Nappier.

[173] *See* letter from USPE.

[174] Dodd-Frank Act §§ 971(a) and (b).

[175] Dodd-Frank Act § 971(c). A comment letter on July 28, 2010 from the Society of Corporate Secretaries & Governance Professionals invoked this new legislation in support of a request to re-open the period for comment on the Proposal as it relates to small companies. As noted, we did specifically request comment in the Proposal on the rule's effect on smaller reporting companies, and we received and have considered numerous comments on this topic. Accordingly, we believe we have substantially achieved the objective stated in that letter, namely to identify and evaluate any "unique and significant challenges that access to the proxy will create for small and mid-sized companies." Moreover, our determination to delay implementation of Rule 14a–11 in respect of smaller companies will further allow us to evaluate the implementation of Rule 14a–11 by larger companies and provide us with the additional opportunity to consider whether adjustments to the rule would be appropriate for smaller reporting companies.

[176] *See* Exchange Act Rule 12b–2. A smaller reporting company is defined as "an issuer that is not an investment company, an asset-backed issuer, or a majority-owned subsidiary of a parent that is not a smaller reporting company and that: had a public float of less than $75 million as of the last business day of its most recently completed second fiscal quarter, computed by multiplying the aggregate worldwide number of shares of its voting and non-voting common equity held by non-affiliates by the price at which the common equity was last sold, or the average of the bid and asked prices of common equity, in the principal market for the common equity; or in the case of an initial registration statement under the Securities Act or Exchange Act for shares of its common equity, had a public float of less than $75 million as of a date within 30 days of the date of the filing of the registration statement, computed by multiplying the aggregate worldwide number of such shares held by non-affiliates before the registration plus, in the case of a Securities Act registration statement, the number of such shares included in the registration statement by the estimated public offering price of the shares; or in the case of an issuer whose public float as calculated under paragraph (1) or (2) of this definition was zero, had annual revenues of less than $50 million during the most recently completed fiscal year for which audited financial statements are available." Whether or not an issuer is a smaller reporting company is determined on an annual basis.

the rule would have a disproportionate impact on small issuers. Despite identifying that concern in the Proposal, however, the comments we received did not substantiate that concern, and comments from companies overwhelmingly supported uniform ownership thresholds for all public companies. Moreover, the data we examined did not indicate any substantial difference in share ownership concentrations between large accelerated filers and non-accelerated filers. Thus, we expect that the eligibility requirements will help achieve the stated objectives of the rule without disproportionately burdening any particular group of companies.

4. Who Can Use Exchange Act Rule 14a–11

a. General

In an effort to facilitate fair corporate suffrage, we could have proposed and adopted a rule pursuant to which the ability to use Rule 14a–11 would be conditioned solely on whether the shareholder lawfully could nominate a director, and not include any ownership thresholds or holding period. However, we believe it is appropriate to take a measured approach that balances competing interests and seeks to ensure investor protection. Accordingly, Rule 14a–11 will be available to shareholders that hold a significant, long-term interest in the company, have provided timely notice of their intent to include a nominee in the company's proxy materials, and provide specified disclosure concerning themselves and their nominees. More specifically, as described in detail in this section, a company will be required to include a shareholder nominee or nominees if the nominating shareholder or group: [177]

- Holds, as of the date of the shareholder notice on Schedule 14N,[178] either individually or in the aggregate,[179] at least 3% of the voting power (calculated as required under the rule) [180] of the company's securities that are entitled to be voted on the election of directors at the annual meeting of shareholders (or, in lieu of such an annual meeting, a special meeting of shareholders) or on a written consent in lieu of a meeting; [181]
- Has held the qualifying amount of securities used to satisfy the minimum ownership threshold continuously for at least three years as of the date of the shareholder notice on Schedule 14N (in the case of a shareholder group, each member of the group must have held the amount of securities that are used to satisfy the ownership threshold continuously for at least three years as of the date of the shareholder notice on Schedule 14N); [182]
- Continues to hold the required amount of securities used to satisfy the ownership threshold through the date of the shareholder meeting; [183]
- Is not holding any of the company's securities with the purpose, or with the effect, of changing control of the company or to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the company could be required to include under Rule 14a–11; [184]
- Does not have an agreement with the company regarding the nomination; [185]
- Provides a notice to the company on Schedule 14N, and files the notice with the Commission,[186] of the nominating shareholder's or group's intent to require that the company include that nominating shareholder's or group's nominee in the company's proxy materials no earlier than 150 calendar days, and no later than 120 calendar days, before the anniversary of the date that the company mailed its proxy materials for the prior year's annual meeting; [187] and
- Includes the certifications required in the shareholder notice on Schedule 14N.[188]

b. Ownership Threshold

As proposed, a nominating shareholder or group would have been required to beneficially own 1%, 3%, or 5% of the company's securities entitled to be voted on the election of directors at the shareholder meeting, depending on the company's accelerated filer status or, in the case of registered investment companies, depending on the net assets of the company. We received significant comment on this topic, which we discuss further below, and have made alterations to the final rule to reflect the concerns expressed by commenters.

As adopted, to rely on Rule 14a–11, a nominating shareholder or group will be required to hold, as of the date of the shareholder notice on Schedule 14N, either individually or in the aggregate, at least 3% of the voting power of the company's securities that are entitled to be voted on the election of directors at the annual (or a special meeting in lieu of the annual) meeting of shareholders or on a written consent in lieu of a meeting. The nominating shareholder or group or member of a nominating shareholder group will be required to hold both the power to dispose of and the power to vote the securities, as discussed below. The nominating shareholder or member of a nominating shareholder group also will be required to have held the qualifying amount of securities for at least three years as of the date of the notice on Schedule 14N, and to hold that amount through the date of the election of directors. Each aspect of the ownership requirement is discussed further below.

[177] In some circumstances, the requirements of Rule 14a–11 applicable to a nominating shareholder group must be satisfied by each member of the group individually (*e.g.,* no member of the group may be holding the company's securities with the purpose of, or with the effect, of changing control of the company or to gain more than the maximum number of nominees that the registrant would be required to include under the rule). *See also* Section II.B.4.

[178] Throughout this release, when we say "as of the date of the notice on Schedule 14N" we mean the date the nominating shareholder or group files the Schedule 14N with the Commission and transmits the notice to the company. *See* Section II.B.8.c.ii. below for a further discussion of the timing requirements for filing a Schedule 14N.

[179] The manner in which a nominating shareholder or group would establish its eligibility to use new Rule 14a–11 is discussed further in Section II.B.4.b.iv. below.

[180] *See* Instruction 3 to new Rule 14a–11(b)(1).

[181] *See* new Rule 14a–11(b)(1).

[182] *See* new Rule 14a–11(b)(2). The three-year holding period requirement applies only to the amount of securities that are used for purposes of determining the ownership threshold.

[183] See new Rule 14a–11(b)(2).

[184] *See* new Rule 14a–11(b)(6).

[185] *See* new Rule 14a–11(b)(7).

[186] *See* Section II.B.8. for a discussion of new Schedule 14N and the disclosures required to be filed. The Schedule 14N may be filed by an individual shareholder that meets the ownership threshold, an individual shareholder that is a member of a nominating shareholder group that is aggregating the individual members' securities to meet the ownership threshold but is choosing to file the notice on Schedule 14N individually, or a nominating shareholder group through their authorized representative, as provided for in Rule 14n–1(b)(1).

[187] The dates would be calculated by determining the release date disclosed in the previous year's proxy statement, increasing the year by one, and counting back 150 calendar days and 120 calendar days for the beginning and end of the window period, respectively. In this regard, we note that the deadline could fall on a Saturday, Sunday or holiday. In such cases, the deadline should be treated as the first business day following the Saturday, Sunday or holiday, similar to the treatment filing deadlines receive under Exchange Act Rule 0–3. *See* Instruction 1 to Rule 14a–11(b)(10). If the company did not hold an annual meeting during the prior year, or if the date of the meeting has changed by more than 30 days from the prior year, then the nominating shareholder or group must provide notice pursuant to new Item 5.08 a reasonable time before the company mails its proxy materials, as specified by the company in a Form 8–K filed within four business days after the company determines the anticipated meeting date. *See* new Rule 14a–11(b)(10) and Instruction 2 to that paragraph. *See* further discussion in Section II.B.8.c.ii.

[188] *See* new Rule 14a–11(b)(11) and Item 8 of new Schedule 14N. Pursuant to new Schedule 14N, the nominating shareholder or group would be required to include in its notice to the company a certification that the nominating shareholder or group satisfies the requirements in Rule 14a–11.

i. Percentage of Securities

We proposed tiered ownership thresholds for large accelerated, accelerated, and non-accelerated filers in an effort to address the possibility that certain companies could be affected disproportionately based on their size.[189] Many commenters criticized the proposed ownership thresholds or recommended generally higher thresholds.[190] Of these, most commenters criticized the tiered ownership thresholds and recommended a uniform ownership threshold generally higher than the proposed thresholds.[191] Many of these commenters questioned whether the data on shareholdings discussed in the Proposal in relation to the proposed thresholds took into account the fact that shareholders could aggregate their holdings in order to use Rule 14a–11.[192] One of these commenters described formation of a nominating group as "the most likely scenario" to qualify for use of Rule 14a–11,[193] and another commenter submitted that with a significant ownership threshold an "inability to aggregate shareholders to reach the ownership threshold is unreasonable."[194]

A few commenters criticized generally the proposed thresholds as too high and recommended lower thresholds.[195] One commenter opposed the tiered ownership thresholds because a number of companies regularly move from one category of filer to another as the aggregate worldwide market value of their voting and non-voting common equity changes from fiscal year to fiscal year, which the commenter believed would lead to uncertainty under the Commission's tiered approach.[196] Commenters from the investment company industry noted that the proposed eligibility thresholds were based on data for non-investment companies and were not supported by empirical data analysis for investment companies.[197]

On the other hand, we also received comment generally supporting the proposed tiered ownership thresholds.[198] One commenter expressed general support for the proposed thresholds and stated that the proposed thresholds would achieve the Commission's and commenter's shared objective of facilitating the exercise of shareholders' nomination rights.[199] Another commenter explained that the thresholds would "ensure[ ] that only those long-term shareholders who are seriously concerned about the governance of portfolio companies will have a seat at the table."[200]

With regard to an appropriate uniform ownership threshold, commenters recommended a number of different possibilities, including:

- At least 1% of the company's outstanding shares for an individual shareholder and 5% for a group of shareholders;[201]
- At least 2% of a company's voting securities;[202]
- 3% of a company's shares;[203]
- 5% of the company's voting securities for an individual shareholder and 10% for a group of shareholders;[204]
- 5% of a company's outstanding shares;[205]
- 5% of a company's outstanding shares for an individual shareholder and a higher but unspecified threshold for a group of shareholders;[206]
- With regard to investment companies, a 5% threshold;[207]
- From 5% to 10% of a company's shares;[208]
- 10% of the company's shares;[209]
- 10% of the company's outstanding shares for an individual shareholder and 15% of the outstanding shares for a group of shareholders;[210]
- 5% to 15% of the company's outstanding shares;[211]

[189] Similarly, we proposed tiered ownership thresholds for registered investment companies with the tiers based on net assets.

[190] *See* letters from 26 Corporate Secretaries; ABA; Australian Council of Superannuation Investors ("ACSI"); ADP; Advance Auto Parts; Aetna; Alaska Air; Alcoa Inc. ("Alcoa"); Allstate; American Express; Anadarko; Applied Materials; Association of Corporate Counsel; AT&T; Avis Budget; Barclays; Best Buy; J. Blanchard; Boeing; BorgWarner; BRT; Burlington Northern; R. Burt; Calvert Group, Ltd. ("Calvert"); Caterpillar; CFA Institute; Chevron; J. Chico; Committee on Investment of Employee Benefit Assets ("CIEBA"); CIGNA; Peter Clapman ("P. Clapman"); Cleary; CNH Global; Comcast; Con Edison; Capital Research and Management Company ("CRMC"); CSX; Cummins; Darden Restaurants; Davis Polk; Deere; Dewey; W. Brinkley Dickerson, Jr. ("W. B. Dickerson"); J. Dillon; DTE Energy; DuPont; Craig Dwight ("C. Dwight"); Eaton; Edison Electric Institute; Eli Lilly; Emerson Electric; eWareness; ExxonMobil; FedEx; Financial Services Roundtable; FMC Corp.; FPL Group; GE; General Mills; A. Goolsby; Home Depot; Honeywell; IBM; ICI; Intel; ITT; JPMorgan Chase; J. Kilts; Koppers; E.J. Kullman; N. Lautenbach; Leggett; Lionbridge Technologies, Inc. ("Lionbridge Technologies"); Lorsch *et al.;* M. Metz; McDonald's; MeadWestvaco; J. Miller; Motorola; Norfolk Southern; Northrop Grumman Corporation ("Northrop"); Office Depot; PepsiCo; Pfizer; P&G; Praxair, Inc. ("Praxair"); Protective; Stephen Lange Ranzini ("S. Ranzini"); Rosen; Ryder; Sara Lee; S&C; Seven Law Firms; Shearman & Sterling; Sherwin-Williams; SIFMA; Society of Corporate Secretaries; Southern Company; Tenet; Tesoro; Textron; TI; TIAA–CREF; Tidewater Inc. ("Tidewater"); Tompkins Financial Corporation ("Tompkins"); G. Tooker; T. Rowe Price; tw telecom; L. Tyson; UnitedHealth; U.S. Bancorp; ValueAct Capital; Vanguard; Verizon Communications Inc. ("Verizon"); Bruno de la Villarmois ("B. Villarmois"); Wachtell; Wells Fargo; Weyerhaeuser; Xerox.

[191] *See* letters from ACSI; ADP; Advance Auto Parts; Allstate; American Express; Applied Materials; Association of Corporate Counsel; AT&T; Avis Budget; Barclays; Best Buy; J. Blanchard; Boeing; BRT; Burlington Northern; R. Burt; Calvert; Caterpillar; CFA Institute; J. Chico; CIGNA; CNH Global; Comcast; Con Edison; CSX; Darden Restaurants; Davis Polk; Deere; Dewey; W. B. Dickerson; J. Dillon; DTE Energy; DuPont; Eaton; Edison Electric Institute; Eli Lilly; Emerson Electric; ExxonMobil; FedEx; Financial Services Roundtable; FMC Corp.; FPL Group; General Mills; Home Depot; IBM; Intel; ITT; JPMorgan Chase; J. Kilts; E.J. Kullman; Lorsch *et al.;* McDonald's; M. Metz; Motorola; N. Lautenbach; Office Depot; PepsiCo; Praxair; Protective; S. Ranzini; Sara Lee; S&C; Seven Law Firms; Shearman & Sterling; Sherwin-Williams; Society of Corporate Secretaries; Southern Company; Tesoro; Textron; TI; TIAA–CREF; Tompkins; G. Tooker; T. Rowe Price; tw telecom; L. Tyson; UnitedHealth; U.S. Bancorp; ValueAct Capital; Vanguard; Verizon; Weyerhaeuser; Xerox.

[192] *See* letters from ABA; ABA II; BRT; Business Roundtable (January 19, 2010) ("BRT II"); Cleary; Davis Polk; Honeywell; SIFMA.

[193] Letter from BRT II.

[194] Letter from California State Teachers' Retirement System (Nov. 18, 2009)("CalSTRS II").

[195] *See* letters from Committee of Concerned Shareholders ("Concerned Shareholders"); L. Dallas; USPE.

[196] *See* letter from Shearman & Sterling.

[197] *See, e.g.,* letters from ICI; S&C; T. Rowe Price.

[198] *See* letters from AFL–CIO; AFSCME; British Insurers; CalPERS; CalSTRS; COPERA; CRMC; Florida State Board of Administration; Glass Lewis; IAM; ICGN; LACERA; Marco Consulting; D. Nappier; Nathan Cummings Foundation; P. Neuhauser; Norges Bank; OPERS; Pax World; RiskMetrics; David E. Romine ("D. Romine"); Shamrock; Sodali; Teamsters; WSIB.

[199] *See* letter from CII.

[200] Letter from AFL–CIO.

[201] *See* letter from Deere.

[202] *See* letter from ADP.

[203] *See* letters from CSI; Calvert; CFA Institute; Labour Union Co-operative Retirement Fund ("LUCRF"); S. Ranzini.

[204] *See* letters from Advance Auto Parts; Alaska Air; American Express; Association of Corporate Counsel; Avis Budget; Best Buy; J. Blanchard; Boeing; BRT; Burlington Northern; Callaway; CIGNA; CNH Global; Comcast; Con Edison; Darden Restaurants; Dewey; J. Dillon; DTE Energy; DuPont; Eaton; Edison Electric Institute; Eli Lilly; Emerson Electric; ExxonMobil; FedEx; FMC Corp.; FPL Group; General Mills; Home Depot; Intel Corporation ("Intel"); JPMorgan Chase; E.J. Kullman; McDonald's; N. Lautenbach; PepsiCo; Praxair; Protective (recommending this threshold if its proposed 35% withhold vote triggering event is not included; if included, it recommended a 3% threshold); Sara Lee; Seven Law Firms; Sherwin-Williams; Society of Corporate Secretaries; Textron; Tompkins; G. Tooker; Weyerhaeuser; Xerox.

[205] *See* letters from Applied Materials; R. Burt; CSX; Financial Services Roundtable; IBM (recommending 5% as one of the two acceptable thresholds); ITT; J. Kilts; Shearman & Sterling; Southern Company; Tesoro; TIAA–CREF; T. Rowe Price; tw telecom; UnitedHealth; U.S. Bancorp; Verizon.

[206] *See* letters from Applied Materials; U.S. Bancorp.

[207] *See* letters from S&C; TIAA–CREF.

[208] *See* letters from Davis Polk; Lorsch *et al.*

[209] *See* letters from Allstate; Caterpillar; J. Chico; W. B. Dickerson; IBM (recommending 10% as one of the two acceptable thresholds); ICI; M. Metz; Office Depot; L. Tyson; ValueAct Capital; Vanguard.

[210] *See* letter from Motorola.

[211] *See* letter from Barclays.

• 15% of the company's shares;[212] and

• 20% of a company's shares.[213]

Two of the commenters that criticized the proposed threshold as too high recommended that Rule 14a–11 have the same ownership threshold as Rule 14a–8,[214] with one of these commenters expressing the belief that the proposal, with its ownership thresholds, would enable only institutional shareholders to access the corporate ballot.[215] Another of the commenters opposing the proposed thresholds asserted that the threshold for non-accelerated filers is too high and cited figures indicating that a significant number of such filers do not have any shareholders that would satisfy the proposed threshold.[216] This commenter suggested that for an individual shareholder or a group of shareholders, the threshold should be based on the dollar value of the shares held (*e.g.,* $250,000) or a lower percentage of shares (*e.g.,* 0.25%).

After considering the comments, we believe that it is appropriate to apply a uniform 3% ownership threshold to all companies subject to the rule, regardless of whether they are classified as large accelerated, accelerated, or non-accelerated filers under the Federal securities laws. As an initial matter, as we did at the time we issued the Proposing Release, we considered whether and why Rule 14a–11 should include any ownership threshold. Because the Commission's proxy rules seek to enable the corporate proxy process to function, as nearly as possible, as a replacement for in-person participation at a meeting of shareholders, some may argue that once a shareholder has satisfied any procedural requirements to a director nomination that a company is allowed to impose under State law, then that nomination should be included in the company's proxy materials. Each time we consider and adopt amendments to our rules, however, we balance competing interests.

Based on our consideration of these competing interests, including balancing and facilitating shareholders' ability to participate more fully in the nomination and election process against the potential cost and disruption of the amendments, we have determined that requiring a significant ownership threshold is appropriate to use Rule 14a–11. Indeed, we believe that the 3% ownership threshold—combined with the other requirements of the rule—properly addresses the potential practical difficulties of requiring inclusion of shareholder director nominations in a company's proxy materials, and some concerns that both company management and other shareholders may have about the application of Rule 14a–11. Providing this balanced, practical, and measured limitation in Rule 14a–11 is consistent with the approach we have taken in many of our other proxy rules[217] and reflects our desire to proceed cautiously with these new amendments to our rules.

We also considered whether the ownership threshold we adopt for Rule 14a–11 should be tiered based on the size and related filing status (or net assets) of the company, or uniform for all companies, and what percentage of ownership would be most appropriate. We have decided to adopt a uniform standard for all companies for several reasons. First, we determined that a uniform standard would reduce the complexities of Rule 14a–11. As noted by one commenter,[218] the potential for the filing status of a company to change would result in uncertainty about the availability of the provisions of Rule 14a–11 as a result of market fluctuations in share prices, acquisitions, or divestitures. A uniform standard avoids that uncertainty and the resulting potential for the costs and burdens of disputes over the selection of the appropriate tier. Elimination of that uncertainty, moreover, would make the availability of Rule 14a–11 more predictable and therefore more useful for shareholders in planning nominations in reliance on the rule. A uniform standard also will avoid any ability on the part of management to structure corporate actions to modify the impact of Rule 14a–11 by placing the company in a different tier. The concern we expressed in the Proposal—that companies could be disproportionately affected by adoption of the rule based on their size—was not supported by comments of potentially affected companies; to the contrary, comments from companies overwhelmingly supported uniform ownership thresholds.[219] In addition, as discussed below, we are deferring implementation of Rule 14a–11 for smaller reporting companies.[220]

A comparison of the share ownership concentrations in large accelerated filers and non-accelerated filers produced relatively minor observable difference. The results, adjusted to give effect to a three-year holding period requirement, are summarized in the table below:[221]

[212] *See* letter from TI.

[213] *See* letter from AT&T.

[214] *See* letters from Concerned Shareholders; USPE.

[215] *See* letter from Concerned Shareholders.

[216] *See* letter from L. Dallas.

[217] *See, e.g.,* Exchange Act Rule 14a–8(b) (requiring shareholders to have "continuously held at least $2,000 in market value, or 1%, of the company's securities entitled to be voted on the proposal at the meeting for at least one year by the date" they submit a shareholder proposal); Exchange Act Rule 14a–6(g) (requiring a soliciting person that "owns beneficially securities of the class which is the subject of the solicitation with a market value of over $5 million" to file a notice with the Commission); Regulation S–K, Item 404(a) (requiring disclosure of transactions with related parties that exceed $120,000).

[218] *See* letter from Shearman & Sterling.

[219] *See* letters from General Mills; Tesoro; T. Rowe Price; ValueAct Capital; Verizon (explicitly opposing variation in percentage ownership requirement based on issuer size); and letters identified in footnotes 199–211 above (commenters supporting various uniform ownership thresholds).

[220] As noted in Section II.B.3.f., we have adopted a three-year delay in implementation for smaller reporting companies.

[221] The percentages in the table are derived from the data set described in the Proposing Release involving companies that have held meetings between January 1, 2008 and April 15, 2009 (the "Proposing Release data"). *See* Section III.B.3. of the Proposing Release. The percentages have been adjusted, however, because the Proposing Release data did not give effect to any holding period requirement, and we have attempted to estimate what those percentages would have been had they given effect to the three-year holding period we are adopting. By the calculation described below, we have estimated a reasonable adjustment to the reported percentages in the Proposing Release data by using the data presented in a November 24, 2009 memorandum based on the analysis of Schedule 13F filings, data which did give effect to holding period requirements. *See* Memorandum from the Division of Risk, Strategy, and Financial Innovation regarding the Share Ownership and Holding Period Patterns in 13F data (November 24, 2009), *available at http://www.sec.gov/comments/s7-10-09/s71009-576.pdf* (the "November 2009 Memorandum"). The two data sets have overlapping statistics that can be used for comparison and adjustment: Both sets report percentages of a broad sample of public companies and identify percentages of companies having (i) at least one shareholder with holdings of 3% of more, (ii) at least two shareholders with holdings of 3% or more, (iii) at least one shareholder with holdings of 1% or more, and (iv) at least two shareholders with holdings of 1% or more. Comparing the percentages reflected in the November 2009 Memorandum (giving effect to a three-year holding period requirement) with the percentages in the Proposing Release data (not reflecting any holding period requirement), we observe that the percentages reported in the Proposing Release data exceed the percentages reported in the November 2009 memorandum by amounts ranging from 56% to 69%. In order to derive the approximate percentages in the table, we adjusted downward by 62.5% the percentages reported in the Proposing Release data, to account at least approximately for the application of the three-year holding period requirement.

	Non-accelerated filers (approximate percentages)	Large accelerated filers (approximate percentages)
Companies with at least one 1% shareholder	37	37
Companies with at least one 3% shareholder	33	32
Companies with at least one 5% shareholder	22	16
Companies with at least two 1% shareholders	36	37
Companies with at least two 1.5% shareholders	33	33
Companies with at least two 2.5% shareholders	27	25

Our further review of relevant data has persuaded us that applying different ownership thresholds to large accelerated filers and non-accelerated filers is not justified.[222]

As noted above, we have decided to adopt a uniform ownership threshold for all categories of public companies. We determined that a 3% ownership threshold is an appropriate standard for all such companies—not just accelerated filers. We believe that the 3% threshold, while higher for many companies and lower for others than the thresholds advanced in the Proposal, properly balances our belief that Rule 14a–11 should facilitate shareholders' traditional State law rights to nominate and elect directors with the potential costs and impact of the amendments on companies. The ownership threshold we are establishing should not expose issuers to excessively frequent and costly election contests conducted through use of Rule 14a–11, but it is also not so high as to make use of the rule unduly inaccessible as a practical matter.

We selected the uniform 3% threshold based upon comments received, our analysis of the data available to us, and the fact that the rule allows for shareholders to form groups to aggregate their holdings to meet the threshold. We also considered that our amendments to Rule 14a–8 remove barriers to the ability of shareholders to have proposals included in company proxy materials to establish a procedure under a company's governing documents for the inclusion of one or more nominees in the company's proxy materials. Because of these amendments, shareholders who believe the 3% threshold is too high can take steps to seek to establish a lower ownership threshold.[223]

We note that we considered a lower threshold, such as 1%, and a higher threshold, such as 5%, both of which were thresholds in the proposed tiers. Quite a few commenters, including a number who generally supported the adoption of Rule 14a–11, advocated for an ownership threshold higher than the 1% level we proposed for large accelerated filers.[224] One large institutional investor, for example, "strongly urg[ed] the adoption of proposed Rule 14a–11" and argued that "existing reforms are incomplete as long as boards retain the exclusive control of the proxy card and sole discretion over the mechanisms that govern their own elections," but also stated the belief that "in order to use company resources to nominate a director, a significant amount of capital must be represented and 5% is an acceptable threshold."[225] Similarly, the manager of a large family of investment companies stated its "support [for] the Commission's intent to facilitate shareholders' rights to participate in the governance process," yet commented that "a 1% threshold is too low, in our opinion, to maintain the critical balance between serving the interests of eligible nominating shareholders and serving the interests of a company's shareholder base at large."[226] That commenter recommended a "flat 5% threshold for all companies" because it "represents significant economic stake." Other commenters recommended a uniform 3% ownership threshold in the interest of avoiding "frivolous or vexatious nominations,"[227] or because it "is not so small that it would allow a board nomination for only a de minimis investment in [a non-accelerated filer]," but "would not be so large as to prevent all but the largest institutional shareowners to submit nominees for [large accelerated filers]."[228]

In light of such comments we have determined not to adopt the 1% threshold we had proposed with respect to large accelerated filers. We also have determined not to adopt, as the uniform standard, the 5% threshold we had proposed for non-accelerated filers. Several commenters from the investor community explicitly opposed a 5% uniform threshold, maintaining that it would as a practical matter exclude all but the largest institutional investors.[229] On the other hand, although some companies supported a uniform 5% threshold,[230] most other companies urged the adoption of a substantially higher threshold, either for individual shareholders or for shareholder groups, or both. For example, companies and their counsel generally believed a higher threshold should apply to group nominations and overwhelmingly recommended a 10% minimum ownership requirement for nominations by shareholder groups.[231] We note, however, that at a 10% threshold for groups, the likelihood of forming a group sufficient to meet the minimum ownership requirement would likely be significantly reduced compared to a 3% threshold. Given a three-year holding period, the data in the November 2009 Memorandum identify combinations

[222] *See* letter from P. Neuhauser (suggesting only two ownership eligibility tiers because data show "almost no difference in ownership characteristics between smaller accelerated filers and non-accelerated filers.").

[223] As noted in Section II.C., we are adopting an amendment to Rule 14a–8(i)(8) to preclude companies from relying on that basis to exclude from their proxy materials shareholder proposals that seek to establish a procedure under a company's governing documents for the inclusion of one or more shareholder director nominees in the company's proxy materials. Such a shareholder proposal would, of course, have to satisfy the other requirements of the rule, like other Rule 14a–8 shareholder proposals.

[224] *See* letters from ACSI (advocating a uniform 3% threshold); Calvert (same); LUCRF (same); S. Ranzini (same); TIAA–CREF (advocating a uniform 5% threshold); T. Rowe Price (same).

[225] Letter from TIAA–CREF.

[226] Letter from T. Rowe Price.

[227] Letters from SCSI and LUCRF.

[228] Letter from CFA Institute.

[229] *See* letters from CFA Institute; P. Neuhauser; RiskMetrics.

[230] *See* letters from CSX; ITT; Southern Company; Tesoro; tw telecom; UnitedHealth; Verizon.

[231] *See* letters from Advance Auto Parts; Alaska Air; American Express; Association of Corporate Counsel; Avis Budget; Best Buy; J. Blanchard; Boeing; BRT; Burlington Northern; Callaway; CIGNA; CNH Global; Comcast; Con Edison; Darden Restaurants; Dewey; J. Dillon; DTE Energy; DuPont; Eaton; Edison Electric Institute; Eli Lilly; Emerson Electric; ExxonMobil; FedEx; FMC Corp.; FPL Group; General Mills; Home Depot; Intel; JPMorgan Chase; E.J. Kullman; McDonald's; N. Lautenbach; PepsiCo; Praxair; Protective (recommending this threshold if its proposed 35% withhold vote triggering event is not included; if included, it recommended a 3% threshold); Sara Lee; Seven Law Firms; Sherwin-Williams; Society of Corporate Secretaries; Textron; Tompkins; G. Tooker; Weyerhaeuser; Xerox.

totaling 10% or more but involving five or fewer shareholders as achievable in as little as 7% of public companies, compared to at least 21% of public companies at a 5% threshold and at least 31% of public companies at a 3% threshold. In addition, the data suggest that it would be even more unlikely that a company would have an individual shareholder that would meet a 10% ownership threshold.[232] While some commenters suggested a 5% threshold was appropriate because that amount is consistent with other filing requirements such as Schedule 13D and 13G,[233] we ultimately were not persuaded because the underlying principles of such filing requirements[234] are quite different from those underlying the ownership condition to Rule 14a–11. After considering the comments and available data, we have decided that a 3% ownership threshold—including where shareholders form groups to satisfy the threshold—is an appropriate and workable approach for the rule.

In adopting a uniform 3% threshold for all companies, as opposed to a lower ownership threshold for all companies, we are mindful that the rule will allow shareholders to form a group by aggregating their holdings to meet the ownership threshold.[235] Indeed, as we assumed in the Proposing Release and as some commenters told us, in many cases shareholders will need to form groups to meet the ownership threshold for the purpose of submitting director nominations pursuant to Rule 14a–11.[236] Commenters also pointed to instances of coordinated shareholder activity in recent "vote no" campaigns as support for the ability of shareholders to form groups.[237] We have adopted a number of amendments to our rules that will facilitate the formation of groups for this purpose.[238] We understand the result of our ownership threshold determination may be that shareholders will need to convince other shareholders to support their attempt to use Rule 14a–11. We believe this outcome reduces the potential for excessive costs to be incurred by companies and their shareholders.

The data available to us also suggest that reaching the 3% ownership threshold we are adopting is possible for a significant number of shareholders either individually or by a number of shareholders aggregating their holdings in order to satisfy the ownership requirement. In particular, the data presented in the November 2009 Memorandum indicate that a sizeable percentage (33%) of public companies have at least one institutional investor owning at least 3% of their securities for at least three years, and thus potentially qualified to meet the Rule 14a–11 ownership threshold individually. As noted, however, the data are based on Form 13F filings, which include holders that are custodians and may not be likely users of the rule. The data in the November 2009 Memorandum also suggest that forming nominating shareholder groups with holdings aggregating 3% is achievable at many companies by a relatively small number of shareholders. Even factoring in the requirement of continuous ownership for three years, 31% of public companies have three or more holders with at least 1% share ownership each; and 29% have two or more holders with at least 2% share ownership each.[239] Moreover, neither of these categories includes companies with one holder of 2% and another holder of at least 1%, and none of these percentages includes companies having a relatively small number (*e.g.* four to ten) of holders whose aggregate holdings exceed 3% but whose individual holdings do not bring the company within any of the categories identified in the data.

We are concerned, however, that use of Rule 14a–ndash;11 may not be consistently and realistically viable, even by shareholder groups, if the uniform ownership threshold were set at 5% or higher. At the 5% minimum ownership requirement for individuals as advocated by many of those same commenters, only 20% of public companies had even one shareholder satisfying that requirement. Finally, even applying a 5% threshold for shareholder groups, the data identify combinations involving five or fewer shareholders that add up to 5% or more as theoretically achievable in as few as 21% of public companies—at least 25% fewer than with a 3% threshold.[240]

All of these data thus suggest that a uniform 5% ownership requirement would be substantially more difficult to satisfy than the 3% requirement we are adopting. Moreover, our resulting concern about the viability of a 5% ownership threshold is exacerbated by several limitations on the data reported in the November 2009 Memorandum. While those data do account for the application of a three-year holding period requirement, they may overstate in several ways the potential to meet the ownership threshold. First, they may include controlling shareholders that may be unlikely to rely on Rule 14a–11. Second, the data are based on filings on Form 13F, in which ownership is defined differently than under Rule 14a–11, and thus may yield a higher number of larger shareholdings. Finally, the data include large shareholdings by institutions which report aggregated holdings of securities held for multiple beneficial owners.[241]

Nevertheless, and principally because they give effect to holding period requirements, we considered the data in

[232] The data in the November 2009 Memorandum suggest that just 4% of companies would have at least one shareholder with 10%.

[233] *See, e.g.,* letters from CSX; ITT; Shearman & Sterling; Tesoro; T. Rowe Price; tw telecom.

[234] *See, e.g.,* Release No. 34–26598, Reporting of Beneficial Ownership in Publicly-Held Companies (March 6, 1989) ("The beneficial ownership reporting requirements embodied in Sections 13(d) and 13(g) of the [Exchange Act] and the regulations adopted thereunder are intended to provide to investors and to the subject issuer information about accumulations of securities that may have the ability to change or influence control of the issuer."). *See also* Release No. 34–50699 (proposing to require disclosure of persons holding 5% of an ownership interest in a securities exchange because the principles underlying such disclosure were similar to those underlying other filing requirements: "The 5% reporting threshold and the information proposed to be required to be disclosed about such ownership is modeled on the beneficial ownership reporting requirements of the Williams Act, embodied in Sections 13(d) and 13(g) of the Exchange Act and the rules and regulations thereunder. These Exchange Act provisions are intended to provide information to the issuer and the marketplace about accumulations of securities that may have the potential to change or influence control of an issuer." (footnotes omitted)).

[235] Some commenters suggested that the data on share ownership dispersion referred to in the Proposing Release were insufficient because we did not focus on the possibility that shareholders could form groups to satisfy the minimum ownership requirement. *See* letters from American Bar Association (January 19, 2010) ("ABA III"); BRT II.

[236] *See* letters from AFL–CIO ("[I]t will be necessary to permit aggregation of holdings to prevent the Proposed Access Rule from being usable only by hedge funds."); Florida Board of Administration ("Public funds would need to form a nominating group in order to meet the hurdle in nearly all cases.").

[237] *See* letter from BRT II.

[238] *See, e.g.,* Rule 14a–2(b)(7).

[239] We note that it is unlikely that the ownership test used in calculating the data tracks the definition that we are adopting for Rule 14a–11. As a result, the percentages in the data may be over- or under-inclusive.

[240] At the 10% threshold for groups urged by many commenters, for example, the likelihood of forming a group sufficient to meet the minimum ownership requirement would be more sharply constrained: the data in the November 2009 Memorandum identify combinations totaling 10% or more but involving five or fewer shareholders as theoretically achievable in as little as 7% of public companies.

[241] On the other hand, the data in the November 2009 Memorandum may understate the number of large shareholdings, because the data may exclude smaller holdings in multiple institutions that are subject to common voting control, and in any event, do not include holdings of less than 1% at all, even though such holdings could contribute to the formation of a group eligible to use Rule 14a–11. Likewise, those data do not include securities held by institutions holding less than $100 million in securities because Exchange Act Section 13(f) does not require such institutions to report their holdings. *See* letters from ABA III; BRT II.

the November 2009 Memorandum to be the most pertinent to our selection of a uniform minimum ownership percentage. We received additional data relating to large companies, however, that offer some additional indication about the number of shareholders potentially available to form a group to meet the 3% ownership threshold. One study indicated that in the top 50 companies by market capitalization as of March 31, 2009, the five largest institutional investors held from 9.1% to 33.5% of the shares, and an average of 18.4% of the shares.[242] That same study found that among a sample of 50 large accelerated filers, the median number of shareholders holding at least 1% of the shares for at least one year was 10.5, with 45 of the 50 companies in the sample having at least seven such shareholders.[243] Another study that was reported to us [244] similarly suggests relatively high concentration of share ownership. According to that analysis of S&P 500 companies, 14 institutional investors could satisfy a 1% threshold at more than 100 companies, eight could meet that threshold at over 200 companies, five could meet it at over 300 companies, and three could meet it at 499 of the 500. Information from specific large issuers likewise suggests the achievability of shareholder groups aggregating 3%.[245]

We realize these data likely overstate the number of eligible shareholders or shareholders whose holdings could be grouped to meet the ownership threshold, as these data generally do not appear to reflect any continuous holding requirement.

In any event, our assessment of the percentage of companies with various share ownership concentrations cannot be taken as an assurance that shareholder nominating groups will or will not be formed at any particular combination of percentage ownership and holding period requirements or of the likelihood that persons with large securities holdings would be inclined or disinclined to use Rule 14a–11.[246] Taking all of this information into account, overall we believe that our selection of a 3% ownership threshold strikes an appropriate balance between the benefits of facilitating shareholder participation in the process of electing directors of public companies and the costs and disruption associated with contested elections of directors conducted pursuant to new Rule 14a–11. We also believe, and as noted, many commenters supported, that a threshold tied to a significant commitment to the company is an important feature of our amendments. Of course, to the extent that shareholders believe the 3% threshold is too high our amendments to Rule 14a–8 will facilitate their ability to adopt a lower ownership percentage.[247]

We proposed to apply the same thresholds for registered investment companies and business development companies as for non-investment companies, except that the applicability of the particular thresholds for registered investment companies would have depended on the net assets of the company, rather than the company's accelerated filer status. No commenters recommended a higher threshold for investment companies than for non-investment companies. While some commenters noted the absence of data specifically relating to the impact of various ownership thresholds on investment companies,[248] no commenter supplied any data suggesting the need for an ownership threshold for investment companies different from that applicable to non-investment companies.[249] Although two commenters suggested a 5% ownership threshold for investment companies, both of these commenters also suggested a 5% threshold for non-investment companies.[250]

We believe that it is appropriate to apply to registered investment companies and business development companies the same 3% ownership threshold that we are applying to other companies. We also believe that, similar to non-investment companies, our selection of a 3% ownership threshold strikes an appropriate balance between the benefits of facilitating shareholder participation in the process of electing directors of investment companies and the costs and disruption associated with contested elections of directors conducted pursuant to Rule 14a–11.

We are not adopting the suggestion of commenters that the eligibility thresholds for investment companies be based on the holdings for the fund complex in the case of unitary boards or the cluster in the case of cluster boards.[251] We believe that eligibility should be based on holdings for the investment company, not the entire fund complex or cluster, because under State law, shareholder voting is determined based on the holdings in the investment company. Fund complexes have flexibility to organize their funds into one or more investment companies. Thereafter, State law governs which shareholders vote as a group for directors. Because Rule 14a–11 is intended to facilitate the exercise of traditional State law rights to nominate and elect directors, we believe that the rule should follow State law.

[242] *See* "Report on Effects of Proposed SEC Rule 14a–11 on Efficiency, Competitiveness and Capital Formation, in Support of Comments by Business Roundtable" by NERA Economic Consulting ("NERA Report"), Appendix Table 1, submitted with the letter from BRT.

[243] *Id.* at 13–14, Figure 2.

[244] *See* letter from JPMorgan Chase.

[245] *See* letters from AT&T (eight shareholders owning 1% or more, although holding periods not identified); AGL Resources (same); CIGNA (20 1%+ shareholders, although holding periods not identified); Cummins (36 1+% shareholders, although holding periods not identified); General Mills (one 5%+ shareholder holding for at least 6 years, over 12 1%+ shareholders, and over 25 0.5%+ shareholders, although holding periods not identified); ITT (14 1%+ shareholders, although holding periods not identified); McDonald's (10 holders owning 1% or more, one shareholder owning 5%, although holding periods not identified); UnitedHealth (four 3%+ shareholders, six 2%+ shareholders, nine 1%+ shareholders, 20 0.5%+ shareholders, 32 0.25% shareholders, applying a 2-year holding period); Weyerhaeuser (three 5%+ shareholders, 20 1%+ shareholders, although holding periods not identified).

[246] *See* letter from Council of Institutional Investors (January 14, 2010) ("CII II"). This comment refers to research indicating that in a small sample of accelerated and non-accelerated filers, the holdings of the ten largest public pension funds, if aggregated, would not exceed 5% and would also be unlikely to meet a 3% threshold, while a 1% threshold could be met. Apart from the sample size, however, this research itself appears limited in that it apparently does not include other types of shareholders and is not adjusted for any holding period.

[247] *See* footnote 223 above.

[248] *See, e.g.,* letters from ICI; S&C; T. Rowe Price.

[249] One joint comment letter provided data regarding the net assets of investment companies and the dollar value of the shares that would be necessary to meet the proposed 1%, 3%, or 5% thresholds. *See* letter from ICI/IDC. The data provided by the commenters suggest that there are a limited number of small investment companies with net assets ranging from $50,000 to $351,000, where the 3% threshold could be met by an investment ranging from $1,500 to $10,530. However, the data also indicate that the vast majority of funds are significantly larger, and would therefore require a significantly larger investment to meet the 3% threshold (*e.g.,* 90% of long-term mutual funds, money market funds, and closed-end funds have total net assets greater than $19 million, $100 million, and $57 million, respectively; the median long-term mutual fund, money market fund, and closed-end fund have total net assets of $216 million, $844 million, and $216 million, respectively).

[250] *See* letters from S&C (recommending "with respect to the ownership thresholds applicable to shareholders of [registered investment companies], a minimum percentage of no less than the 5% threshold recommended in the Seven Law Firm Letter" (to which Sullivan & Cromwell was a party and which recommended that ownership thresholds of non-investment companies be adjusted upwards to 5% for individual shareholders and higher for groups of shareholders)); TIAA–CREF (recommending "that the Commission adopt a 5% ownership requirement across the board regardless of the company's size" and "[w]ith respect to investment companies, * * * that the 5% requirement be applied at the fund complex level rather than at the individual fund level").

[251] *See* letters from Barclays; T. Rowe Price; TIAA–CREF.

ii. Voting Power

We proposed that the ownership threshold be determined as a percentage of the securities entitled to be voted on the election of directors. Some commenters sought clarification of how the ownership threshold would be calculated where companies have multiple classes of stock with varying voting rights.[252] These commenters observed that the proposed rule did not adequately address voting regimes where the voting rights have been separated from the economic rights of ownership.[253] One commenter explained that in situations where ownership of securities does not correlate with voting power,[254] shares will have voting rights disproportionate to the number of shares held, and that creates a disparity between the two classes in terms of the economic value of a single vote.[255] One commenter advised that further clarification was needed for companies with two or more outstanding classes of voting securities with disparate voting rights, including those companies with classes of voting securities and non-voting securities, so that those companies would be treated in a manner consistent with companies that have one class of voting securities.[256]

In proposing that the ownership threshold be determined as a percentage of securities entitled to be voted on the election of directors, our goal was to have the requirement tie to the percentage of votes that could be cast for the director nominees. In response to these commenters, we have revised the rule text to clarify that the ownership threshold will be determined as a percentage of *voting power* of the securities entitled to be voted on the election of directors at the meeting, rather than as a percentage of *securities* entitled to be voted on the election of directors, as was proposed. Accordingly, where a company has multiple classes of stock with unequal voting rights and the classes vote together on the election of directors, then voting power would be calculated based on the collective voting power.[257] If a company has multiple classes of stock that do not vote together in the election of all directors (where, for example, each class elects a subset of directors), then voting power would be determined only on the basis of the voting power of the class or classes of stock that would be voting together on the election of the person or persons sought to be nominated by the nominating shareholder or group, rather than the voting power of all classes of stock.[258] We believe this approach properly bases the availability of Rule 14a–11 on the right to vote for the nominees that may be included in the company's proxy materials, which is both consistent with the intent of the provisions of a company's governing documents and in accord with the principle that class directors are elected by the votes of the holders of the class.

iii. Ownership Position

In the Proposing Release, we solicited comment about whether beneficial ownership is the appropriate standard of ownership to use for purposes of the minimum ownership threshold in the rule or whether another standard would be more appropriate. In this regard, we requested comment about whether a net long requirement should be used and, if so, what other modifications would be required. We received a number of comments addressing the appropriate standard of ownership and supporting the inclusion of a net long requirement.[259] Commenters suggested that we adopt an "ultimate" beneficial owner definition that included, among other things, a requirement that the nominating shareholder or group hold the entire bundle of voting and economic rights to any securities used to determine eligibility under the rule.[260] At least one of these commenters thought the ownership definition should be adopted this way in order to remove the possibility that multiple parties may count the same securities toward their individual securities ownership totals.[261] Moreover, many commenters were concerned that without requiring net long ownership, shareholders could engage in hedging strategies to obtain the requisite amount of ownership while eliminating or reducing their economic exposure.[262] Some commenters expressed the view that shares loaned to a third party should be taken into account when determining whether the nominating shareholder or group satisfies the relevant ownership threshold.[263] Commenters explained that institutional investors who hold shares for the long-term may lend their shares to others periodically while retaining the right to recall those shares to cast votes.[264] Commenters suggested several conditions for counting these shares: the shareholder has a legal right to recall the shares and cast votes;[265] the shareholder discloses in the Schedule 14N an intention to vote the shares;[266] the shareholder holds the shares through the date of the meeting;[267] and the shares are held past the date of the election.[268]

After considering the comments, we have modified in several respects the ownership requirement of Rule 14a–11 so that it is consistent with our intent to limit use of Rule 14a–11 to long-term shareholders with significant ownership interests. First, in order to satisfy the ownership requirement, the nominating shareholder or member of the nominating shareholder group must hold a class of securities subject to the proxy solicitation rules.[269] Limiting Rule 14a–11 nominations to holders of securities that are subject to the proxy rules appropriately excludes from the calculation private classes of voting securities held by persons that would have no expectation that our proxy rules would be available to facilitate their State law nomination rights. Further, if we included securities not covered by

[252] *See* letters from ABA; Duane Morris; Media General; P. Neuhauser; New York Times. These letters illustrated a scenario where one publicly-issued class of stock is entitled to one vote per share, while the privately-held controlling class of stock is entitled to 10 votes per share and both classes vote together on the election of directors.

[253] *See* letters from ABA; P. Neuhauser; Duane Morris; Media General.

[254] *See, e.g.,* discussion in footnote 252 of common ten-to-one voting provisions of a structure with Class A and Class B securities.

[255] *See* letter from ABA.

[256] *See* letter from Duane Morris.

[257] *See* Rule 14a–11(b)(1) and Instruction 3 and the discussion below.

[258] *See* Instruction 3 to Rule 14a–11(b)(1).

[259] *See* letters from 26 Corporate Secretaries; Advance Auto Parts; Aetna; Alaska Air; Alcoa; Alston & Bird; American Express; BorgWarner; BRT; Burlington Northern; CSX; L. Dallas; Dewey; DuPont; FPL Group; Florida State Board of Administration; GE; Honeywell; ICI; JPMorgan Chase; Kirkland & Ellis LLP ("Kirkland & Ellis"); Leggett; P. Neuhauser; PepsiCo; Protective; Seven Law Firms; SIFMA: Society of Corporate Secretaries; T. Rowe Price; tw telecom; UnitedHealth; ValueAct Capital; Xerox.

[260] *See* letters from BRT; Devon; IBM; P. Neuhauser; Society of Corporate Secretaries.

[261] *See* letter from ABA.

[262] *See* letters from 26 Corporate Secretaries; ABA; Advance Auto Parts; Alaska Air; Allstate; Applied Materials; Association of Corporate Counsel; AT&T; J. Blanchard; Biogen; BRT; CIEBA; Cleary; Devon; Dewey; Headwaters; IBM; JPMorgan Chase; PepsiCo; Sara Lee; Seven Law Firms; Shearman & Sterling; Sidley Austin; Society of Corporate Secretaries; Verizon.

[263] *See* letters from AFL–CIO; CalPERS; CII; COPERA; IAM, LIUNA; Marco Consulting; P. Neuhauser; D. Nappier; Sheet Metal Workers National Pension Fund ("Sheet Metal Workers"); SWIB.

[264] *See* letters from AFL–CIO; Marco Consulting; Sheet Metal Workers; SWIB.

[265] *See* letters from CalPERS; CII; COPERA; IAM; LIUNA; D. Nappier.

[266] *See* letters from AFL–CIO; CalPERS; CII; IAM; D. Nappier.

[267] *See* letters from CalPERS; CII; IAM; D. Nappier.

[268] *See* letters from COPERA.

[269] This would include securities registered pursuant to Section 12 of the Exchange Act or subject to Investment Company Act Rule 20a–1.

the proxy rules in the calculation, those securities could dilute the relative holdings of shareholders holding securities that our rules are designed to protect. Second, the nominating shareholder or member of the nominating shareholder group must hold both investment and voting power, either directly or through any person acting on their behalf, of the securities. By requiring that a nominating shareholder or member of a nominating shareholder group hold investment and voting power of the securities that are used for purposes of determining whether the ownership requirement has been met, we are addressing the concerns raised by certain commenters that the provisions of Rule 14a–11 should only be available to shareholders that possess ultimate ownership rights over the shares.

Similar to the provisions in Exchange Act Rule 13d–3,[270] the definition of voting power for purposes of Rule 14a–11 includes the power to vote, or to direct the voting of, such securities and investment power for purposes of Rule 14a–11 includes the power to dispose, or to direct the disposition of, such securities.[271] Unlike the provisions in Rule 13d–3, however, the ownership requirement of Rule 14a–11 includes both voting and investment power—as opposed to just one or the other—and voting and investment power for purposes of Rule 14a–11 does not exist over securities that a nominating shareholder or member of a nominating shareholder group merely has the right to acquire. For example, a nominating shareholder or member of a nominating shareholder group will not be able to count securities that could be acquired, such as securities underlying options that are currently exercisable but have not yet been exercised.

For purposes of meeting the ownership threshold in Rule 14a–11, a nominating shareholder or group will include investment and voting power of the company's securities that is held "either directly or through any person acting on their behalf." We are adopting the ownership provisions with this language to account for the common situation when financial intermediaries, such as banks or brokers, hold securities on behalf of their clients.[272] This additional language also covers relationships, such as parent and subsidiary, when for organizational or tax reasons, among others, investment and voting power is held by an entity that is controlled by another entity. This provision, however, would not include securities that are held in a pooled investment vehicle in which the nominating shareholder or member of a nominating shareholder group does not have voting and investment power over the securities held in the pooled investment vehicle.

Third, we have adopted a provision in the ownership requirement in Rule 14a–11 that, subject to specific conditions, allows for securities that have been loaned to a third party by or on behalf of the nominating shareholder or member of a nominating shareholder group to be considered in the calculation. We recognize that share lending is a common practice, and we believe that loaning securities to a third party is not inconsistent with a long-term investment in a company.[273] To capture only securities where voting power can ultimately be exercised by the nominating shareholder or member of a nominating shareholder group in the election of directors, however, securities that have been loaned by or on behalf of the nominating shareholder or any member of the nominating shareholder group to another person may be counted toward the ownership requirement only if the nominating shareholder or member of the nominating shareholder group:

- Has the right to recall the loaned securities; and
- will recall the loaned securities upon being notified that any of the nominees will be included in the company's proxy materials.

Absent satisfaction of these conditions—in addition to holding the requisite investment power over the loaned securities—we believe it is appropriate to exclude securities that have been loaned to another person from the calculation of voting power because, generally, the person to whom the securities have been loaned has the ability to vote those securities.[274] If the rule were to allow loaned securities that either will not or cannot be recalled to be included for purposes of the ownership calculation, then the voting power of a nominating shareholder or member of a nominating shareholder group may potentially be inflated because the calculation could include votes that the nominating shareholder or member of a nominating shareholder group cannot actually cast.

In determining the total voting power of the company's securities held by or on behalf of the nominating shareholder or any member of the nominating shareholder group, the voting power would be reduced by the voting power of any of the company's securities that the nominating shareholder or any member of a nominating shareholder group has sold in a short sale during the relevant periods.[275] In addition, the rule text explicitly excludes borrowed shares because the rule is intended to be used by holders with a significant long-term commitment to the company, and including shares that are merely borrowed is inconsistent with that purpose. The instruction makes clear that to the extent borrowed securities are not already excluded through the subtraction of securities sold short, borrowed securities would be subtracted in computing the relevant amount. We recognize that by requiring the voting power of securities sold short or borrowed for purposes other than a short sale to be subtracted from the ownership calculation, we are potentially reducing the eligibility of certain shareholders to rely on Rule 14a–11.[276] Nevertheless, as noted above,

[270] 17 CFR § 240.13d–3. Like the approach under Rule 13d–3, we are including and excluding certain securities from the determination of who has voting power for policy reasons. Those inclusions and exceptions and the policy reasons underlying them are discussed throughout this section.

[271] *See* Instruction 3.c. to Rule 14a–11(b)(1).

[272] The rule also clarifies that financial intermediaries, such as banks or brokers, that may hold securities on behalf of their clients could not use the provisions of Rule 14a–11. *See* Instruction 3.c. to Rule 14a–11(b)(1).

[273] *See* letters from AFL–CIO; CalPERS; CII; COPERA; IAM; LIUNA; Marco Consulting; P. Neuhauser; D. Nappier; Sheet Metal Workers; SWIB.

[274] *See* letter from P. Neuhauser.

[275] *See* Instruction 3.b.3 to Rule 14a–11(b)(1). We note that in a typical short sale the person selling the securities short would not have the power to vote the securities subject to the short sale. Nevertheless, the provisions of Rule 14a–11 require that the voting power of the securities subject to the short sale be deducted from the voting power held directly or on behalf of the nominating shareholder or member of the nominating shareholder group to address our concerns about limiting the application of Rule 14a–11 to shareholders that retain significant ownership interests in a company. Likewise, a person whose ownership of shares arises solely from borrowing them for purposes of short sale would be deemed to have no share ownership for purposes of the ownership requirement of Rule 14a–11(b)(1).

[276] The ownership provisions related to short sales do not apply to securities that have been sold in a short sale where the nominating shareholder or member of the nominating shareholder group had no control over such transactions. *See* Instruction 3.b.3. to Rule 14a–11(b)(1) (covering short sales by "the nominating shareholder or any member of the nominating shareholder group, as the case may be, or any person acting on their behalf * * *"). For example, a nominating shareholder would not be required to exclude securities that have been sold short by a pooled investment vehicle in which the nominating shareholder or member of a nominating shareholder group has invested as long as the shareholder does not have the ability to direct the investments held in the pooled investment vehicle. Similarly, securities held by the pooled investment vehicle with respect to which the shareholder does not have the ability to direct the investments held in the pooled investment vehicle would not be

Continued

we believe that eligibility for Rule 14a–11 should be limited to those shareholders that have a significant interest in the company.[277] We agree with commenters who suggested that selling a company's securities short may divest that shareholder of the economic risks of ownership.[278]

For purposes of determining whether the nominating shareholder or any member of a nominating shareholder group has sold a company's securities short, the term "short sale" will have the meaning provided in Exchange Act Rule 200(a).[279] Under that rule, a short sale is "any sale of a security which the seller does not own or any sale which is consummated by the delivery of a security borrowed by, or for the account of, the seller."

In calculating the voting power required to satisfy the 3% voting power eligibility requirement described above, nominating shareholders or members of a nominating shareholder group must first determine the total number of votes that can be derived from their holdings of securities that are subject to the proxy rules. This determination is made as of the date the Schedule 14N is filed. The total number of votes can be increased by the number of votes attributable to securities which have been loaned (subject to the conditions previously noted) and must be reduced by the number of votes attributable to any securities that have been sold in a short sale that is not closed out as of that date or borrowed for purposes other than a short sale. This adjusted number of votes is the qualifying number of votes eligible to be used as the numerator in calculating the percentage held of the company's total voting power. The number of securities to which these qualifying votes are attributable is the amount of securities that must be used for evaluating compliance with the continuous holding period requirements specified in Rule 14a–11(b)(2), and discussed below.

In determining the total voting power of the company's securities, nominating shareholders and members of a nominating shareholder group will be entitled to rely on the most recent quarterly, annual or current report filed by the company unless the nominating shareholder or member of a nominating shareholder group knows or has reason to know that the information in the reports is inaccurate.[280] We believe that a nominating shareholder or member of a nominating shareholder group should be able to rely on the filings made by the company in making the calculation of voting power for purposes of Rule 14a–11 even if the number of securities outstanding has changed since the last report so that a nominating shareholder or member of a nominating shareholder group can easily make a determination about the percentage of voting power that they hold.

iv. Demonstrating Ownership

Under the Proposal, a nominating shareholder or member of a nominating shareholder group would be able to demonstrate ownership in several ways.[281] If the nominating shareholder or member of the nominating shareholder group is the registered holder of the shares, he or she could state as much. In this instance, the company would have the ability to independently verify the shareholder's ownership. Where the nominating shareholder or member of the nominating shareholder group is not the registered holder of the securities, the nominating shareholder or member of the nominating shareholder group would be required to demonstrate ownership by attaching to the Schedule 14N a written statement from the "record" holder of the nominating shareholder's shares (usually a broker or bank) verifying that, at the time of submitting the shareholder notice to the company on Schedule 14N, the nominating shareholder or member of the nominating shareholder group continuously held the securities being used to satisfy the applicable ownership threshold for a period of at least one year.[282] In the alternative, if the nominating shareholder or member of the nominating shareholder group has filed a Schedule 13D, Schedule 13G, Form 3, Form 4, and/or Form 5, or amendments to those documents, the shareholder or group member may so state and attach a copy or incorporate that filing or amendment by reference.

Commenters generally did not object to the proposed methods of demonstrating ownership; however, they did suggest some revisions to the rule. Two commenters believed that the nominating shareholder or group, if requested by the company, should be required to provide evidence from its broker-dealer or custodian certifying that its ownership position meets the requisite threshold through a date that is within five days of the shareholders' meeting.[283] Another commenter recommended a revision to the proposed rule to allow the written statement to be dated no more than seven days prior to the date of submission of the nomination to the company.[284] The commenter explained that it may be difficult for a group of nominating shareholders to obtain letters from the "record" holders on the exact same date they submit the nomination to the company and file a Schedule 14N and cited similar problems in the context of the Rule 14a–8 process as an example. Another commenter recommended more generally that the written statement be dated a short period before the filing of the Schedule 14N.[285] Other commenters submitted various suggestions as to who

included in the amount of holdings of the shareholder.

[277] We recognize that selling a company's securities short is only one of a number of ways that a shareholder can hedge the economic risk of its investment. Indeed, a number of commenters suggested that we adopt a beneficial ownership definition for purposes of Rule 14a–11 that netted all hedging arrangements (derivatives, swaps, *etc.*). We believe, however, that it is appropriate at this time to adopt the ownership threshold for Rule 14a–11 with the provision only relating to short sales as it contributes significantly towards the goal of excluding votes from the ownership calculation securities where the voting and economic interests are separated and does not unduly complicate the rule. Further, by excluding securities that the holder merely has the right to acquire (such as securities underlying options) and securities that have been loaned and cannot be recalled, we have further narrowed the application of the rule to address concerns about separating economic interest and voting power.

[278] *See* letters from 26 Corporate Secretaries; ABA; Advance Auto Parts; Alaska Air; Allstate; Applied Materials; Association of Corporate Counsel; AT&T; J. Blanchard; Biogen; BRT; CIEBA; Cleary; Devon; Dewey; Headwaters; IBM; JPMorgan Chase; PepsiCo; Sara Lee; Seven Law Firms; Shearman & Sterling; Sidley Austin; Society of Corporate Secretaries; Verizon.

[279] 17 CFR 242.200(a). We note that certain of the provisions in Exchange Act Rule 200, including when a "person shall be deemed to own a security" as defined in Rule 200(b), differ from the provisions we have adopted for purposes of Rule 14a–11. For instance, Rule 200(b) extends ownership of a security to options that have been exercised. As noted above, however, we have not extended ownership for purposes of Rule 14a–11 to options. We believe that these different, but not conflicting, approaches are appropriate and reflect the policy objectives for adopting each rule.

[280] *See* Instruction 1 to Rule 14a–11(b)(1). In the case of a registered investment company, in determining the total voting power of the securities that are entitled to be voted on the election of directors for purposes of establishing whether the 3% voting power threshold has been met, the nominating shareholder or group may rely on information set forth in the following documents, unless the nominating shareholder or group knows or has reason to know that the information contained therein is inaccurate: (1) In the case of a series company, a Form 8–K that will be required to be filed in connection with the meeting where directors are to be elected; or (2) in the case of other registered investment companies, the company's most recent annual or semi-annual report filed with the Commission on Form N–CSR. *See* Instruction 2 to Rule 14a–11(b)(1).

[281] *See* Item 5 of proposed Schedule 14N.

[282] *See* the discussion below regarding the holding period we are adopting.

[283] *See* letters from BorgWarner; Society of Corporate Secretaries.

[284] *See* letter from CII.

[285] *See* letter from P. Neuhauser.

should provide the required written statement.[286]

While we are adopting the requirements to demonstrate ownership as proposed, we agree with the commenters that additional clarity is needed with regard to how far in advance of the notice date the statement of the broker or bank may be dated, as well as what type of bank or broker may provide the written statement on behalf of the shareholder. We believe the date should be as close as practicable to the notice date, and believe that seven calendar days should provide a workable time frame that is still close in time to the notice date. Accordingly, we have revised the rule to clarify that the statement from the registered holder, broker, or bank may be dated within seven calendar days prior to the date the nominating shareholder or group submits the notice on Schedule 14N.[287]

Also, to provide additional clarity about these requirements, the final rule includes an example of a form of written statement verifying share ownership that may be used if the nominating shareholder or any member of the nominating shareholder group (i) is not the registered holder of the shares, (ii) is not proving ownership by providing previously filed Schedules 13D or 13G or Forms 3, 4, or 5, and (iii) holds the shares in an account with a broker or bank that is a participant in the Depository Trust Company ("DTC") or a similar clearing agency acting as a securities depository.[288] An instruction to Schedule 14N describes more fully what information should be provided if a nominating shareholder or any member of the nominating shareholder group holds the securities through a broker or bank (*e.g.,* in an omnibus account) that is not a participant in DTC or a similar clearing agency.[289]

We note that satisfying the requirement in Rule 14a–11(b)(3) to demonstrate ownership is different from satisfying the requirement in Rules 14a–11(b)(1) and 14a–11(b)(2) that a shareholder or shareholder group hold the requisite amount of the company's securities that are entitled to be voted on the election of directors for three years, as calculated pursuant to the Instruction to paragraph (b)(2). It is possible for a shareholder to be able to demonstrate ownership pursuant to Rule 14a–11(b)(3), and yet not satisfy the total voting power and holding period requirements in Rules 14a–11(b)(1) and (b)(2).

c. Holding Period

With respect to duration of ownership, we proposed a one-year holding requirement for each nominating shareholder or member of a nominating shareholder group. Although many commenters supported the proposed one-year holding period,[290] the majority of commenters suggested a holding period longer than the proposed one-year period, with many recommending alternative holding periods ranging from 18 months to four years.[291] Some commenters, for example, expressed a belief that increasing the duration of the minimum holding period would ensure that use of Rule 14a–11 is limited to holders of a significant, long-term interest and would dissuade shareholders from using the rule to nominate and elect directors to make short-term gains at the expense of long-term shareholders.[292] A small number of commenters believed that Rule 14a–11 should not include a holding period requirement.[293] One commenter believed that all holders of the same securities should have the same rights under Rule 14a–11 regardless of how long the securities have been held.[294] Another commenter stated that a short-term shareholder has the same risk as long-term shareholders; thus their rights under Rule 14a–11 should be equal.[295]

After considering the comments, we have decided to adopt a three-year holding requirement, rather than the proposed one-year requirement. This decision is based on our belief that holding securities for at least a three-year period better demonstrates a shareholder's long-term commitment and interest in the company.[296] We also based our decision to have a holding period longer than one year on the strong support of a variety of commenters. For instance, we received

[286] *See* letters from ABA; CII; ICI; P. Neuhauser; Schulte Roth & Zabel; Seven Law Firms; S&C. Litigation subsequent to the Proposal has underscored the utility of clarifying the source of verification of ownership by shareholders who are not themselves registered owners of the shares. *See Apache Corp. v. Chevedden,* 696 F.Supp.2d 723 (S.D.Tex. Mar. 10, 2010) (interpreting the proof of ownership requirement in Rule 14a–8(b)(2)).

[287] We note that a nominating shareholder may have changed brokers or banks during the time period in which it has held the shares it is using to meet the ownership threshold. In such cases, the nominating shareholder would need to obtain a written statement from each broker or bank with respect to the shares held and specify the time period in which the shares were held.

[288] This form of written statement from a bank or broker is a modification to the Proposal, and is provided as a non-exclusive example of an acceptable method of satisfying the requirement in Rule 14a–11(b)(3). *See* Instruction to Item 4 of new Schedule 14N. We note that the written statements would not reflect all aspects of the ownership requirement, such as the percentage of voting power held, and thus, would not be dispositive with regard to whether the nominating shareholder or group satisfied the ownership threshold. For purposes of complying with Rule 14a–11(b)(3), loaned securities may be included in the amount of securities set forth in the written statements. Consistent with the Proposal, a nominating shareholder or group proving ownership by using a previously filed Schedule 13D or 13G or Form 3, 4, or 5 could attach a copy of the filing to the Schedule 14N or incorporate it by reference into the Schedule. We note that the calculation of voting power of a company's securities for purposes of Rule 14a–11 differs from the determination of beneficial ownership for purposes of those schedules and forms. In addition, as adopted, we are clarifying that the schedules or forms used to provide proof of ownership must reflect ownership of the securities as of or before the date on which the three-year eligibility period begins.

[289] *See* the Instruction to Item 4 of new Schedule 14N.

[290] *See* letters from ADP; AFSCME; Callaway; CalPERS; CalSTRS; Calvert; CFA Institute; J. Chico; CII; Corporate Library; Dominican Sisters of Hope ("Dominican Sisters of Hope"); GovernanceMetrics International ("GovernanceMetrics"); ICGN; Lorsch *et al.;* LUCRF; Mercy Investment Program ("Mercy Investment Program"); Motorola; D. Nappier; Nathan Cummings Foundation; P. Neuhauser; Norges Bank; Pax World; RiskMetrics; Shamrock; Shearman & Sterling; Sisters of Mercy Regional Community of Detroit Charitable Trust ("Sisters of Mercy"); Social Investment Forum; Sodali; Tri-State Coalition for Responsible Investment ("Tri-State Coalition"); Trillium; T. Rowe Price; Ursuline Sisters of Tildonk ("Ursuline Sisters of Tildonk"); USPE; ValueAct Capital; Walden Asset Management ("Walden").

[291] *See* letters from 26 Corporate Secretaries; ABA; Advance Auto Parts; Aetna; AFL–CIO; Alaska Air; Alcoa; Allstate; Alston & Bird; Amalgamated Bank; American Express; Anadarko; Applied Materials; Association of Corporate Counsel; AT&T; Avis Budget; Biogen; J. Blanchard; Boeing; BorgWarner; BRT; Burlington Northern; Caterpillar; Chevron; CIEBA; CIGNA; CNH Global; P. Clapman; Comcast; Con Edison; CSX; CtW Investment Group; Cummins; L. Dallas; Darden Restaurants; E. Davis; Deere; Devon; Dewey; DTE Energy; DuPont; Eaton; Eli Lilly; ExxonMobil; FedEx; Fenwick; FMC Corp.; FPL Group; General Mills; Headwaters; Home Depot; Honeywell; IAM; IBM; ICI; Intel; ITT; JPMorgan Chase; Lionbridge Technologies; LIUNA; Marco Consulting; McDonald's; M. Metz; J. Miller; NACD; D. Nappier (expressing a willingness to accept a two-year holding period instead of the proposed one-year holding period); Northrop; Office Depot; OPERS; Pfizer; P&G; Praxair; Protective; RiskMetrics (accepting a two-year holding period as alternative to the proposed one-year holding period); Sara Lee; S&C; Sheet Metal Workers; Sidley Austin; SIFMA; Society of Corporate Secretaries; Southern Company; Teamsters; Tesoro; Textron; Theragenics; TI; TIAA–CREF; Tidewater; Time Warner Cable Inc. ("Time Warner Cable"); tw telecom; L. Tyson; UnitedHealth; U.S. Bancorp; Wells Fargo; Weyerhaeuser; Xerox; Vanguard; Verizon; B. Villiarmois.

[292] *See* letters from BRT; CIEBA; IBM; McDonald's; Society of Corporate Secretaries.

[293] *See* letters from 13D Monitor; ACSI; British Insurers; Ironfire Capital LLC ("Ironfire"); LUCRF.

[294] *See* letter from British Insurers.

[295] *See* letter from 13D Monitor.

[296] One commenter pointed to the Aspen Principles, *available at http://www.aspeninstitute.org/sites/default/files/content/docs/pubs/Aspen_Principles_with_signers_April_09.pdf,* suggesting that companies that are often forced to react to short-term investors are constrained from creating valuable goods and services, investing in innovations, and creating jobs. *See also* letter from AFL–CIO.

comments that advised that we should "adopt a more reasonable holding period of at least two years,"[297] and "a minimum holding period of at least two years is appropriate" because a "shorter holding period would allow shareholders with a short-term focus to nominate directors who, if elected, would be responsible for dealing with a company's long-term issues."[298] Another commenter stated that "three years would be a more reasonable test with respect to longevity of stock ownership."[299] Although two commenters suggested even longer holding periods,[300] we believe that a three year holding period reflects our goal of limiting use of the rule to significant, long-term holders and appropriately responds to commenters' suggestions regarding the length of the holding period. In this regard, as noted previously, some commenters suggested a two year holding period, but others stated it should be "at least" two years. Given the support expressed for a significant holding period, we believe a three year holding period, rather than one or two years, strikes the appropriate balance in providing shareholders with a significant, long-term interest with the ability to have their nominees included in a company's proxy materials while limiting the possibility of shareholders attempting to use Rule 14a–11 inappropriately, as discussed further below.

We also factored our desire to limit the use of Rule 14a–11 to shareholders who do not possess a change in control intent with regard to the company into our decision to extend the holding period. Although we have, as noted below, adopted specific requirements in Rule 14a–11 to address the control issue, we believe that a longer holding period is another safeguard against shareholders that may attempt to inappropriately use Rule 14a–11 as a means to quickly gain control of a company. Finally, we note that if shareholders believe that the three-year period should be shorter, the amendment that we decided to adopt to Rule 14a–8 will remove barriers to proposals that seek to establish a different procedure with a lesser (or no) holding period condition.

The requirement we are adopting is that shareholders seeking to use Rule 14a–11 to have a nominee or nominees included in a company's proxy materials must have held the minimum amount of securities used to satisfy the 3% ownership threshold continuously for at least three years.[301] Similar to the calculation of voting power discussed above, in order to satisfy the three-year holding requirement, the nominating shareholder or member of the nominating shareholder group must have investment and voting power over the amount of securities, and the amount of securities held during the period will have to be reduced by the amount of securities of the same class that are the subject of short positions or are borrowed for purposes other than a short sale during the period.[302] The rule also allows securities loaned to a third party to be considered held during the period, provided that the nominating shareholder or group has the right to recall the loaned securities during the period.[303] As discussed above, we do not believe that the common practice of lending securities is inconsistent with a long-term investment. While we believe it is important to include both of the recall provisions for purposes of allowing loaned securities to be used in the 3% ownership threshold calculation in Rule 14a–11(b)(1), we believe it is only necessary for the nominating shareholder or member of a nominating shareholder group to have the right to recall the loaned securities to satisfy the three-year holding period requirement.[304] Finally, the rule requires the amount of securities to be adjusted for stock splits, reclassifications or other similar adjustments made by the company during the period.[305]

A commenter suggested that we clarify that a nominating shareholder or each member of the group must have continuously held only the minimum number of shares used to satisfy the ownership requirement.[306] We agree that a nominating shareholder or member of a nominating shareholder group is not required to have continuously held shares in excess of the amount used to attain eligibility for purposes of Rule 14a–11. For example, under Rule 14a–11(b)(2), which requires continuous holding of "the amount of securities that are used for purposes of satisfying the *minimum* ownership required of paragraph (b)(1) * * *," if a nominating shareholder owns 400,000 shares and those shares comprise 4% of the issuer's voting power as of the date of filing of the Schedule 14N, that shareholder is not required to have held 400,000 shares continuously during the preceding three years and through the date of election of directors. Rather, the nominating shareholder would be required to continuously hold the minimum amount of shares required to satisfy the 3% ownership threshold in paragraph (b)(1), assuming no adjustments (in this example, at least 300,000 shares).

We also believe that it is important that any shareholder or member of a nominating shareholder group that intends to submit a nominee to a company for inclusion in the company's proxy materials continue to maintain the qualified minimum amount of securities in the company needed to satisfy the ownership provisions in the rule through the date of the meeting at which the shareholder's or group's nominee is presented to a vote of shareholders. To meet the eligibility criteria in proposed Rule 14a–11(b)(2), a nominating shareholder or member of a nominating shareholder group would have been required to "intend to continue to hold" the securities used to meet the ownership threshold through the date of the meeting. Commenters on the Proposing Release generally supported a holding requirement

[297] Letter from Teamsters.

[298] Letter from BRT.

[299] Letter from Tesoro.

[300] *See* letters from E. Davis; Fenwick.

[301] As proposed, a nominating shareholder or group would have been required to hold "the securities that are used for purposes of determining the applicable ownership threshold" and intend to continue to hold "those securities" through the date of the meeting. *See* proposed Rule 14a–11(b)(2). The Proposal also would have required the nominating shareholder or group to provide a statement that the nominating shareholder or group intends to continue to own the "requisite shares" through the date of the meeting. *See* proposed Rule 14a–18(f). As adopted, we are modifying Rule 14a–11 to require the nominating shareholder or each member of the nominating shareholder group to have held the "amount of securities" that are used for satisfying the ownership requirement and to continue to hold that amount of securities through the date of the meeting, rather than referring to the "requisite securities." In addition, even though the ownership requirement is based on the percentage of voting power held, the requirement refers to "amount" rather than "percentage" so that satisfaction of the ownership requirement can be accurately determined. We believe it would be unduly burdensome to require that a nominating shareholder or group determine whether its holdings exceeded 3% of the company's voting power continuously for a three-year period prior to the filing of the Schedule 14N.

[302] *See* the Instruction to Rule 14a–11(b)(2). For purposes of this calculation, the amount of the short position or borrowed securities at any point in time during the three year holding period would be deducted from the amount of securities otherwise held at that point in time.

[303] *Id.*

[304] *Id.* The recall provisions are discussed in Section II.B.4.b.iii. above. We note that at the time the nominating shareholder or group calculates its ownership and submits a nominee or nominees, it may not be certain that its nominee or nominees will be included in the company's proxy materials. We do not believe it is necessary to require a nominating shareholder or group to recall loaned shares that it has the right to recall and vote prior to the time that the nominating shareholder or group is notified that its nominee or nominees will be included in the company's proxy materials.

[305] *See* the Instruction to Rule 14a–11(b)(2).

[306] *See* letter from AFSCME.

through the date of the meeting,[307] and one commenter suggested that we clarify that shareholders would be required to hold the securities used for determining ownership through the election of directors.[308] We agree with the suggestion and are modifying the language in Rule 14a–11(b)(2) to clarify that a nominating shareholder or member of a nominating shareholder group "must continue to hold" the requisite amount of securities through the date of the meeting.[309] If a nominating shareholder or member of a nominating shareholder group fails to continue to hold the requisite amount of securities as required by the rule, a company could exclude the nominee or nominees submitted by the nominating shareholder or group.[310]

We also are adopting, as proposed, the requirement that a nominating shareholder or member of a nominating shareholder group provide a statement as to the nominating shareholder's or group member's intent to continue to hold the qualifying minimum amount of securities through the date of the meeting.[311] In addition, we proposed that nominating shareholders or members of a nominating shareholder group disclose their intent with regard to continued ownership of their shares after the election (which may be contingent on the election's outcome). As noted above, commenters generally supported the requirement for the nominating shareholder or group to hold the requisite amount of securities through the date of the meeting, although some commenters expressed opposition to the proposed disclosure requirement or any requirement for the nominating shareholder or group to disclose their intent to hold the company's shares after the date of the election.[312] One commenter explained that the nominating shareholder or group may not know its intent at the time the Schedule 14N is filed and, depending on the outcome of the director election, the nominating shareholder or group may, in fact, purchase more stock or sell some stock.[313] Another commenter observed that it is impractical for shareholders to represent that they would hold their position beyond the election and instead favored disclosure in an amended Schedule 14N of any change in the ownership of more than 1% of the voting shares or net economic position during a period after the election (*e.g.,* 60 days).[314] Other commenters supported the proposed disclosure requirement regarding the nominating shareholder's or group's intent to hold shares after the meeting, or recommended that the Commission require instead that the nominating shareholder or group hold the requisite amount of shares for a specific period after the date of the meeting.[315]

We believe that a requirement to hold the securities through the date of the election of directors is appropriate to demonstrate the nominating shareholder's or group member's commitment to the director nominee and the election process. In addition, we are adopting the disclosure requirement, as proposed, concerning the nominating shareholder's or group member's intent with respect to continued ownership of their shares after the election.[316] We are not, however, adopting a requirement for a nominating shareholder or member of a nominating shareholder group to continue to hold their shares for a certain period of time after the date of the election. We believe that disclosure of a nominating shareholder's or group member's intent with respect to continued ownership in a Schedule 14N or amended Schedule 14N will provide investors with the information they need for this purpose.

d. No Change in Control Intent

Under the Proposal, to rely on Rule 14a–11, a nominating shareholder or member of a nominating shareholder group would have been required to provide a certification in the filed Schedule 14N that it did not hold the securities with the purpose, or with the effect, of changing the control of the company or gaining more than a limited number of seats on the board.[317] We noted that this certification, along with the other required disclosures, would assist shareholders in making an informed decision with regard to any nominee or nominees put forth by the nominating shareholder or group, in that the information would enable shareholders to gauge the nominating shareholder's or group's interest in the company, longevity of ownership, and intent with regard to continued ownership in the company.

Most commenters on this aspect of the Proposal agreed generally that Rule 14a–11 should not be available to shareholders seeking to effect a change in control of a company (or to obtain more than a specified number of board seats) and supported a certification requirement regarding the lack of change in control intent.[318] Some

[307] *See* letters from ABA; Advance Auto Parts; Alston & Bird; American Express; Association of Corporate Counsel; J. Blanchard; BorgWarner; CalPERS; CII; Cleary; Comcast; CSX; Dewey; W. B. Dickerson; Florida State Board of Administration; General Mills; Headwaters; JPMorgan Chase; Nathan Cummings Foundation; Protective; Schulte Roth & Zabel; Seven Law Firms; Shearman & Sterling; Society of Corporate Secretaries; tw telecom; ValueAct Capital.

[308] *See* letter from ABA.

[309] For purposes of determining whether the requirement to hold the specified amount of securities from the date of the filing of the Schedule 14N through the date of the election of directors is satisfied, a nominating shareholder or group must hold (as determined pursuant to the instruction to the rule) the qualifying minimum amount of securities, which can include securities that are loaned to a third party if the nominating shareholder or group has the right to recall the securities, and will recall them upon being notified that any of the nominees will be included in the company's proxy materials. Of course, between the date of the filing of the Schedule 14N and the date of the election of directors previously loaned securities may be returned. Likewise, the amount of securities held during the period from the filing of the Schedule 14N through the date of the election of directors must be reduced by the amount of securities of the same class that are sold in a short sale.

[310] *See* new Rule 14a–11(b)(2) and Rule 14a–11(g). The company would be required to provide notice to the staff in accordance with Rule 14a–11(g) and could seek a no-action letter from the staff with regard to the determination to exclude the nominee at that time if the company so wished. In the event that the nominating shareholder's or group's failure to continue to hold the securities comes to light after the company has printed its proxy materials, the company would be permitted to exclude the nominee or nominees and send a revised proxy card to its shareholders. For additional information about a company's obligations in the event a nominee withdraws or is disqualified, *see* Section II.B.7.b. below.

[311] *See* new Rule 14a–11(b)(4) and proposed Rule 14a–18(f).

[312] *See* letters from Alston & Bird; Amalgamated Bank; Calvert; CII; Florida State Board of Administration; P. Neuhauser; Norges Bank; Schulte Roth & Zabel; TIAA–CREF; USPE; ValueAct Capital.

[313] *See* letter from CII.

[314] *See* letter from Cleary.

[315] *See* letters from 26 Corporate Secretaries; ABA; Aetna; AGL; Alaska Air; Alcoa; Anadarko; Applied Materials; Association of Corporate Counsel; Avis Budget; BRT; Burlington Northern; Callaway; Caterpillar; Comcast; L. Dallas; Darden Restaurants; Devon; W. B. Dickerson; Dupont; Eli Lilly; FPL Group; General Mills; Home Depot; Honeywell; Intel; Lionbridge Technologies; Lorsch *et al.;* Keating Muething; Office Depot; PepsiCo; Pfizer; Protective; Sara Lee; SIFMA; Tesoro; Textron; TI; UnitedHealth; U.S. Bancorp; Verizon; Xerox.

[316] *See* new Rule 14a–11(b)(5) and new Item 4(b) of Schedule 14N.

[317] *See* Item 8 of proposed Schedule 14N.

[318] *See* letters from ABA; Advance Auto Parts; American Bankers Association; American Express; Americans for Financial Reform ("Americans for Financial Reform"); BRT; CalSTRS; CII; Cleary; COPERA; Corporate Library; Dewey; Dominican Sisters of Hope; Eli Lilly; Emerson Electric; Florida State Board of Administration; A. Goolsby; GovernanceMetrics; ICI; JPMorgan Chase; Sen. Carl Levin ("C. Levin"); Mercy Investment Program; Metlife; Nathan Cummings Foundation; P. Neuhauser; Protective; RiskMetrics; Seven Law Firms; SIFMA; Sisters of Mercy; Social Investment Forum; Society of Corporate Secretaries; Sodali; SWIB; TIAA–CREF; Trillium; Tri-State Coalition; T. Rowe Price; tw telecom; Ursuline Sisters of Tildonk; Wachtell; Walden; B. Villiarmois.

commenters, however, expressed concern about the lack of a remedy when a certification regarding control intent proves to be false or when a nominating shareholder or group changes its intent.[319] Suggested remedies included excluding the nominee of any nominating shareholder or group that changes intent and barring the nominating shareholder or group from using the rule for the following two annual meetings,[320] requiring disclosure of a change of intent and resignation of the Rule 14a–11 director,[321] and imposing liability under Rule 14a–9.[322]

We are adopting this requirement with some modifications from the Proposal. To rely on Rule 14a–11, the nominating shareholder (or where there is a nominating shareholder group, any member of the nominating shareholder group) must not be holding any of the company's securities with the purpose, or with the effect, of changing control of the company [323] or to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the registrant could be required to include under Rule 14a–11 and must provide a certification to this effect in its filed Schedule 14N.[324]

The final requirement differs from the Proposal in three respects. First, in addition to requiring the certification to address the absence of change in control intent or intent to gain more than the maximum number of seats provided under the rule, we also have added this condition as an explicit requirement to the rule.[325] We believe that this more directly achieves our intent—that the rule not be used by shareholders that have an intent to change the control of the company or gain more than the maximum number of seats specified in the rule.

Second, we have clarified the language of the requirements so that it provides that the rule is available only if the nominating shareholder or group members do not have an intent to change control of the company [326] or gain more seats on the board than the maximum provided for under Rule 14a–11. We slightly revised the language of the requirement to clarify our intended meaning. The Proposal used the language "gain more than a limited number of seats on the board," which was intended to refer to the limitations within the rule on the maximum number of nominees required to be included in the company's proxy materials. The final rule states this more explicitly.

Finally, we have added an instruction to clarify that in order to rely on Rule 14a–11 to include a nominee or nominees in a company's proxy materials, a nominating shareholder or a member of a nominating shareholder group may not be a member of any other group with persons engaged in solicitations or other nominating activities in connection with the subject election of directors; may not separately conduct a solicitation in connection with the subject election of directors other than a Rule 14a–2(b)(8) exempt solicitation in relation to those nominees it has nominated pursuant to Rule 14a–11 or for or against the company's nominees; and may not act as a participant in another person's solicitation in connection with the subject election of directors.[327]

We understand that companies have concerns that shareholders using Rule 14a–11 may inaccurately assert that they do not have a change in control intent, and that this can be a difficult factual issue. If a company determines that it can exclude a nominee based on this eligibility condition, it will be required to notify the nominating shareholder, members of the nominating shareholder group, or, where applicable, the nominating shareholder group's authorized representative, of a deficiency in its notice on Schedule 14N and provide the nominating shareholder or group the opportunity to respond. The company also would be required to submit a notice to the Commission stating its intent to exclude a nominee from its proxy materials (which would be required to include a description of the company's basis for exclusion) and, if it wished to, it could seek the staff's informal view with regard to its determination to exclude the nominee (commonly referred to as a "no-action" request).[328] In addition, a nominating shareholder and each member of a nominating shareholder group will have liability under Rule 14a–9 for a materially false or misleading certification in the Schedule 14N. Questions concerning the nomination also may be resolved by the parties outside the staff process provided in Rule 14a–11(g), including through private litigation where necessary, similar to the way they resolve issues arising in traditional proxy contests.[329] Finally, we note that the Commission also could take enforcement action with respect to companies that inappropriately exclude nominees under Rule 14a–11 or shareholders that provide false certifications in their Schedule 14N. We believe these measures should provide sufficient means to address situations in which a nominating shareholder or member of a nominating shareholder group provides a false certification regarding change in control intent.

e. Agreements With the Company

In the Proposing Release, we noted that a shareholder nomination process that includes limits on the number of nominees that a company is required to include in its proxy materials presents the potential risk of nominating shareholders or groups acting merely as a surrogate for the company or its management in order to block usage of the rule by another nominating shareholder or group. We proposed to address this concern by providing that a nominating shareholder or group using Rule 14a–11 would be required to represent that no agreement between the nominating shareholder or group and the company and its management exists.[330] To avoid any uncertainty about the breadth of this requirement, the Proposal included an instruction noting that prohibited agreements would not include unsuccessful negotiations with the company to have the nominee included in the company's proxy materials as a management nominee, or negotiations that are limited to whether the company is required to include the shareholder

[319] *See* letters from American Bankers Association; Dewey; Emerson Electric; A. Goolsby; Metlife; Protective; Seven Law Firms; SIFMA.

[320] *See* letter from Seven Law Firms.

[321] *See* letter from Protective.

[322] *See* letter from P. Neuhauser.

[323] Although Rule 14a–11 does not contain a requirement that the shareholder nominee or nominees do not have an intent to change the control of the company, a nominating shareholder's or group's ability to meet the requirement and certify that it does not have such an intent will be impacted by the intentions and actions of its nominee or nominees. For example, a nominating shareholder would not be able to certify that it does not hold the company's securities for the purpose, or with the effect, of changing the control of the company if its nominee is engaged in its own proxy contest or tender offer while the Rule 14a–11 nomination is pending.

[324] *See* certifications in Item 8 of new Schedule 14N.

[325] *See* Rule 14a–11(b)(6).

[326] A change in control includes, but is not limited to, an extraordinary corporate action, such as a merger or tender offer.

[327] *See* new Instruction to Rule 14a–11(b).

[328] *See* Section II.B.9.b. below for further discussion of determinations to exclude a nominee or nominees.

[329] *See* Sections II.B.8. and II.B.9. for an explanation of the disclosure requirements applicable to a nomination made pursuant to Rule 14a–11 and the process for excluding a nominee.

[330] In this regard, we also proposed to require a nominating shareholder or group to represent that no relationships or agreements between the nominee and the company and its management exist. This aspect of the rule is discussed in Section II.B.5.c. below.

nominee in the company's proxy materials under Rule 14a–11.

Commenters generally supported the proposed requirement, including the clarifying instruction regarding certain negotiations with the company.[331] One commenter specifically supported the portion of the proposed rule providing that unsuccessful negotiations or negotiations that were limited to whether the company is required to include a shareholder nominee under Rule 14a–11 would not be deemed to be a direct or indirect agreement.[332] One commenter was concerned about possible manipulation by companies and supported a prohibition on agreements.[333] According to that commenter, negotiations that resulted in a nomination being included in the proxy statement should be treated as a company nominee and not a shareholder nominee under Rule 14a–11.

Some commenters encouraged us to allow negotiations that resulted in inclusion of shareholder nominees as management nominees and cautioned that the proposal could discourage constructive dialogue between companies and shareholders.[334] Three commenters opposed limits on some or all relationships between the company and the nominating shareholder, group, or shareholder nominee.[335] These commenters believed that the Commission should not prohibit agreements between a company and a nominating shareholder or group. They warned that restricting the ability of companies to reach agreements with a nominating shareholder or group would limit the dialogue between companies and investors. One commenter suggested that proposed Rule 14a–18(d) be revised to permit a company to agree not to contest the eligibility of a shareholder nominee.[336] The commenter also suggested that if a company settled a threatened election contest by placing a shareholder nominee on the board, additional shareholder nominees should not be permitted for a specified period of time.

After careful review of the comments, we continue to believe that it is appropriate to provide that a nominating shareholder or group will not be eligible to have a nominee or nominees included in a company's proxy materials under Rule 14a–11 if the nominating shareholder, group, or any member of the nominating shareholder group, has any agreement with the company with respect to the nomination. We have revised the rule to make it clearer that this is an eligibility condition by listing it as a condition in the rule, rather than only a representation required in Schedule 14N.[337] We have incorporated, as proposed, the instruction with respect to unsuccessful negotiations (*i.e.* negotiations that do not result in an agreement) regarding whether a company is required to include a nominee in order to make clear that those negotiations would not be disqualifying.

As described above, a nominating shareholder or group will not be eligible to use Rule 14a–11 if there is an agreement with the company regarding the nomination of the nominee.[338] When a nominating shareholder or group files its Schedule 14N, this requirement will apply, and the certification required by Schedule 14N will have the effect of confirming that there are no agreements. We believe this is an important safeguard to prevent actions that could undermine the purpose of the rule. If, after the Schedule 14N is filed, a nominating shareholder or group reached an agreement with the company for the nominee to be included in the company's proxy materials as a management nominee, the nominating shareholder or group would no longer be proceeding under Rule 14a–11. Consequently, there is no need to revise the "no agreements" requirement in Rule 14a–11 to address that fact pattern.

Although we are adopting the "no agreements" requirement largely as proposed, we are persuaded by commenters that we should revise our final rules so that they do not unnecessarily discourage constructive dialogue between shareholders and companies. However, we believe this concern is more appropriately addressed in the method of calculation of the maximum number of permissible nominees, and the question of whether that number should include management nominees that were originally put forward as shareholder nominees under Rule 14a–11. Our revisions to that provision are discussed in Section II.B.6. below.

f. No Requirement To Attend the Annual or Special Meeting

Under Rule 14a–11 as proposed, a nominating shareholder or group would have no obligation to attend the annual or special meeting at which its nominee or nominees is being presented to shareholders for a vote. We received comment on the Proposal, however, suggesting that we require a nominating shareholder or group, or a qualified representative of the nominating shareholder or group, to attend the company's shareholder meeting and nominate its director candidate(s) in person.[339] One commenter explained that this requirement would be consistent with State law requirements for nominations and many companies' advance notice bylaws.[340] Another commenter suggested that, as required under Rule 14a–8(h)(3) for shareholder proposals, if the nominating shareholder or group (or its qualified representative) fails, without good cause, to appear and nominate the candidate, the company should be permitted to exclude from its proxy materials for the following two years all nominees submitted by that nominating shareholder or members of the nominating group.[341]

We have decided not to include a requirement that the nominating shareholder or qualified representative appear at the meeting and present the nominee because we believe that shareholders will have sufficient incentive to take steps to assure that their nominees are voted on at the meeting, whether through attending the meeting or sending a qualified representative, or through other arrangements with the company, and we do not want to add unnecessary complexities and burdens to the rule. We note that State law will control what happens if a candidate is not nominated at the meeting because the person supporting the candidate does not

[331] *See* letters from ADP; BRT; Calvert; CFA Institute; CII; Seven Law Firms; TIAA–CREF; USPE.

[332] *See* letter from CII.

[333] *See* letter from USPE.

[334] *See* letters from BRT; Seven Law Firms; Society of Corporate Secretaries.

[335] *See* letters from ABA; Steve Quinlivan ("S. Quinlivan"); Verizon.

[336] *See* letter from S. Quinlivan.

[337] We note that a nominating shareholder or members of a nominating shareholder group will be required to provide a certification in the Schedule 14N that the requirements of Rule 14a–11 are satisfied, which will include the "no agreements" requirement. A nominating shareholder or member of a nominating shareholder group will be liable, pursuant to Rule 14a–9(c), for a false or misleading certification provided in Schedule 14N.

[338] *See* Rule 14a–11(b)(7). *See also* Rule 14a–11(d)(7) which clarifies that if a nominee, nominating shareholder or any member of a nominating group has an agreement with the company or an affiliate of the company regarding the nomination of a candidate for election, other than as specified in Rule 14a–11(d)(5) or (6), any nominee or nominees from such shareholder or group shall not be counted in calculating the number of shareholder nominees for purposes of Rule 14a–11(d).

[339] *See* letters from ABA; BRT.

[340] *See* letter from ABA.

[341] *See* letter from BRT.

attend the meeting or make other arrangements.[342]

g. No Limit on Resubmission

Under the Proposal, a nominating shareholder's or group's ability to use Rule 14a–11 would not be impacted by prior unsuccessful use of the rule. In response to our request for comment, a number of commenters supported a provision that would render a nominating shareholder or group ineligible to use Rule 14a–11 for a period of time (*e.g.,* one, two, or three years) if the nominating shareholder or group presented a nominee who failed to receive significant shareholder support in a previous election (*e.g.,* 10%, 15%, 25%, or 30%).[343] One commenter indicated that this resubmission threshold would have a dual purpose: (i) when the nominee failed to garner significant support from shareholders, it would be inappropriate to require the company to expend resources repeatedly to include the unsuccessful nominee;[344] and (ii) other shareholders would have an opportunity to submit their own nominations.[345] On the other hand, some commenters opposed a provision that would render a nominating shareholder or group ineligible to use Rule 14a–11 for a period of time if the nominating shareholder or group presented a nominee who failed to receive a specified percentage of shareholder votes at a previous election.[346] One commenter pointed out that management nominees are not subject to similar limits.[347] After consideration of the comments we do not believe it is necessary or appropriate to include a limitation on use of Rule 14a–11 by nominating shareholders or groups that have previously used the rule. We continue to believe that such a limitation would not facilitate shareholders' traditional State law rights and would add unnecessary complexity to the rule's operation.

5. Nominee Eligibility Under Exchange Act Rule 14a–11

a. Consistent With Applicable Law and Regulation

Under the Proposal, a company would have been able to exclude a nominee where the nominee's candidacy or, if elected, board membership would violate controlling State law, Federal law, or rules of a national securities exchange or national securities association (other than rules of a national securities exchange or national securities association that set forth requirements regarding the independence of directors, which the rule addresses separately) and such violation could not be cured.[348]

Commenters generally supported this requirement.[349] These commenters suggested that the rule require the nominating shareholder or group to provide any information necessary to ensure compliance with these laws or regulations. Some of these commenters noted that there are various Federal and State laws that govern or affect the ability of a person to serve as a director, such as the Federal Power Act and related FERC regulations, Federal maritime laws and regulations, Department of Defense security clearance requirements, Department of State export licensing requirements, bank holding company laws, FCC licensing requirements, state gaming licensing requirements, Federal Reserve regulations, FDIC regulations, U.S. government procurement regulations, Section 8 of the Clayton Act, Section 1 of the Sherman Act, and Section 5 of the Federal Trade Commission Act.[350] One commenter, for example, explained that banking laws and regulations impose their own eligibility standards for directors.[351] One commenter stated more generally that it does not oppose the proposed requirement that a company would not have to include a shareholder nominee in its proxy materials if the nominee's candidacy or election would violate Federal law or State law and such violation could not be cured.[352] It noted, however, that "there is not a lot of law" that disqualifies a person from serving as a director and described concerns about State law barriers as a "red herring."

On the other hand, one commenter stated that a company should not be allowed to exclude a shareholder nominee from its proxy materials because the election of the nominee would result in the violation of State law or Federal law.[353] The commenter explained that allowing such exclusion "would make it prohibitively expensive for most shareowners to submit nominations under the proposed rule. It would lead to many shareowner nominees being disqualified based on technicalities or invented legal theories."

After considering the comments, we continue to believe that Rule 14a–11 should address Federal law, State law, and applicable exchange requirements (other than the requirements related to objective independence standards, which are addressed separately under the rule). Requiring compliance with basic legal requirements regarding nominees should encourage nominating shareholders to bring forward candidates that may be more likely to be able to be elected and serve as directors, and should reduce disruption and expense for companies of opposing a candidate who could not serve on the board if elected because their service would violate law.[354] Thus, under Rule 14a–11, a nominee will not be eligible to be included in a company's proxy materials if the nominee's candidacy, or if elected, board membership will violate Federal law, State law, or applicable exchange requirements, if any,[355] other than those related to

[342] While state statutes are largely silent on the subject of presentation of nominations, motions or other business at meetings of shareholders, the chairman of the meeting typically has broad discretionary authority over its conduct (*see, e.g.,* Model Business Corporation Act § 7.08(b)). As we understand, it is prevailing practice for the chairman to invite nominations of directors from the meeting floor. *See* David A. Drexler, *et al.,* Delaware Corporation Law and Practice, ¶ 24.05[3] (2009 supp.); Carroll R. Wetzel, *Conduct of a Stockholders' Meeting,* 22 Bus. Law. 303, 313–314 (1967); American Bar Association Corporate Laws Committee and Corporate Governance Committee, Business Law Section, Handbook for the Conduct of Shareholders' Meetings (2d ed. 2010) at 151.

[343] *See* letters from 26 Corporate Secretaries; ABA; ADP; Advance Auto Parts; Aetna; Alcoa; AllianceBernstein; Anadarko; Applied Materials; Avis Budget; Boeing; BorgWarner; BRT; Burlington Northern; Caterpillar; Chevron; CIGNA; Cleary; Comcast; CSX; Darden Restaurants; Deere; Dewey; DTE Energy; Dupont; Eaton; FedEx; Florida State Board of Administration; FMC Corp.; FPL Group; General Mills; Headwaters; Intel; ITT; JPMorgan Chase; Kirkland & Ellis; E.J. Kullman; Leggett; P. Neuhauser; Northrop; PepsiCo; Pfizer; Protective; RiskMetrics; Sara Lee; Seven Law Firms; SIFMA; Society of Corporate Secretaries; Southern Company; T. Rowe Price; tw telecom; U.S. Bancorp; Wells Fargo; Weyerhaeuser; Whirlpool; Xerox.

[344] *See* discussion in Section II.B.5.e. below with regard to resubmission of unsuccessful shareholder nominees.

[345] *See* letter from Society of Corporate Secretaries.

[346] *See* letters from CII; Norges Bank; Solutions; USPE; Walden.

[347] *See* letter from CII.

[348] In the Proposing Release, we described an exception from the provision if the violation could be cured. We inadvertently did not include language for this provision in the proposed regulatory text.

[349] *See* letters from 26 Corporate Secretaries; American Bankers Association; Association of Corporate Counsel; BRT; Dewey; Emerson Electric; Financial Services Roundtable; GE; Intel; JPMorgan Chase; O'Melveny & Myers; Protective; Sidley Austin; Tenet; Xerox.

[350] *See* letters from American Bankers Association; BRT; Emerson Electric; GE; O'Melveny & Myers; Sidley Austin; Tenet.

[351] *See* letter from American Bankers Association.

[352] *See* letter from CII.

[353] *See* letter from USPE.

[354] We note that this condition would not disqualify a nominee unless the violation could not be cured during the time period in which a nominating shareholder or group has to respond to a company's notice of deficiency.

[355] We are not aware of other exchange requirements related to director qualifications, but

independence standards, and such violation could not be cured during the time period provided in the rule.[356]

b. Independence Requirements and Other Director Qualifications

Under the Proposal, the nominating shareholder or each member of the nominating shareholder group would have been required to provide a representation that the shareholder nominee meets the *objective criteria* for "independence" of the national securities exchange or national securities association rules applicable to the company, if any, or, in the case of a registrant that is an investment company, a representation that the nominee is not an "interested person" of the registrant, as defined in Section 2(a)(19) of the Investment Company Act.[357] For registrants other than investment companies, the representation would not have been required in instances where a company is not subject to the requirements of a national securities exchange or a national securities association. We also noted that exchange rules regarding director independence generally include some standards that depend on an objective determination of facts and other standards that depend on subjective determinations.[358] Under our Proposal, the representation would not cover subjective determinations. Also, the representation would not cover additional independence or director qualification requirements imposed by a board on its independent members, although we requested comment on whether it should.

Commenters generally supported the requirement regarding the objective independence standards.[359] Institutional and other investors agreed that nominating shareholders should not be required to represent that nominees satisfy the subjective independence standards of the relevant exchange or national securities association, and also agreed that they should not be subject to any director independence or qualification standards set by the board or the nominating committee.[360] One of these commenters expressed agreement with the Proposal that where a company is not subject to the independence standards of an exchange or national securities association, the nominating shareholder or group should not be required to provide disclosure concerning whether nominees would be independent.[361] To the extent that a company has independence standards that are more stringent than those of an exchange, then the commenter would not oppose the application of those standards to the shareholder nominee as long as the standards are objective. Two commenters expressed the view that the Section 2(a)(19) test is more appropriate for investment company directors than the independence standard applied to non-investment company directors,[362] with one noting that the Section 2(a)(19) test is tailored to the types of conflicts of interest faced by investment company directors and that the Section 2(a)(19) provision is critical given that investment companies must have a specified percentage of independent directors to be able to comply with certain statutory and regulatory requirements.[363]

A significant number of commenters from the corporate community stated generally that shareholder nominees should satisfy not just the objective director independence standards of the relevant exchange or national securities associations, but all of the company's director qualifications and independence standards (including, if applicable, more stringent objective independence standards imposed by the board, subjective director independence standards, director qualification standards, board service guidelines, and code of conduct in the company's governance principles and committee charters) applicable to all directors and director nominees.[364] Many commenters warned that exempting shareholder nominees from a company's director independence and qualification standards could cause the company to be exposed to legal issues, lower the quality and diversity of the board, and create difficulties in recruiting qualified directors.[365] Other commenters also believed that exempting shareholder nominees from the subjective director independence standards of the relevant exchange or national securities association would put companies at risk of noncompliance with the exchange's

should an exchange adopt new requirements, this provision would apply.

[356] As discussed in Section II.B.9.b., a company that intends to exclude a shareholder nominee or nominees will be required to notify the nominating shareholder or group of the basis on which the company plans to exclude the nominee or nominees and the nominating shareholder or group will have 14 calendar days to cure the deficiency (where curable).

[357] Pursuant to proposed Rule 14a–18(c), a nominating shareholder or group would include a representation in its notice to the company that the nominee satisfies the existing independence or "interested person" standards.

[358] *See* proposed Rule 14a–18(c) and the Instruction to paragraph (c). For example, the NYSE listing standards include both subjective and objective components in defining an "independent director." As an example of a subjective determination, Section 303A.02(a) of the NYSE Listed Company Manual provides that no director will qualify as "independent" unless the board of directors "affirmatively determines that the director has no material relationship with the listed company (either directly or as a partner, shareholder or officer of an organization that has a relationship with the company)." On the other hand, Section 303A.02(b) provides that a director is not independent if he or she has any of several specified relationships with the company that can be determined by a "bright-line" objective test. For example, a director is not independent if "the director has received, or has an immediate family member who has received, during any twelve-month period within the last three years, more than $120,000 in direct compensation from the listed company, other than director and committee fees and pension or other forms of deferred compensation for prior service (provided such compensation is not contingent in any way on continued service)." Similar to the NYSE rules, the NASDAQ Listing Rules require a company's board to make an affirmative determination that individuals serving as independent directors do not have a relationship with the company that would impair their independence. The NASDAQ rules include certain objective criteria, similar to those provided in NYSE Section 303A.02(b), for making such a determination. *See* NASDAQ Rule 5605(a)(2) and IM–5605.

[359] *See* letters from ABA; ACSI; Advance Auto Parts; Aetna; Alaska Air; Alcoa; Anadarko; Avis Budget; Biogen; The Board Institute ("Board Institute"); BorgWarner; BRT; Burlington Northern; Callaway; CalSTRS; Caterpillar; CIGNA; Cleary; Comcast; Con Edison; CII; COPERA; CSX; Cummins; Darden Restaurants; Deere; Dewey; DTE Energy; Eaton; Edison Electric Institute; Einstein Noah Restaurant Group, Inc. ("Einstein Noah"); Emerson Electric; ExxonMobil; FedEx; FMC Corp.; FPL Group; General Mills; A. Goolsby; Headwaters; Home Depot; Honeywell; Horizon Lines, Inc. ("Horizon"); C. Horner; IBM; Intel; JPMorgan Chase; Keating Muething; E.J. Kullman; LUCRF; McDonald's; Merchants Terminal; Metlife; P. Neuhauser; Norfolk Southern; Northrop; Office Depot; O'Melveny & Myers; P&G; PepsiCo; Pfizer; Protective; S&C; Seven Law Firms; Sidley Austin; SIFMA; Society of Corporate Secretaries; Southern Company; Tenet; Tesoro; Theragenics; TI; TIAA–CREF; Tompkins; tw telecom; UnitedHealth; U.S. Bancorp; ValueAct Capital; Verizon; Wells Fargo; Weyerhaeuser.

[360] *See* letters from ACSI; CalSTRS; CII; COPERA; LUCRF; P. Neuhauser; TIAA–CREF; ValueAct Capital.

[361] *See* letter from CII.

[362] *See* letters from ABA II; ICI.

[363] *See* letter from ICI. One commenter stated that the application of the "interested person" standard of Section 2(a)(19) is unnecessary. *See* letter from Norges Bank.

[364] *See* letters from ABA; Advance Auto Parts; Aetna; Alaska Air; Alcoa; Anadarko; Avis Budget; Biogen; Board Institute; BorgWarner; BRT; Burlington Northern; Callaway; Caterpillar; CIGNA; Cleary; Comcast; Con Edison; CSX; Cummins; Darden Restaurants; Deere; Dewey; DTE Energy; Eaton; Edison Electric Institute; Einstein Noah; Emerson Electric; ExxonMobil; FedEx; FMC Corp.; FPL Group; General Mills; A. Goolsby; Headwaters; Home Depot; Honeywell; Horizon; C. Horner; IBM; Intel; JPMorgan Chase; Keating Muething; E.J. Kullman; McDonald's; Merchants Terminal; Metlife; Norfolk Southern; Northrop; Office Depot; O'Melveny & Myers; P&G; PepsiCo; Pfizer; Protective; S&C; Seven Law Firms; Sidley Austin; SIFMA; Society of Corporate Secretaries; Southern Company; Tenet; Tesoro; Theragenics; TI; Tompkins; tw telecom; UnitedHealth; U.S. Bancorp; Verizon; Wells Fargo; Weyerhaeuser.

[365] *See* letters from Board Institute; BRT; Con Edison; C. Horner; TI; Verizon.

or association's rules regarding independent directors, burden the remaining independent directors with additional duties by forcing them to serve on more board committees, make it more difficult for companies to recruit the independent directors needed for the board committees, and force companies to increase the size of the board and conduct additional searches for directors qualifying as independent.[366]

After carefully considering the comments, we are adopting the requirement largely as proposed. We believe that the Rule 14a–11 process should be limited to nominations of board candidates who meet any objective independence standards of the relevant securities exchange. While we understand the concerns expressed by many commenters from the corporate community, particularly with respect to the risk of noncompliance with listing standards, we continue to believe that the rule should not extend to subjective independence standards. We note that Rule 14a–11 only addresses when a company must include a nominee in its proxy materials—it does not preclude a nominee from ultimately being subject to any subjective determination of independence for board committee positions. We believe the concerns regarding independent directors being forced to take on additional duties, companies needing to increase the size of the board or conducting additional searches for independent directors are best addressed through disclosure. A company could include disclosure in its proxy materials advising shareholders that the shareholder nominee would not meet the company's subjective criteria, as appropriate. This would provide shareholders with the opportunity to make an informed choice with regard to the candidates for director.

We believe that it is in both the company's and shareholders' interest for the company to continue to meet any applicable listing standards, and requiring that Rule 14a–11 nominees meet the objective independence standards will further that interest. It also should help reduce disruption and expense for companies opposing a candidate it believes would cause it to violate applicable listing standards. To clarify that this is an affirmative requirement for Rule 14a–11 nominees, we have revised the rule to include this provision as an eligibility requirement rather than a representation.[367]

A nominating shareholder or group also will be required to provide a statement in Schedule 14N that the nominee or nominees meets the objective independence standards of the applicable exchange rules.[368] For this purpose, the nominee would be required to meet the definition of "independent" that is applicable to directors of the company generally and not any particular definition of independence applicable to members of the audit committee of the company's board of directors.[369] To the extent a rule imposes a standard regarding independence that requires a subjective determination by the board or a group or committee of the board (for example, requiring that the board of directors or any group or committee of the board of directors make a determination that the nominee has no material relationship with the listed company), this element of an independence standard would not have to be satisfied.[370] Where a company (other than an investment company) is not subject to the standards of a national securities exchange or national securities association, the requirement would not apply.

While we acknowledge commenters' concerns about nominees not being subject to subjective independence requirements, we believe that including such requirements would create undue uncertainty for shareholders seeking to nominate directors and make it difficult to evaluate the board's conclusion regarding independence. In addition, if a board believes a nominee would not be considered independent under its subjective independence evaluation, it could describe its reasons for that view in its proxy statement. In this regard, we note that in a traditional proxy contest an insurgent's nominee or nominees do not have to comply with any requirements, including the independence requirements applicable to the company.[371] We also agree with the commenter who noted that the "interested person" test under Section 2(a)(19) is tailored to the types of conflicts of interest faced by investment company directors and that the Section 2(a)(19) provision is critical given that investment companies must have a specified percentage of independent directors to be able to comply with certain statutory and regulatory requirements.[372] Accordingly, under the final rule, a company will be required to include a shareholder nominee in its proxy materials if the shareholder nominee meets the objective criteria for "independence" of the national securities exchange or national securities association rules applicable to the company, if any, or, in the case of a company that is an investment company, the nominee is not an "interested person" of the registrant, as defined in Section 2(a)(19) of the Investment Company Act.[373]

As noted above, we did not propose to require a shareholder nominee submitted pursuant to Rule 14a–11 to be subject to the company's director qualification standards. With regard to these standards, we believe that a nominee's compliance with a company's director qualifications is best addressed through disclosure. Under State law, shareholders generally are free to nominate and elect any person to the board of directors, regardless of whether the candidate satisfies a company's qualification requirement at the time of nomination and election.[374] Many commenters recommended a requirement that the shareholder nominee complete the company's standard director questionnaire or otherwise provide information required of other nominees.[375] While we do not

[366] *See* letters from Metlife; O'Melveny & Myers; Seven Law Firms; Wells Fargo.

[367] *See* Rule 14a–11(b)(9).

[368] *See* Item 5(f) of new Schedule 14N.

[369] *See* new instruction to paragraph (b)(9) in Rule 14a–11.

[370] The rule addresses only the requirements under Rule 14a–11 to be included in a company's proxy materials—it would not preclude a nominee from ultimately being subject to the subjective determination test of independence for board committee positions. A company could include disclosure in its proxy materials advising shareholders that the shareholder nominee for director would not meet the company's subjective criteria, as appropriate. If a shareholder nominee is elected and the board determines that the nominee is not independent, the board member presumably would be included in the group of non-independent directors for purposes of applicable listing standards.

[371] If a shareholder nominee did not meet the independence requirements of a listed market, that listed market may provide for a cure period during which time the company may resolve this deficiency. *See, e.g.,* NASDAQ Rule 5810(c)(3)(E) ("If a Company fails to meet the majority board independence requirement in Rule 5605(b)(1) due to one vacancy, or because one director ceases to be independent for reasons beyond his/her reasonable control, the Listing Qualifications Department will promptly notify the Company and inform it has until the earlier of its next annual shareholders meeting or one year from the event that caused the deficiency to cure the deficiency.").

[372] *See* letter from ICI.

[373] *See* new Rule 14a–11(b)(9).

[374] *See, e.g., Triplex Shoe Co.* v. *Rice & Hutchins, Inc.,* 152 A. 342, 375 (Del. 1930). *See also* 1–13 David A. Drexler *et al.,* Delaware Corporation Law and Practice § 13.01 n. 42 (citing *Triplex* for the proposition that "a bylaw requiring a director to be a stockholder required a director to own stock prior to entering into the office of director, not prior to election").

[375] *See* letters from 26 Corporate Secretaries; Advance Auto Parts; Alaska Air; Anadarko; Aetna; American Express; Association of Corporate Counsel; BorgWarner; BRT; Callaway; Caterpillar; Dewey; DTE Energy; Dupont; Emerson Electric; eWareness; ExxonMobil; Financial Services Roundtable; IBM; ICI; McDonald's; O'Melveny &

believe nominees submitted pursuant to Rule 14a–11 should be required to complete a company's director questionnaire, we are persuaded that information should be provided regarding whether the nominee meets the company's director qualifications, if any. Accordingly, although we have not revised the rule to allow exclusion of nominees who do not meet any director qualification requirements, we have adopted a requirement that a nominating shareholder or group disclose under Item 5 of Schedule 14N whether, to the best of their knowledge, the nominating shareholder's or group's nominee meets the company's director qualifications, if any, as set forth in the company's governing documents.[376] The company also may choose to provide disclosure in its proxy statement about whether it believes a nominee satisfies the company's director qualifications, as is currently done in a traditional proxy contest. Where a company's governing documents establish certain qualifications for director nominees that, consistent with State law, would preclude the company from seating a director who does not meet these qualifications, we believe this would be important disclosure for shareholders.

c. Agreements With the Company

As discussed above with regard to the eligibility requirements for a nominating shareholder or group, we recognize that certain limitations of the rule create the potential risk of nominating shareholders or groups acting merely as a surrogate for the company or its management in order to block usage of the rule by another nominating shareholder or group.[377] Under the Proposal as it relates to nominee eligibility, a nominating shareholder or group would have been required to represent that no agreements between the nominee and the company and its management exist regarding the nomination of the nominee.[378] The Proposal included an instruction clarifying that negotiations between a nominating shareholder or group, nominee, and nominating committee or board of a company to have the nominee included in the company's proxy materials, where the negotiations were unsuccessful or were limited to whether the company was required to include the nominee in accordance with Rule 14a–11, would not represent a direct or indirect agreement with the company.[379]

Commenters generally supported this proposed requirement.[380] Most of the comments addressed negotiations or agreements between the nominating shareholder or group and the company rather than the relationship or agreements between a nominee and the company.[381]

Consistent with our approach to agreements with nominating shareholders, we are adopting the requirement that there not be any agreements between the nominee and the company and its management regarding the nomination of the nominee largely as proposed. In this regard, we believe it would undermine the purpose of the rule to allow nominees under Rule 14a–11 to have such agreements with the company because of the potential risk of a nominating shareholder or group acting merely as a surrogate for a company. In order to clarify that this is an affirmative requirement of Rule 14a–11, we have revised the rule to make clear that this is an eligibility condition by listing it as a condition in the rule, rather than only in a representation required in Schedule 14N.

d. Relationship Between the Nominating Shareholder or Group and the Nominee

We did not propose a requirement that the nominee must be independent or unaffiliated with the nominating shareholder or group, but we requested comment on whether we should include such a requirement.[382] A large number of commenters supported generally an independence requirement that would limit some or all relationships between the nominating shareholder or group and its nominee.[383] Commenters explained that an independence requirement would reduce the risk that a successful shareholder nominee would represent only the nominating shareholder or group, avoid potential disruptions and divisiveness from having "special interest" directors, ameliorate the issue of preserving confidentiality within the boardroom and avoiding misuse of material non-public information, and lessen the likelihood that Rule 14a–11 would be used for change in control attempts.[384]

With regard to the degree of independence needed and types of relationships that should be prohibited, numerous commenters recommended a prohibition on any affiliation between the nominating shareholder or group and the shareholder nominee.[385] Some commenters recommended that Rule 14a–11 prohibit a shareholder nominee from being (1) a nominating shareholder, (2) a member of the immediate family of any nominating shareholder, or (3) a partner, officer, director or employee of a nominating shareholder or any of its affiliates.[386] They noted that a similar limitation was included in the 2003 Proposal. Two commenters recommended that the Commission impose the same restrictions and disclosure requirements that were included in the 2003 Proposal.[387]

One commenter noted the Commission's assertion in the Proposing Release that "such limitations may not be appropriate or necessary" because, if elected, a director would be subject to State law fiduciary duties owed to the company.[388] The commenter, however, expressed skepticism that fiduciary obligations would adequately resolve the issue of "special interest" directors. One commenter would not require independence between the nominating shareholder or group and the nominee if the nominating shareholder or group could use Rule 14a–11 to nominate only one candidate; however, if the nominating shareholder or group is allowed to nominate more than one

Myers; PepsiCo; Praxair; Seven Law Firms; Society of Corporate Secretaries; Theragenics; UnitedHealth; U.S. Bancorp; Xerox.

[376] *See* Item 5(e) of new Schedule 14N.

[377] *See* the discussion in Section II.B.4.e. above regarding relationships or agreements between the nominating shareholder or group and the company and its management.

[378] In this regard, we also proposed to require a nominating shareholder or group to represent that no relationships or agreements between the nominee and the company and its management exist. This aspect of the rule is discussed in Section II.B.5.d. below.

[379] *See* instruction to proposed Rule 14a–18(d).

[380] *See* letters from ADP; BRT; Calvert; CFA Institute; CII; Seven Law Firms; TIAA–CREF; USPE.

[381] *See* Section II.B.4.e. above for a further discussion of the comments.

[382] The 2003 Proposal included such a requirement. For a discussion of this aspect of the 2003 Proposal and the comments received, *see* the Proposing Release.

[383] *See* letters from ABA; Advance Auto Parts; Aetna; Alaska Air; Association of Corporate Counsel; Avis Budget; Biogen; Boeing; BorgWarner; Brink's; BRT; Callaway; Caterpillar; CIGNA; Comcast; Cummins; Darden Restaurants; Deere; Dewey; Dupont; Eaton; Eli Lilly; ExxonMobil; FedEx; Financial Services Roundtable; FMC Corp.; FPL Group; General Mills; Headwaters; Honeywell; JPMorgan Chase; E.J. Kullman; Leggett; Norfolk Southern; Office Depot; O'Melveny & Myers; Pax World; Protective; Sara Lee; Seven Law Firms; SIFMA; Society of Corporate Secretaries; Southern Company; Tenet; U.S. Bancorp; Vinson & Elkins LLP ("Vinson & Elkins"); Wells Fargo; Weyerhaeuser.

[384] *See* letters from ABA; Alaska Air; Eli Lilly; Leggett.

[385] *See* letters from Advance Auto Parts; Aetna; Association of Corporate Counsel; Avis Budget; Boeing; Brink's; CIGNA; Cummins; Deere; Eaton; FedEx; FMC Corp.; FPL Group; General Mills; E.J. Kullman; Pax World; Protective; Sara Lee.

[386] *See* letters from Alaska Air; BorgWarner; Caterpillar; JPMorgan Chase; O'Melveny & Myers; Society of Corporate Secretaries.

[387] *See* letters from BRT; Intel.

[388] Letter from BRT.

candidate using Rule 14a–11, then the commenter believed independence between the nominating shareholder or group and the nominees is needed.[389] The commenter asserted that a lack of an independence requirement between multiple nominees and the nominating shareholder could give rise to control issues because the nominees, if elected, could be beholden to a single nominating shareholder or group. In addition, the commenter claimed that a lack of independence could give rise to "single issue" or "special interest" directors, thereby causing balkanization of boards. According to this commenter, if independence is not required, then Schedule 14N should require detailed disclosure about the nature of relationships between the nominating shareholder or group and the nominees.[390]

A few commenters recommended requiring disclosure in the Schedule 14N of any direct or indirect relationships between the nominating shareholder or group and the nominee, including family or employment relationships, ownership interests, commercial relationships and any other arrangements or agreements.[391] One commenter recommended that a nominating shareholder or group provide "[d]isclosure about any agreements or relationships with the Rule 14a–11 nominee other than those relating to the nomination of the nominee."[392]

Other commenters opposed generally any requirement that the nominating shareholder or group be independent from the shareholder nominee.[393] Of these, some commenters recommended the Commission require full disclosure of any affiliations and business relationships instead of an outright prohibition.[394] One commenter noted that no such restriction or prohibition applies to current director candidates, some of whom have various personal and professional links to the company and its executives.[395] Another commenter noted that the NYSE recognized the issue of share ownership when crafting its director independence rules and determined that even significant share ownership should not be dispositive as to a determination of a director's independence.[396] Two commenters opposed a prohibition on any affiliation between the nominating shareholder and its nominee because they believed that fears regarding the election of "special interest" directors are unfounded or exaggerated, as any nominee would have to gain the support of a broad array of shareholders to be elected.[397] One commenter asserted that existing fiduciary duties are an adequate safeguard against "special interest" directors.[398]

We continue to believe that such limitations are not appropriate or necessary. Rather, we believe that Rule 14a–11 should facilitate the exercise of shareholders' traditional State law rights and afford a shareholder or group meeting the requirements of the rule the ability to propose a nominee for director that, in the nominating shareholder's view, better represents the interests of shareholders than those put forward by the nominating committee or board. We note that once a nominee is elected to the board of directors, that director will be subject to State law fiduciary duties and owe the same duty to the corporation as any other director on the board.[399] To the extent a company board is concerned that a director nominee will not represent the views of shareholders, the board could address those points in the company's proxy materials opposing the candidate's election. In addition, we believe the disclosure requirements about the relationships between a nominating shareholder or group and the nominee that we are adopting, combined with the fact that any nominee elected will be subject to fiduciary duties, should help address any "special interest" concerns.

e. No Limit on Resubmission of Shareholder Director Nominees

Under the Proposal, an individual would not be limited in their ability to stand as a nominee under the rule based on prior unsuccessful nominations under the rule. A number of commenters supported a provision under which a shareholder nominee who failed to receive a specified threshold (*e.g.,* 10%, 15%, 25%, or 30%) of support at a previous election would be ineligible to be nominated again pursuant to Rule 14a–11 for a specified period (*e.g.,* one, two, or three years).[400] One commenter reasoned that "[t]his would allow more shareholders to participate in the process and would motivate them to propose high quality candidates."[401] On the other hand, other commenters opposed a provision under which a shareholder nominee who failed to receive significant support at a previous election would be ineligible to be nominated again pursuant to Rule 14a–11 for a specified period.[402] One commenter reasoned that "[s]imilar resubmission requirements aren't applicable to management's candidates, so they shouldn't apply to candidates suggested by shareowners."[403] We agree with those commenters who opposed a provision that would limit the ability of a shareholder nominee to be nominated based on the level of support received in a prior election. We do not believe that such a limitation would facilitate shareholders' traditional State law rights and would add undue complexity to the rule's operation.

6. Maximum Number of Shareholder Nominees To Be Included in Company Proxy Materials

a. General

Under the Proposal, a company would be required to include no more than one shareholder nominee or the number of nominees that represents 25% of the company's board of directors, whichever is greater.[404] Where the term of a director that was nominated

[389] *See* letter from Seven Law Firms.

[390] *Id.* The recommended disclosures included: familial relationships with a nominating shareholder or group member; ownership interests (or other participation) in a nominating shareholder, group member, or affiliates; employment history with a nominating shareholder, group member, or affiliates; prior advisory, consulting or other compensatory relationships with a nominating shareholder, group member, or affiliates; and agreements with a nominating shareholder, group member, or affiliates (other than relating to the nomination).

[391] *See* letters from O'Melveny & Myers; SIFMA; UnitedHealth. *See also* letter from CII.

[392] Letter from IBM.

[393] *See* letters from Amalgamated Bank; CalSTRS; CFA Institute; CII; COPERA; Nathan Cummings Foundation; P. Neuhauser; Norges Bank; Pershing Square; Relational; RiskMetrics; Solutions by Design ("Solutions"); TIAA–CREF; USPE; B. Villiarmois.

[394] *See* letters from CFA Institute; CII; COPERA; P. Neuhauser; Pershing Square; Relational; USPE; B. Villiarmois.

[395] *See* letter from CII.

[396] *See* letter from Relational.

[397] *See* letters from CII; Nathan Cummings Foundation.

[398] *See* letter from TIAA–CREF.

[399] *See* E. Norman Veasey & Christine T. DiGuglielmo, *How Many Masters Can a Director Serve? A Look at the Tensions Facing Constituency Directors,* 63 Bus. Law. 761 (2008).

[400] *See* letters from 26 Corporate Secretaries; ABA; Aetna; Anadarko; BorgWarner; BRT; Burlington Northern; Caterpillar; Cummins; Dewey; Headwaters; JPMorgan Chase; Kirkland & Ellis; Leggett; P. Neuhauser; Northrop; PepsiCo; Pfizer; Protective; Sara Lee; SIFMA; Society of Corporate Secretaries; TIAA–CREF; T. Rowe Price; Xerox.

[401] Letter from Northrop.

[402] *See* letters from CII; Corporate Library; Dominican Sisters of Hope; First Affirmative Financial Network LLC ("First Affirmative"); Mercy Investment Program; Sisters of Mercy; Social Investment Forum; Tri-State Coalition; Trillium; Ursuline Sisters of Tildonk; USPE.

[403] Letter from CII.

[404] *See* proposed Rule 14a–11(d)(1). According to information from RiskMetrics, based on a sample of 1,431 public companies, in 2007, the median board size was 9, with boards ranging in size from 4 to 23 members. Approximately 40% of the boards in the sample had 8 or fewer directors, approximately 60% had between 9 and 19 directors, and less than 1% had 20 or more directors.

pursuant to Rule 14a–11 continues past the meeting date, that director would continue to count for purposes of the 25% maximum.

As noted in the Proposing Release, we do not intend for Rule 14a–11 to be available for any shareholder or group that is seeking to change the control of the company or to gain more than a limited number of seats on the board.[405] The existing procedures regarding contested elections of directors are intended to continue to fulfill that purpose.[406] We also noted that by allowing shareholder nominees to be included in a company's proxy materials, part of the cost of the solicitation is essentially shifted from the individual shareholder or group to the company and thus, all of the shareholders.[407] We do not believe that we should require that an election contest conducted by a shareholder to change the control of the company or to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the registrant could be required to include under Rule 14a–11 be funded out of corporate assets.

Some commenters supported generally the proposed limit on the number of shareholder nominees.[408] While agreeing that the Commission's proposed limit on the number of shareholder nominees is needed to ensure a more measured approach towards inclusion of shareholder nominees in company proxy materials, one commenter supported the general principle that shareholders should be entitled to nominate as many directors as necessary to focus the board's attention on optimizing company performance, profitability and sustainable returns.[409] On the other hand, many commenters disagreed with the proposed limit or recommended different limits.[410] Some commenters expressed a general concern that the proposed limit would affect a significant portion of the board, disrupt the board, facilitate a change in control of the company, and possibly require companies to integrate numerous new directors into their boards each year.[411] Other commenters wanted more shareholder nominees to be allowed because they feared that a single shareholder-nominated director would be ineffective due to the lack of a second for motions at board meetings, hostile board members, possible exclusion from key committees, and being effectively cut out of key discussions.[412] Commenters' suggestions as to the appropriate limitation on the number of shareholder nominees ranged from a limit of one shareholder nominee, regardless of the size of the board,[413] to at least two nominees, but less than a majority of the board.[414] Other commenters recommended various limits ranging from 10% to 15% of the board.[415]

We carefully considered commenters' concerns regarding the limitation on the number of Rule 14a–11 nominees; however, we are adopting the limitation largely as proposed. We believe the rule we are adopting strikes the appropriate balance in allowing shareholders to more effectively exercise their rights to nominate and elect directors, but does not provide nominating shareholders or groups using the rule with the ability to change control of the company. The limitation on the number of Rule 14a–11 nominees that a company is required to include should also limit costs and disruption as compared to a rule without such a limit. We also believe that a lower threshold, such as 10% or 15%, may result in only one shareholder-nominated director at many companies. In addition, we note that our rule only addresses the inclusion of nominees in the company's proxy materials. After reviewing all of the disclosures provided by the company and the nominating shareholder or group, shareholders will be able to make an informed decision as to whether to vote for and elect a shareholder nominee. We believe that the modifications we are making to the rule, as described below, help to alleviate concerns that the election of shareholder nominees would unduly disrupt the board. As to concerns about the possibility that a single shareholder-nominated director would be ineffective due to actions of other members of the board, the rule is not intended to address the interactions of board members after the election of directors. In this respect, we note that any shareholder-nominated directors and board-nominated directors would be subject to fiduciary duties under State law.

As adopted, Rule 14a–11(d) will not require a company to include more than one shareholder nominee or the number of nominees that represents 25% of the company's board of directors, whichever is greater.[416] Consistent with the Proposal, where a company has a director (or directors) currently serving on its board of directors who was elected as a shareholder nominee pursuant to Rule 14a–11, and the term of that director extends past the date of the meeting of shareholders for which the company is soliciting proxies for the election of directors, the company will not be required to include in its proxy materials more shareholder nominees than could result in the total number of directors serving on the board that were elected as shareholder nominees being greater than one shareholder nominee or 25% of the company's board of

[405] The final rule clarifies the second part of this requirement by specifying that a nominating shareholder or group may not be seeking to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the registrant could be required to include under Rule 14a–11.

[406] *See, e.g.,* Exchange Act Rule 14a–12(c).

[407] In this regard, we anticipate that shareholders seeking election of nominees included in the company's proxy materials may need to engage in solicitation efforts for which they will incur expenses.

[408] *See* letters from CalPERS; CalSTRS; CFA Institute; ICGN; Nathan Cummings Foundation; P. Neuhauser; Norges Bank; Protective; RiskMetrics; TIAA–CREF; T. Rowe Price; WSIB.

[409] *See* letter from CalPERS.

[410] *See* letters from 13D Monitor; ABA; ACSI; Advance Auto Parts; Aetna; Alcoa; Allstate; American Express; Americans for Financial Reform; Association of Corporate Counsel; Avis Budget; Best Buy; J. Blanchard; Boeing; BorgWarner; BRT; Burlington Northern; R. Burt; Callaway; CalPERS; Caterpillar; CIGNA; CII; Cleary; CNH Global; Comcast; Concerned Shareholders; COPERA; Cummins; L. Dallas; Darden Restaurants; Deere; Dupont; Eaton; Eli Lilly; Dale C. Eshelman ("D. Eshelman"); ExxonMobil; FedEx; FMC Corp.; FPL Group; Frontier; GE; General Mills; Headwaters; C. Holliday; Honeywell; IBM; ICI; ITT; JPMorgan Chase; J. Kilts; E. J. Kullman; N. Lautenbach; Leggett; C. Levin; Lionbridge Technologies; LUCRF; McDonald's; Motorola; Office Depot; O'Melveny & Myers; OPERS; P&G; Nathan Cummings Foundation; Northrop; Pax World; PepsiCo; Sara Lee; S&C; Schulte Roth & Zabel; Sherwin-Williams; Sidley Austin; SIFMA; Society of Corporate Secretaries; Solutions; SWIB; Teamsters; TI; G. Tooker; tw telecom; Universities Superannuation; U.S. Bancorp; Verizon; USPE; B. Villiarmois; Wachtell; Wells Fargo; Weyerhaeuser; WSIB.

[411] *See* letters from BRT (citing a July 2009 survey showing many companies would have to integrate multiple new directors); CII; Eaton; N. Lautenbach; McDonald's; Sherwin-Williams; Sidley Austin; Society of Corporate Secretaries; G. Tooker; WSIB.

[412] *See* letters from CII; L. Dallas; C. Levin; Nathan Cummings Foundation; Universities Superannuation.

[413] *See* letters from Advance Auto Parts; Avis Budget; BRT; Caterpillar; CIGNA; CNH Global; Comcast; Cummins; Darden Restaurants; Deere; Eaton; Eli Lilly; FedEx; FMC Corp.; FPL Group; Frontier; General Mills; ICI; ITT; E. J. Kullman; N. Lautenbach; Leggett; McDonald's; Office Depot; O'Melveny & Myers; PepsiCo; Sherwin-Williams; TI; G. Tooker; tw telecom; Verizon; Wachtell; Weyerhaeuser.

[414] *See* letters from ACSI; Americans for Financial Reform; CalPERS; CII (stating that while it supports the Commission's proposed limit, shareholders should be allowed to nominate two candidates in all cases); COPERA; C. Levin; LUCRF; Nathan Cummings Foundation; SWIB; Teamsters.

[415] *See, e.g.,* Aetna; Association of Corporate Counsel; Barclays; J. Blanchard; BorgWarner; Dewey; ExxonMobil; Headwaters; Honeywell; Lionbridge Technologies; Northrop; Sidley Austin; Society of Corporate Secretaries; U.S. Bancorp.

[416] *See* new Rule 14a–11(d)(1).

directors, whichever is greater.[417] We believe this limitation is appropriate to reduce the possibility of a nominating shareholder or group using Rule 14a–11 as a means to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the company could be required to include under Rule 14a–11 or to effect a change in control of the company by repeatedly nominating additional candidates for director. One commenter requested that we explain how Rule 14a–11 would apply to different board structures, and in particular, classified boards.[418] In the case of a staggered board, the rule provides that the 25% limit will be calculated based on the total number of board seats,[419] not the lesser number that are being voted on because it is the size of the full board, not the number up for election, that would be relevant for considering the effect on control.

We note that in the 2003 Proposal, the Commission proposed to require companies to include a set number of nominees, rather than a percentage of the board.[420] We believe that using a percentage in the rule will promote ease of use and alleviate any concerns that a company may increase its board size in an effort to reduce the effect of a shareholder nominee elected to the board.

We understand the concerns addressed by some commenters that this limitation could result in shareholder-nominated directors being less influential,[421] as well as the concerns of other commenters that the possibility of 25% of the board changing through the Rule 14a–11 process could present significant changes to the board.[422] For the reasons discussed above, we believe the limitation as adopted strikes an appropriate balance and is an appropriate safeguard to assure that the Rule 14a–11 process is not used as a means to effect a change in control.

Though we are adopting this requirement largely as proposed, we have added certain clarifications, which are described below, to address situations at companies where shareholders are able to elect only a subset of the board, revised the standard for determining which nominating shareholder or group will have their nominee or nominees included in the company's proxy materials where there is more than one eligible nominating shareholder or group, and made other modifications designed to facilitate negotiations between companies and nominating shareholders.

b. Different Voting Rights With Regard to Election of Directors

Several commenters responded to the Commission's request for comment about how to calculate the maximum number of candidates a nominating shareholder or group could nominate under Rule 14a–11 when certain directors are not elected by all shareholders. Some commenters noted that controlled companies are commonly structured with dual classes of stock which allow shareholders of the non-controlling class of stock to elect a set number of directors that is less than the full board.[423]

In the context of a company where shareholders are only entitled to elect a subset of the total number of directors, the rule as proposed potentially would have allowed shareholders to nominate more candidates than may be elected by the nominating shareholders. Two commenters argued that Rule 14a–11 should be modified so that the maximum number of shareholder nominees is based on the number of directors that may be elected by the class of securities held by the shareholders making the nomination, as opposed to the number of total directors.[424] Another commenter urged us to revise Rule 14a–11 so that it would be limited to a percentage of the number of directors that are elected by the public shareholders (rather than a percentage of all directors) and would not apply to directors that are elected by shareholders of a class of stock having a right to nominate and elect a specified number or percentage of directors, or preferred shareholders having such right as a result of the company's failure to pay dividends.[425] Another commenter argued that, as proposed, Rule 14a–11 would not allow companies with multiple classes of voting shares the ability to make choices about how to best implement access to the company's proxy to fit their capital structure.[426] One commenter suggested that Rule 14a–11 address how it would apply to companies with multiple classes of stock to prevent shareholders from using the rule to change control of the class of directors those shareholders have the right to elect.[427] Other commenters, by contrast, believed that the maximum number of nominees that companies should be required to include should be based on the total number of director seats, regardless of whether a class of shares only gets to elect a subset of the board.[428]

We also sought comment on how to calculate the maximum number of nominees where the company is contractually obligated to permit a certain shareholder or group to elect a set number of directors to the board. Commenters' views differed on how to calculate the maximum number of nominees a shareholder or shareholder group may nominate in that case. Some commenters believed that the maximum number of nominees should be based on the total board size, regardless of whether a company has granted rights to nominate.[429] One such commenter noted that if Rule 14a–11 contained an exception for board seats subject to contractual rights, companies would have an incentive to enter into contractual agreements in order to evade its application.[430] Other commenters, however, asserted that the maximum number of nominees that shareholders should be permitted to nominate under Rule 14a–11 should be limited to 25% of the "free" seats on the board—that is, only those board seats that are not subject to a contractual nomination right that existed as of the date of the submission and filing of a Schedule 14N.[431] These commenters suggested taking board seats subject to contractual nomination rights "off the table" and basing the 25% calculation on the number of nominees that the nominating committee is free to name. One such commenter remarked that unless board seats subject to contractual nomination rights are excluded,

[417] *See* new Rule 14a–11(d)(2). This requirement is adopted as it was proposed in Rule 14a–11(d)(2). Depending on board size, 25% of the board may not result in a whole number. In those instances, the maximum number of shareholder nominees for director that a registrant will be required to include in its proxy materials will be the closest whole number below 25%. *See* the Instruction to paragraph (d)(1).

[418] *See* letter from ABA.

[419] *See* Rule 14a–11(d)(2).

[420] Comments on the 2003 Proposal provided a range of views regarding the appropriate number of shareholder nominees. Commenters that supported the use of a percentage, or combination of a set number and a percentage, to determine the number of shareholder nominees suggested percentages ranging from 20% to 35%. *See* Comment File No. S7–19–03, *available at http://www.sec.gov/rules/proposed/s71903.shtml.*

[421] *See* letters from CII; L. Dallas; C. Levin; Nathan Cummins Foundation; Universities Superannuation.

[422] *See* letters from BRT (citing a July 2009 survey showing many companies would have to integrate multiple new directors); CII; Eaton; N. Lautenbach; McDonald's; Sherwin-Williams; Sidley Austin; Society of Corporate Secretaries; G. Tooker; WSIB.

[423] *See* letters from ABA; Duane Morris; Media General; New York Times.

[424] *See* letters from Media General; New York Times.

[425] *See* letter from Sidley Austin.

[426] *See* letter from BRT.

[427] *See* letter from Media General.

[428] *See* letters from CII; P. Neuhauser.

[429] *Id.*

[430] *See* letter from P. Neuhauser.

[431] *See* letters from Seven Law Firms; Sidley Austin; ValueAct Capital.

companies may be limited in their ability to offer contractual nominating rights to shareholders without running a heightened risk of change of control, which could result in increased costs of capital and a decrease in the number of strategic alternatives.[432]

We believe that the maximum number of candidates a shareholder can nominate using Rule 14a–11 at companies with multiple classes of stock should be based on the total board size, as is the case at other companies. Thus, we are adopting this requirement as proposed. We believe the changes we are adopting with regard to calculating ownership and voting power, as discussed above, should address concerns about the possibility that the rule could be used to change control of the company or to affect the rights of shareholders as established by a particular company's capital structure.[433] Where shareholders have the right to elect a subset of the full board, however, we believe it is appropriate to provide that the maximum number of nominees a company may be required to include under Rule 14a–11 may not exceed the number of director seats the class of shares held by the nominating shareholder is entitled to elect.[434] We believe the right to nominate is an integral part of the right to elect, therefore we are linking the ability under Rule 14a–11 for a shareholder to nominate directors to instances in which the shareholder can elect directors. Limiting the number of nominations to the number of director seats the class of shares held by the nominating shareholder is entitled to elect presumably would allow to be fully expressed the views of the shareholder about who should sit in the director seats in respect of which the shareholder has nomination rights.

The shareholder nomination provisions in Rule 14a–11 are available only for holders of classes of securities that are subject to the Exchange Act proxy rules, provided that a company is otherwise subject to the rule. If a company subject to Rule 14a–11 has multiple classes of eligible securities, however, the maximum number of candidates a shareholder can nominate will be determined based on the number of director seats the class of shares held by the nominating shareholder is entitled to elect.[435]

c. Inclusion of Shareholder Nominees in Company Proxy Materials as Company Nominees

As discussed in Section II.B.4.e. above, commenters expressed concern that the rule, as proposed, might discourage constructive dialogue between shareholders and companies.[436] These commenters noted that companies would be discouraged from discussing potential board candidates with shareholders planning to use Rule 14a–11 and including them as management nominees because such nominees would not reduce the maximum number of shareholder nominees that the company would be required to include under Rule 14a–11. Subject to certain safeguards, we believe our rule should not discourage dialogue between nominating shareholders and companies and agree that the rule, as proposed, could have the effect of discouraging constructive dialogue if shareholder nominees nominated by a company as a result of that dialogue do not count toward the maximum number of shareholder nominees a company is required to include in its proxy materials. Consequently, under our final rule, where a company negotiates with the nominating shareholder or group that has filed a Schedule 14N before beginning any discussion with the company about the nomination and that otherwise would be eligible to have its nominees included in the company's proxy materials, and the company agrees to include the nominating shareholder's or group's nominees on the company's proxy card as company nominees, those nominees will count toward the 25% maximum set forth in the rule.[437] As noted, this would only apply where the nominating shareholder or group has filed its notice on Schedule 14N before beginning discussions with the company. Although this limitation may reduce somewhat the utility of this provision, we believe limiting the treatment to situations in which the nominating shareholder or group has filed a Schedule 14N will reduce the possibility that this exception is used by a company to avoid having to include shareholder director nominees submitted by shareholders or groups of shareholders that are not affiliated with or not working on behalf of the company.

In the Proposing Release, we requested comment as to whether it would be appropriate for the rule to take into account incumbent directors who were nominated pursuant to Rule 14a–11 for purposes of determining the maximum number of shareholder nominees, or whether there should be a different means to account for such incumbent directors. One commenter argued that incumbent Rule 14a–11 directors should not count towards the 25% limit.[438] It reasoned that, once elected, the Rule 14a–11 director represents all shareholders and that future use of

Rule 14a–11 by other shareholders should not be restricted. A number of commenters stated that incumbent Rule 14a–11 directors should count towards the maximum number of shareholder nominees allowed under the rule,[439] with some suggesting that this should be the case in limited circumstances, such as when a Rule 14a–11 director is re-nominated by the board or as long as the director continues on the board.[440] Commenters expressed concerns that the method of calculating the maximum number of directors subject to Rule 14a–11 nominations—which as proposed would not include directors previously elected following a Rule 14a–11 nomination unless they are nominated again by a shareholder using Rule 14a–11—would not encourage boards to integrate these directors.[441] Some commenters asserted that failing to count such a director toward the 25% limit would cause boards to be disinclined to include these directors as company nominees in future elections.[442] They viewed this as counterproductive to efficient board integration and functioning.

While we appreciate commenters' views, we are not persuaded that it is appropriate to provide an exception to the general method of calculating the maximum number of Rule 14a–11 nominees in the case of a shareholder-nominated incumbent director that is re-nominated by the company. As noted

[432] *See* letter from Seven Law Firms.

[433] *See* Section II.B.4.b. above.

[434] *See* new Rule 14a–11(d)(3).

[435] *See* new Rule 14a–11(d)(3).

[436] *See* letters from BRT; Seven Law Firms; Society of Corporate Secretaries.

[437] *See* new Rule 14a–11(d)(4). In this regard, we note that we would view such an agreement as a termination of a Rule 14a–11 nomination. Thus, the nominating shareholder or group would be required to file an amendment to Schedule 14N to disclose the termination of the nomination as a result of the agreement with the company regarding the inclusion of the nominee or nominees. *See* Item 7 of Schedule 14N and Rule 14n–2.

[438] *See* letter from Florida State Board of Administration.

[439] *See* letters from ABA; Aetna; American Express; BorgWarner; BRT; Chevron; Cleary; Davis Polk; DTE Energy; Dupont; Edison Electric Institute; Eli Lilly; ExxonMobil; FPL Group; Home Depot; ICI; JPMorgan Chase; Metlife; P. Neuhauser; Pfizer; Protective; RiskMetrics; S&C; Seven Law Firms; Sidley Austin; SIFMA; Society of Corporate Secretaries; Verizon; Vinson & Elkins; Wells Fargo.

[440] *See* letters from P. Neuhauser; RiskMetrics.

[441] *See* letters from ABA; BRT; Seven Law Firms.

[442] *See* letters from Davis Polk; Society of Corporate Secretaries.

previously, by adopting Rule 14a–11 we are seeking to facilitate shareholders' ability under State law to nominate and elect directors, not necessarily to enhance shareholder representation on the board. We do not believe that a Commission rule is needed to facilitate the working relationship between the shareholder-nominated director and the company-nominated directors, or to provide an incentive for the board to integrate the shareholder-nominated director into its activities. To the extent that a shareholder nominee is elected to the board, the company-nominated directors and the shareholder-nominated director will have a fiduciary duty to act in the best interests of the company and its shareholders.

7. Priority of Nominations Received by a Company

a. Priority When Multiple Shareholders Submit Nominees

Proposed Rule 14a–11(d)(3) addressed situations where more than one shareholder or group would be eligible to have its nominees included in the company's form of proxy and disclosed in its proxy statement pursuant to the proposed rule. In those situations, the company would have been required to include in its proxy materials the nominee or nominees of the first nominating shareholder or group from which it receives timely notice of intent to nominate a director pursuant to the rule, up to and including the total number of shareholder nominees required to be included by the company. We proposed this standard because we believed that there would be a benefit to enabling companies to begin preparing their proxy materials and coordinating with the nominating shareholder or group immediately upon receiving an eligible nomination rather than requiring companies to wait to see whether another nomination from a larger nominating shareholder or group was submitted before the notice deadline.

Commenters were almost uniformly opposed to the proposed "first-in" standard. A large number of commenters expressed general opposition to the proposed first-in approach, with many presenting their own recommendations.[443] Commenters expressed concern that the first-in approach would rush shareholders to submit nominations.[444] One commenter worried that even if the Commission included a window period for submission of shareholder nominees in the final rule, the first-in approach would encourage a race to file, discourage constructive dialogue between shareholders and management, and encourage a "gamesmanship" attitude among possible nominating shareholders or groups.[445] Another commenter argued that the first-in approach would undercut the Commission's stated objectives in proposing Rule 14a–11.[446] One commenter worried that the "first in" approach would favor large shareholders, who have greater resources to prepare their submission materials, over small shareholders who must aggregate to reach the ownership threshold and need to pool resources to prepare their submission materials.[447]

Some commenters expressed general concern about how companies should handle multiple nominations received on the same date.[448] Two commenters worried that it would be difficult for companies to determine which nomination was received first because nominations could be submitted by various methods (*e.g.,* fax transmission, mail, hand delivery) or arrive on the same date.[449] Another commenter feared that a company that receives several nominations on the same date could choose the nomination submitted by shareholders friendly to management.[450]

Many commenters that opposed the first-in approach suggested alternatives. Of these, the majority preferred to give priority to the largest shareholder or group that submits a nomination.[451] Noting that the 2003 Proposal included this standard and that it received the most support, one commenter argued that what matters most is not who is the fastest to nominate but which shareholder or group has the "greatest stake in the director election and, ultimately, the long-term performance of the company" (with the added benefits of avoiding "gamesmanship" and "administrative challenges").[452] Further, commenters believed that an approach based on the largest holdings would provide sufficient certainty because the number of shares of the largest shareholder or group could be determined from the Schedule 14N filing.[453]

Commenters presented a wide range of views or recommendations for determining priority. Some commenters suggested that when the largest shareholder or group nominates fewer than the maximum number of nominees allowed under Rule 14a–11, then the second largest shareholder or group should have the right to have its nominees included (up to the maximum

[443] *See* letters from 13D Monitor; 26 Corporate Secretaries; ABA; ACSI; Advance Auto Parts; Aetna; AFL–CIO; AFSCME; Allstate; Alston & Bird; Amalgamated Bank; American Bankers Association; Anadarko; Applied Materials; Avis Budget; Blue Collar Investment Advisors ("BCIA"); Best Buy; Boeing; BorgWarner; Brink's; BRT; Burlington Northern; CalPERS; CalSTRS; Caterpillar; CFA Institute; Chevron; CIGNA; CII; Cleary; Con Edison; COPERA; Corporate Library; CSX; Cummins; Darden Restaurants; Deere; Devon; Dewey; T. DiNapoli; Dominican Sisters of Hope; DuPont; Eaton; Emerson Electric; ExxonMobil; FedEx; Financial Services Roundtable; First Affirmative; Florida State Board of Administration; FMC Corp.; FPL Group; Frontier; General Mills; A. Goolsby; Honeywell; IAM; IBM; ICI; Intel; JPMorgan Chase; Kirkland & Ellis; C. Levin; Leggett; LIUNA; LUCRF; Marco Consulting; J. McCoy; McDonald's; Joel M. McTague ("J. McTague"); MeadWestvaco; Mercy Investment Program; Metlife; Motorola; D. Nappier; Nathan Cummings Foundation; P. Neuhauser; Norfolk Southern; Norges Bank; Office Depot; OPERS; PACCAR Inc. ("PACCAR"); Pershing Square; PepsiCo; Pfizer; S. Quinlivan; RacetotheBottom; RiskMetrics; Ryder; Sara Lee; Social Investment Forum; Seven Law Firms; Shearman & Sterling; Sheet Metal Workers; Sidley Austin; SIFMA; Sisters of Mercy; Society of Corporate Secretaries; Sodali; Southern Company; SWIB; Teamsters; Tenet; TI; TIAA–CREF; Tri-State Coalition; Trillium; T. Rowe Price; Textron; tw telecom; Universities Superannuation; Ursuline Sisters of Tildonk; U.S. Bancorp; USPE; ValueAct Capital; Verizon; Wachtell; Walden; Wells Fargo; Weyerhaeuser; Whirlpool; WSIB; Xerox.

[444] *See* letters from ABA; BRT; Con Edison; First Affirmative; C. Levin; Verizon.

[445] Letter from ABA.

[446] *See* letter from BRT.

[447] *See* letter from Con Edison.

[448] *See* letters from IBM; S. Quinlivan; USPE; Verizon; Xerox.

[449] *See* letters from IBM; Verizon.

[450] *See* letter from USPE.

[451] *See* letters from 13D Monitor; 26 Corporate Secretaries; ABA (recommending this approach as one of several recommendations); ACSI; Advance Auto Parts; Aetna; AFL–CIO; AFSCME; Allstate; Amalgamated Bank; Anadarko; Applied Materials; Avis Budget; BCIA; Best Buy; Boeing; BorgWarner; Burlington Northern; CalPERS; CalSTRS; Caterpillar; CFA Institute; Chevron; CIGNA (recommending this approach as an alternative to another recommendation that the shareholder that held the shares the longest be given priority); CII; Cleary; Con Edison; COPERA; Corporate Library; Cummins; Darden Restaurants; Deere; Devon; Dominican Sisters of Hope; DuPont; Eaton; Emerson Electric; ExxonMobil; FedEx; Financial Services Roundtable; First Affirmative; Florida State Board of Administration (supporting this approach as an alternative to the first-in approach); FMC Corp.; Frontier; A. Goolsby; IAM; ICI; JPMorgan Chase; Kirkland & Ellis; C. Levin; Leggett; LIUNA; LUCRF; Marco Consulting; J. McCoy; McDonald's; J. McTague; Mercy Investment Program; Metlife; D. Nappier; Nathan Cummings Foundation; P. Neuhauser; Norfolk Southern; Office Depot; PACCAR; Pershing Square; PepsiCo; Pfizer; RiskMetrics; Ryder; Sara Lee; Shamrock; Social Investment Forum; Sodali; Seven Law Firms; Shearman & Sterling; Sheet Metal Workers; Sidley Austin; SIFMA; Sisters of Mercy; Society of Corporate Secretaries; Southern Company; SWIB; Teamsters; Tenet; TI; TIAA–CREF; Tri-State Coalition; Trillium; T. Rowe Price; Textron; tw telecom; Universities Superannuation; Ursuline Sisters of Tildonk; U.S. Bancorp; Verizon; Wachtell; Walden; Wells Fargo; Whirlpool; WSIB.

[452] Letter from CII.

[453] *See* letters from CII; Society of Corporate Secretaries.

number allowable), and so on.[454] Commenters also suggested that a nominating shareholder or group be required to "rank" their nominees in the order of preference to facilitate any necessary "cutbacks."[455]

A few commenters stated that in the case of competing nominations submitted by shareholders with equally-sized holdings, the shareholder that held the shares for the longest period of time should be allowed to include its nominees.[456] Two commenters recommended that when determining the order of priority, an individual shareholder should have priority over a nominating group.[457]

One commenter recommended that nominees be ordered in accordance with the largest qualifying shareholdings, but subject to the qualification that the Commission impose a cap on either the permitted number of members in a nominating group or on the aggregate holdings of a nominating group and limit each nominating shareholder or group to only one Rule 14a–11 nomination at an annual meeting.[458] If shareholders are not limited to one nomination, then companies should be allowed to order the nominees based on the largest holdings. Alternatively, the commenter recommended awarding Rule 14a–11 nomination slots first to the nominating shareholder or group with the largest holdings, next to the nominating shareholder or group with the longest holding period, then to the next largest holder, and so on.

One commenter stated that priority should be given to the largest nominating shareholder or group based on the number of voting securities over which such shareholder or group has voting control (as opposed to beneficial ownership).[459] Another commenter stated that in the case of nominating groups, the determination of the largest holder should be based on the largest shareholder within the nominating group.[460]

Other commenters recommended that the shareholder or group holding a company's shares for the longest period be permitted to submit nominees under Rule 14a–11.[461] These commenters argued that this approach would be more consistent with the Commission's stated goal of making Rule 14a–11 available to shareholders with a long-term interest.

Some commenters preferred to give priority based on a combination of factors, such as length of ownership and size of ownership stake.[462] Several commenters preferred to let companies (*e.g.,* the nominating committee) choose either the shareholder nominees or the method for deciding which shareholder nominees are included in the proxy materials when there are multiple nominations.[463] Under this approach, companies would disclose the method in the previous year's proxy statement or in a Form 8–K.

A small number of commenters supported the proposed first-in approach.[464] While understanding the concern about "a rush to the courthouse," one commenter indicated that this concern may not necessarily be justified because the "'first' proponent may have sufficiently prepared beforehand for the nomination process."[465] Further, the commenter believed that "[a]llowing the largest shareholder group to essentially trump the first smaller, but no less committed or relevant, shareholder submission is not good governance." Another commenter believed that the first-in approach would best give effect to the proposed rule.[466] If the standard was based on the amount of securities held instead, the commenter would be concerned that long-term owners of companies with index-tracking portfolios might be frozen out of the process. One commenter believed the first-in approach would provide certainty, but companies should be required to set the dates in calendar form and announce the dates in Form 8–K filings at least 30 days prior to the date of effectiveness.[467]

After considering the comments, we have revised the manner in which the rule addresses multiple qualifying nominations. Rather than a first-in standard, as was proposed, a company will be required to include in its proxy materials the nominee or nominees of the nominating shareholder or group with the highest qualifying voting power percentage.[468] In this regard, in light of the comments received, we are concerned that a first-in standard would result in shareholders rushing to submit nominations, discourage constructive dialogue between shareholders and management, and encourage gamesmanship among possible nominating shareholders or groups. When there are multiple qualifying nominations, giving priority to the shareholder or group with the highest voting power percentage is consistent with our overall approach to facilitate director nominations by shareholders with significant commitments to companies. Finally, we seek to avoid the confusion that could result if multiple nominating shareholders or groups submitted their notices on the same day.

We believe that the standard we are adopting, under which the nominating shareholder or group with the highest qualifying voting power percentage will have its nominees included in the company's proxy materials, up to the maximum of 25% of the board, addresses these concerns. We are persuaded that this standard is more consistent with the other limitations of Rule 14a–11 that seek to balance facilitating shareholder rights to nominate directors with practical considerations.

As adopted, Rule 14a–11 addresses situations where more than one shareholder or group would be eligible to have its nominees included on the company's proxy card and disclosed in its proxy statement pursuant to the rule. Given that we are adopting a highest qualifying voting power percentage standard rather than a first-in standard, the company will determine which shareholders' nominees it must include in its proxy statement and on its proxy card by considering which eligible nominating shareholder or group has the highest qualifying voting power percentage, as opposed to which eligible nominating shareholder or group submitted a timely notice first. A company will be required to include in its proxy statement and on its proxy card the nominee or nominees of the nominating shareholder or group with

[454] *See* letters from Amalgamated Bank; CII; COPERA; P. Neuhauser; Protective; T. Rowe Price.

[455] *See* letters from Amalgamated Bank; CFA Institute; CII; COPERA; P. Neuhauser; Protective; T. Rowe Price.

[456] *See* letters from Allstate; Boeing; Pfizer.

[457] *See* letters from Honeywell; Sara Lee.

[458] *See* letter from ABA.

[459] *See* letter from Kirkland & Ellis.

[460] *See* letter from Seven Law Firms.

[461] *See* letters from BRT; CIGNA (recommending this approach as an alternative to its recommendation that the largest shareholder be given priority); Cummins; Darden Restaurants; FPL Group; General Mills; IBM (recommending this approach as an alternative to its recommendation that the largest shareholder be given priority); Motorola; TIAA–CREF; Xerox.

[462] *See* letters from L. Dallas; T. DiNapoli; Nathan Cummings Foundation; OPERS; Southern Company.

[463] *See* letters from Alston & Bird; CSX; Textron.

[464] *See* letters from Calvert; Florida State Board of Administration; Hermes Equity Ownership Services Ltd. ("Hermes"); Protective.

[465] Letter from Calvert.

[466] See letter from Hermes.

[467] *See* letter from Florida State Board of Administration.

[468] *See* Rule 14a–11(e). Rule 14a–11(e)(4) prescribes a limited variation on this principle where the company has more than one class of voting shares subject to the proxy rules and eligible nominating shareholders or shareholder groups from more than one of those classes submit nominations that exceed the 25% maximum. In this circumstance, priority of nominations will be determined by reference to the relative voting power of the classes in question.

the highest qualifying voting power percentage in the company's securities as of the date of filing the Schedule 14N, up to and including the total number of shareholder nominees required to be included by the company.[469] Where the nominating shareholder or group with highest qualifying voting power percentage that is otherwise eligible to use the rule and that filed a timely notice does not nominate the maximum number of directors allowed under the rule, the nominee or nominees of the nominating shareholder or group with the next highest qualifying voting power percentage that is otherwise eligible to use the rule and that filed a timely notice of intent to nominate a director pursuant to the rule would be included in the company's proxy materials, up to and including the total number of shareholder nominees required to be included by the company. This process would continue until the company included the maximum number of nominees it is required to include in its proxy statement and on its proxy card or the company exhausts the list of eligible nominees. If the number of eligible nominees exceeds the maximum number required under Rule 14a–11 and the shareholder or group with the next highest qualifying voting power percentage submitted more nominees than there are remaining available director slots, the nominating shareholder would have the option to specify which of its nominees are to be included in the company's proxy materials.[470]

b. Priority When a Nominating Shareholder or Group or a Nominee Withdraws or Is Disqualified

Under the Proposal, we did not address what would be expected of a company if a nominating shareholder or group or nominee withdraws or is disqualified after the company has provided notice to the nominating shareholder or group of its intent to include the nominee in the company's proxy materials. One commenter asked for guidance on how to handle such situations.[471] Another commenter stated that it opposed allowing a nominating shareholder group to change its composition to correct an identified deficiency, such as a failure of the group to meet the requisite ownership threshold.[472] Two commenters believed that if any member of a nominating shareholder group becomes ineligible due to a failure to own the requisite number of shares, then the entire group and its nominee also should be ineligible to use Rule 14a–11.[473] On the other hand, one commenter recommended that a nominating shareholder group should be allowed to change its composition to correct an identified deficiency, such as the failure of the group to meet the requisite threshold.[474] The commenter also addressed a situation in which a nominating shareholder group qualifies to use Rule 14a–11, provides the necessary notice, submits its nominees, but then becomes disqualified before the meeting at which its nominees would have been put to a shareholder vote. The commenter stated that while it "generally believe[s] that the nominating shareowner should have a short window within which to add a shareowner who would meet all eligibility requirements, a lapse that cannot be cured in that fashion should be remedied by going to the 'second' candidate(s)."

Consistent with the Proposal, under our final rules, neither the composition of the nominating shareholder group nor the shareholder nominee may be changed as a means to correct a deficiency identified in the company's notice to the nominating shareholder or nominating shareholder group—those matters must remain as they were described in the notice to the company.[475] We believe that to allow otherwise could serve to undermine the purpose of the notice deadline provided for in the rule. Thus, a nominating shareholder or group should be sure that it and its nominees meet the requirements of the rule—including the ownership and holding period requirements—before it files its Schedule 14N, as a nominating shareholder or group will not be permitted to add or substitute another shareholder or nominee in order to satisfy the requirements.[476]

In the Proposing Release, we solicited comment on how we should address situations where a nomination is submitted and the nominating shareholder subsequently becomes ineligible under the rule. We also sought comment as to the circumstances under which a second shareholder or group should be able to have its nominees included in a company's proxy materials. Some commenters stated that if a nominating shareholder or group does not remain eligible, the company should be allowed to withdraw the nominating shareholder's or group's candidate from its proxy materials.[477] Some commenters believed that a company should not be required to include a substitute shareholder nominee if the original shareholder nominee is excluded by a company after receiving a no-action letter from the Commission staff regarding the nomination, is withdrawn by the nominating shareholder or group, or otherwise becomes ineligible.[478] These commenters generally argued that a company would not have enough time to seek the exclusion of such a substitute nominee. Still other commenters argued that a nominating shareholder or group should be allowed to submit a new nominee if its original nominee is determined to be ineligible,[479] especially if the company sought and obtained a no-action letter from the staff concerning the company's determination to exclude the nominee.[480] One commenter worried that a prohibition on substitute shareholder nominees would encourage an unduly adversarial approach by both sides.[481] Another commenter recommended that if the first nominating shareholder or group becomes ineligible, then the nominating shareholder or group with the second-largest holdings should be allowed to submit their own nominees.[482]

Our final rule provides that if a nominating shareholder or group withdraws or is disqualified (*e.g.,* because the nominating shareholder or a member of the group[483] failed to

[469] *See* new Rule 14a–11(e) and proposed Rule 14a–11(d)(3).

[470] *See* Instruction 2 to new Rule 14a–11(e).

[471] *See* letter from Best Buy.

[472] *See* letter from ABA.

[473] *See* letters from CFA Institute; Verizon.

[474] *See* letter from CII.

[475] *See* Instruction 2 to Rule 14a–11(g) and proposed Rule 14a–11(f)(6).

[476] In this regard, we note that if a member of a nominating shareholder group withdraws, the nominating shareholder group and its nominee or nominees would continue to be eligible so long as the group continues to meet the requirements of the rule. If the withdrawal of a member of the nominating shareholder group would result in the group failing to meet the ownership threshold, a company would no longer be required to include any nominees submitted by the nominating shareholder group. As another example, if after a nominating shareholder or group submits one nominee for inclusion in a company's proxy materials and the nominee subsequently withdraws or is disqualified, a company will not be required to include a substitute nominee from that nominating shareholder or group.

[477] *See* letters from BorgWarner; Society of Corporate Secretaries.

[478] *See* letters from 26 Corporate Secretaries; ABA; Allstate; American Express; BorgWarner; DTE Energy; Dupont; FPL Group; Honeywell; IBM; Pfizer; RiskMetrics; Seven Law Firms; Society of Corporate Secretaries; Xerox.

[479] *See* letters from AFL–CIO; P. Neuhauser; USPE.

[480] *See* letter from P. Neuhauser.

[481] *See* letter from Universities Superannuation.

[482] *See* letter from CFA Institute.

[483] If one member of a group becomes ineligible to use the rule but the group continues to qualify to use the rule without that member, the group would remain eligible overall.

continue to hold the qualifying amount of securities) after the company provides notice to the nominating shareholder or group of the company's intent to include the nominee or nominees in its proxy materials, the company will be required to include in its proxy statement and form of proxy the nominee or nominees of the nominating shareholder or group with the next highest voting power percentage that is otherwise eligible to use the rule and that filed a timely notice in accordance with the rule, if any.[484] This process would continue until the company included the maximum number of nominees it is required to include in its proxy materials or the company exhausts the list of eligible nominees.

If a nominee withdraws or is disqualified after the company provides notice to the nominating shareholder or group of the company's intent to include the nominee in its proxy materials, the company will be required to include in its proxy materials any other eligible nominee submitted by that nominating shareholder or group.[485] If that nominating shareholder or group did not include any other nominees in its notice filed on Schedule 14N, then the company will be required to include the nominee or nominees of the nominating shareholder or group with the next highest voting power percentage that is otherwise eligible to use the rule and that filed a timely notice in accordance with the rule, if any, until the maximum number of nominees is included in the company's proxy materials or the list of eligible nominees is exhausted.

We believe that these requirements are appropriate in order to give effect to the intent of our rule—to facilitate shareholders' ability to nominate and elect directors. If the nominating shareholder or group with the highest voting power percentage used all available Rule 14a–11 nominations in a company's proxy materials and the nominating shareholder or group with the second highest voting power percentage had its nominees excluded even after one or more nominees from the nominating shareholder or group with the highest voting power percentage withdrew or was disqualified, we believe the purpose of our rule would be undermined. However, in order to address practical considerations, Rule 14a–11(e)(2) provides that once a company has commenced printing its proxy materials it will not be required to include a substitute nominee or nominees. We believe that at that point in the process it would be too difficult and costly for a company to change course to include a new nominee or nominees. If a nominating shareholder or group or nominee withdraws or is disqualified after the company has commenced printing its proxy materials, the company may determine whether it wishes to print (and furnish) additional materials and a proxy card, delete the disqualified or withdrawn nominee, or instead provide disclosure through additional soliciting materials informing shareholders about the change.[486]

8. Notice on Schedule 14N

a. Proposed Notice Requirements

As proposed, in order to submit a nominee for inclusion in the company's proxy statement and form of proxy, Rule 14a–11 would require that the nominating shareholder or group provide a notice on Schedule 14N to the company of its intent to require that the company include that shareholder's or group's nominee or nominees in the company's proxy materials.[487] The shareholder notice on Schedule 14N also would be required to be filed with the Commission on the date it is first sent to the company.

We proposed to require the notice to be provided to the company and filed with the Commission by the date specified in the company's advance notice bylaw provision, or where no such provision is in place, no later than 120 calendar days before the date the company mailed its proxy materials for the prior year's annual meeting. If the company did not hold an annual meeting during the prior year, or if the date of the meeting changes by more than 30 calendar days from the prior year, the nominating shareholder must provide notice a reasonable time before the company mails its proxy materials. The company would be required to disclose the date by which the shareholder must submit the required notice in a Form 8–K filed pursuant to proposed Item 5.07 within four business days after the company determines the anticipated meeting date.[488]

As proposed, the notice on Schedule 14N would include disclosures relating to the nominating shareholder's or group's interest in the company, length of ownership, and eligibility to use Rule 14a–11. The notice on Schedule 14N also would include disclosure required by proposed Rule 14a–18 about the nominating shareholder or group and the nominee for director, as well as disclosure regarding the nature and extent of relationships between the nominating shareholder or group and nominee or nominees and the company. The disclosure provided by the nominating shareholder or group would be similar to the disclosure currently required in a contested election and would be included by the company in its proxy materials.

In addition, as proposed, the notice on Schedule 14N also would include the following representations by the nominating shareholder or group:

- The nominee's candidacy or, if elected, board membership, would not violate controlling State or Federal law, or rules of a national securities exchange or national securities association other than rules relating to director independence;[489]
- The nominating shareholder or group satisfies the eligibility conditions in Rule 14a–11;[490]
- In the case of a company other than an investment company, the nominee meets the objective criteria for "independence" of the national securities exchange or national securities association rules applicable to the company, if any, or, in the case of a company that is an investment company, the nominee is not an "interested person" of the company as defined in Section 2(a)(19) of the Investment Company Act of 1940;[491] and
- Neither the nominee nor the nominating shareholder (or any member of a nominating shareholder group) has an agreement with the company regarding the nomination of the nominee.[492]

Proposed Item 8 of Schedule 14N would have required a certification from the nominating shareholder or each member of the nominating shareholder

[484] *See* new Rule 14a–11(e)(2).

[485] *See* new Rule 14a–11(e)(3).

[486] We note that pursuant to Exchange Act Rule 14a–4(c)(5) a completed proxy card containing a disqualified or withdrawn nominee or nominees could, under certain circumstances, confer discretionary authority to vote on the election of a substitute director or directors.

[487] *See* proposed Rule 14a–11(c), Rule 14a–18 and Rule 14n–1.

[488] *See* proposed Instruction 2 to Rule 14a–11(a) and proposed Rule 14a–18.

[489] *See* proposed Rule 14a–18(a). Proposed Rule 14a–11 also included this provision as a direct requirement. Thus, a company would not be required to include a shareholder nominee in its proxy materials if the nominee's candidacy or, if elected, board membership would violate controlling State law, Federal law, or rules of a national securities exchange or national securities association (other than rules of a national securities exchange or national securities association that set forth requirements regarding the independence of directors).

[490] *See* proposed Rule 14a–18(b) (which referred to the requirements in proposed Rule 14a–11(b)).

[491] *See* proposed Rule 14a–18(c).

[492] *See* proposed Rule 14a–18(d).

group that the securities used for purposes of meeting the ownership threshold in Rule 14a–11 are not held for the purpose, or with the effect, of changing control of the company or to gain more than a limited number of seats on the board.

b. Comments on the Proposed Notice Requirements

Commenters generally supported the proposed content requirements of Schedule 14N on the general principle that the Commission should impose disclosure requirements on nominating shareholders and their nominees.[493] Two of these commenters also stated that additional disclosures or representations are not needed.[494] In addition, some commenters recommended that all nominees be subject to any new disclosure rules adopted by the Commission as part of its proxy disclosure and solicitation enhancements rulemaking.[495] Four commenters asked that companies be allowed to require additional disclosure from a nominating shareholder or group through, for example, the advance notice bylaws, as long as such requirements are consistent with State law.[496] One commenter argued that the nominating shareholder, group, or nominee should provide any disclosure required under a company's governing documents as long as such disclosure is required of all nominees.[497] One commenter asked that all content requirements be set forth in Schedule 14N itself, as it found the structure of the Schedule and the references to disclosure requirements to be unnecessarily complicated.[498] The commenter recommended that we include a requirement that the nominating shareholder or group disclose information about the nature and extent of the relationships between the nominating shareholder, group and the nominee and the company or its affiliates.[499] Another commenter recommended the rules include a representation that the nominee is not controlled by the nominating shareholder or group.[500]

We also sought comment on the proposed representations to be provided by the nominating shareholder or group in Schedule 14N. One commenter stated that the proposed representations are appropriate and no additional representations are needed.[501] This commenter opposed a requirement for a shareholder nominee to make any representation either in addition to, or instead of, those made by the nominating shareholder or group. One commenter stated simply that none of the proposed representations in Schedule 14N should be eliminated.[502] It also observed generally that the shareholder nominee should be required to make the representations (*e.g.,* regarding independence) because he or she would know the facts relating to the representations and therefore should accept responsibility. One commenter opposed the requirement for a representation that a shareholder nomination (or election of the shareholder nominee) would not violate State law, Federal law, or listing standards.[503] The commenter also believed it would be inappropriate to require a representation that the nomination complies with any independence requirement under Federal law, State law, or listing standards.

c. Adopted Notice Requirements

We are adopting the notice requirements substantially as proposed, with differences noted below. In addition, we agree that the rules as proposed could be streamlined to reduce complexity. As adopted, Schedule 14N will contain the disclosure items that were included in the Schedule as proposed, as well as the disclosures proposed in Rule 14a–11, Rule 14a–18 and Rule 14a–19. We believe that the disclosure requirements we are adopting will provide transparency and facilitate shareholders' ability to make an informed voting decision on a shareholder director nominee or nominees without being unnecessarily burdensome on nominating shareholders or groups.

i. Disclosure

Schedule 14N will require a nominating shareholder or group to provide the following information about the nominating shareholder or group and the nominee:[504]

- The name and address of the nominating shareholder or each member of the nominating shareholder group;
- Information regarding the amount and percentage of securities held and entitled to vote on the election of directors at the meeting and the voting power derived from securities that have been loaned or sold in a short sale that remains open, as specified in Instruction 3 to Rule 14a–11(b)(1);[505]
- A written statement from the registered holder of the shares held by the nominating shareholder or each member of the nominating shareholder group, or the brokers or banks through which such shares are held, verifying that, within seven calendar days prior to submitting the notice on Schedule 14N to the company, the shareholder continuously held the qualifying amount of securities for at least three years;[506]
- A written statement of the nominating shareholder's or group's intent to continue to hold the qualifying amount of securities through the shareholder meeting at which directors are elected. Additionally, the nominating shareholder or group would provide a written statement regarding the nominating shareholder's or group's intent with respect to continued ownership after the election;[507]
- A statement that the nominee consents to be named in the company's proxy statement and form of proxy and, if elected, to serve on the board of directors;[508]
- Disclosure about the nominee as would be provided in response to the disclosure requirements of Items 4(b), 5(b), 7(a), (b), and (c) and, for investment companies, Item 22(b) of Schedule 14A, as applicable;[509]
- Disclosure about the nominating shareholder or each member of a nominating shareholder group as would be required in response to the disclosure

[493] *See* letters from ABA; Alston & Bird; Americans for Financial Reform; CalSTRS; CFA Institute; CII; Corporate Library; Dominican Sisters of Hope; Florida State Board of Administration; GovernanceMetrics; ICI; Mercy Investment Program; Protective; RiskMetrics; Sisters of Mercy; Tri-State Coalition; Ursuline Sisters of Tildonk; USPE; Walden.

[494] *See* letters from CII; USPE.

[495] *See* letters from ABA; Alaska Air; Robert A. Bassett ("R. Bassett"); BorgWarner; Eli Lilly; NACD; O'Melveny & Myers; Pfizer; Society of Corporate Secretaries; UnitedHealth.

[496] *See* letters from ABA; Chevron; Sidley Austin; SIFMA.

[497] *See* letter from Cleary.

[498] *See* letter from ABA.

[499] *Id.*

[500] *See* letter from IBM.

[501] *See* letter from CII.

[502] *See* letter from ABA.

[503] *See* letter from USPE.

[504] The disclosure requirements proposed in Rule 14a–18(e)–(*l*) are now contained in new Item 4(b) and new Item 5 of Schedule 14N.

[505] See Item 3 of new Schedule 14N.

[506] *See* Item 4(a) of new Schedule 14N. A nominating shareholder would not be required to provide this statement if the nominating shareholder is the registered holder of the shares or is attaching or incorporating by reference a previously filed Schedule 13D, Schedule 13G, Form 3, Form 4, and/or Form 5, or amendments to those documents to prove ownership.

[507] *See* Item 4(b) of new Schedule 14N. These requirements were proposed in Rule 14a–18(f) and Item 5(b) of Schedule 14N.

[508] *See* Item 5(a) of new Schedule 14N and proposed Rule 14a–18(e).

[509] *See* Item 5(b) of new Schedule 14N and proposed Rule 14a–18(g).

requirements of Items 4(b) and 5(b) of Schedule 14A, as applicable;[510]

• Disclosure about whether the nominating shareholder or any member of a nominating shareholder group has been involved in any legal proceeding during the past ten years, as specified in Item 401(f) of Regulation S–K;[511]

• Disclosure about whether, to the best of the nominating shareholder's or group's knowledge, the nominee meets the director qualifications set forth in the company's governing documents, if any;[512]

• A statement that, to the best of the nominating shareholder's or group's knowledge, in the case of a company other than an investment company, the nominee meets the objective criteria for "independence" of the national securities exchange or national securities association rules applicable to the company, if any, or, in the case of a company that is an investment company, the nominee is not an "interested person" of the company as defined in Section 2(a)(19) of the Investment Company Act of 1940;[513]

• Disclosure about the nature and extent of the relationships between the nominating shareholder or group, the nominee, and/or the company or any affiliate of the company,[514] such as:

• Any direct or indirect material interest in any contract or agreement between the nominating shareholder or any member of the nominating shareholder group, the nominee, and/or the company or any affiliate of the company (including any employment agreement, collective bargaining agreement, or consulting agreement);

• Any material pending or threatened litigation in which the nominating shareholder or any member of the nominating shareholder group and/or the nominee is a party or a material participant, and that involves the company, any of its officers or directors, or any affiliate of the company; and

• Any other material relationship between the nominating shareholder or any member of the nominating shareholder group, the nominee, and/or the company or any affiliate of the company not otherwise disclosed;[515]

• Disclosure of any Web site address on which the nominating shareholder or group may publish soliciting materials;[516] and

• If desired to be included in the company's proxy statement, a statement in support of the shareholder nominee or nominees, which may not exceed 500 words per nominee.[517]

The disclosure provided by the nominating shareholder or group in Item 5 of Schedule 14N would be included by the company in its proxy materials,[518] along with the company's disclosure in response to Items 4(b) and 5(b) of Schedule 14A.[519]

In a traditional proxy contest, shareholders receive the disclosure required by Items 4(b), 5(b), 7, and 22, as applicable, of Schedule 14A from both the company and the insurgent when the contest relates to an annual election of directors. The new Schedule 14N disclosure requirements are somewhat more expansive in that they also include the disclosures concerning ownership amount, length of ownership, intent to continue to hold the shares through the date of the meeting and with respect to continued ownership after the meeting, and disclosure regarding the nature and extent of the relationships between the nominating shareholder or group and nominee and the company or any affiliate of the company. We believe that these disclosures will assist shareholders in making an informed voting decision with regard to any nominee or nominees put forth by the nominating shareholder or group using Rule 14a–11, in that the disclosures will enable shareholders to gauge the nominating shareholder's or group's interest in the company, longevity of ownership, and intent with regard to continued ownership in the company. These disclosures also will be important to the company in determining whether the nominating shareholder or group is eligible to rely on Rule 14a–11 to require the company to include a nominee or nominees in the company's proxy materials.

In some cases, the requirements in new Schedule 14N are slightly different than we proposed. We have clarified that the nominating shareholder or group will be required to include disclosure in the Schedule 14N concerning specified relationships between the nominating shareholder or group and the nominee or nominees. As discussed in Section II.B.5.d. above, we received comment suggesting that, in the absence of a limitation on relationships between the nominating shareholder or group and their nominee or nominees, we should adopt a disclosure requirement concerning relationships between the parties.[520] Similarly, and as discussed in Section II.B.5.b., we have added a requirement that a nominating shareholder or group disclose whether, to the best of their knowledge, the nominating shareholder's or group's nominee meets the company's director qualifications, if any, as set forth in the company's governing documents.[521] We added this requirement because we believe that this information will be useful to shareholders in making a voting

[510] *See* Item 5(c) of new Schedule 14N and proposed Rule 14a–18(h). If a nominating shareholder is organized in a form other than a corporation or partnership, comparable disclosure with respect to persons in similar capacities would be required.

[511] *See* Item 5(d) of new Schedule 14N and proposed Rule 14a–18(i). As proposed, the rule would have required disclosure regarding a nominating shareholder's involvement in any legal proceedings during the past five years. Recently, the Commission amended Item 401(f) of Regulation S–K to require disclosure regarding involvement in legal proceedings for the prior ten years. *See Proxy Disclosure Enhancements,* Release No. 33–9089; 34–61175 (Dec. 16, 2009) [74 FR 68334] ("Proxy Disclosure Enhancements Adopting Release"). Accordingly, as adopted, Item 5(d) will require disclosure about a nominating shareholder's involvement in legal proceedings during the past ten years.

[512] *See* Item 5(e) of new Schedule 14N.

[513] *See* Item 5(f) of new Schedule 14N.

[514] We note that this disclosure requirement would apply to relationships between the nominating shareholder or group and the nominee, as well as the relationships between the nominating shareholder or group or the nominee and the company or its affiliates. *See* Item 5(g) of new Schedule 14N.

[515] *See* Item 5(g) of new Schedule 14N and proposed Rule 14a–18(j).

[516] *See* Item 5(h) of new Schedule 14N and proposed Rule 14a–18(k).

[517] *See* Item 5(i) of new Schedule 14N and proposed Rule 14a–18(*l*). This requirement is discussed in more detail in this section. If a nominating shareholder or group submits a statement in support that exceeds 500 words per nominee, a company will be required to include the nominee or nominees, provided that the eligibility requirements are met, but may exclude the statement in support from its proxy materials pursuant to Rule 14a–11(g). In this instance, the company would provide notice to the staff and could, if desired, seek a no-action letter from the staff. *See* new Rule 14a–11(c) and Rule 14a–11(g). The 500 words would be counted in the same manner as words are counted under Rule 14a–8. Any statements that are, in effect, arguments in support of the nomination would constitute part of the supporting statement. Accordingly, any "title" or "heading" that meets this test would be counted toward the 500-word limitation. Inclusion of a Web site address in the supporting statement would not violate the 500-word limitation; rather, the Web site address would be counted as one word for purposes of the 500-word limitation.

[518] *See* Item 7(e) of Schedule 14A. Similarly, if a company receives a nominee for inclusion in its proxy materials pursuant to a procedure set forth under applicable state or foreign law, or the company's governing documents providing for the inclusion of shareholder director nominees in the company's proxy materials, the disclosure provided by the nominating shareholder or group in response to Item 6 of Schedule 14N would be included in the company's proxy materials. *See* Item 7(f) of Schedule 14A.

[519] Instruction 3 to Rule 14a–12(c) clarifies that though inclusion of a nominee pursuant to Rule 14a–11 or solicitations by a nominating shareholder or nominating shareholder group that are made in connection with that nomination would constitute solicitations in opposition subject to Rule 14a–12(c), they would not be treated as such for purposes of Exchange Act Rule 14a–6(a).

[520] *See* letters from CII; IBM; O'Melveny & Myers; SIFMA; UnitedHealth.

[521] *See* Item 5(e) of new Schedule 14N.

decision by enabling them to consider whether shareholder nominees would meet a company's director qualifications. Shareholders will provide this disclosure "to the best of their knowledge" to address the fact that the standards will be company standards and thus could be subject to interpretation.

We also have added an instruction to Item 4 of Schedule 14N to provide a form of written statement that may be used for verifying the amount of securities held by the nominating shareholder, and that the qualifying amount of securities has been held continuously for at least three years.[522] A statement will be required from a nominating shareholder that is not the registered holder of the securities and is not proving ownership by providing previously filed Schedules 13D or 13G, or Forms 3, 4, or 5. We believe that providing a form of written statement will make it easier for nominating shareholders and the persons through which they hold their securities to comply with the requirement and reduce complexity for shareholders and companies in determining whether satisfactory proof of ownership has been provided.[523] In addition, as noted above, Item 5(d) will require disclosure about each nominating shareholder's involvement in legal proceedings during the past ten years rather than the past five years as proposed, consistent with the changes recently adopted by the Commission for board nominees in general.

In connection with our revisions to the rule concerning calculation of ownership, we also have added new Items 3(c) and (d) to the Schedule 14N to require disclosure of the voting power attributable to securities that have been loaned or sold in a short sale that is not closed out, or that have been borrowed for purposes other than a short sale, as specified in Instruction 3 to Rule 14a–11(b)(1).

Finally, as proposed, a nominating shareholder or group could provide a statement in support of a shareholder nominee or nominees, which could not exceed 500 words if the nominating shareholder or group elects to have such a statement included in the company's proxy materials. Two commenters stated that a limit of 500 words would be appropriate,[524] five commenters recommended that a nominating shareholder or group be permitted to include a supporting statement of more than 500 words,[525] and four commenters proposed a limit of either 750 or 1000 words.[526] We believe it is appropriate to allow a nominating shareholder or group to provide a statement in support of the shareholder nominee or nominees which may not exceed 500 words for each nominee, rather than 500 words for all nominees in total,[527] if the nominating shareholder or group elects to have such a statement included in the company's proxy materials. We believe that a limitation of 500 words per nominee is sufficient for a nominating shareholder or group to express their support for a nominee. In this regard, we note that shareholders and companies are familiar with the 500 word limitation, as it is the limit on the number of words that may be used to support a shareholder proposal submitted under Rule 14a–8. While we believe it is appropriate to limit the length of the supporting statement that the company is required to include, we note that if a nominating shareholder or group wishes to provide additional information, it is free to do so in supplemental materials, provided it complies with the requirements of Rule 14a–2(b)(8). If a nominating shareholder or group submits a statement in support that exceeds 500 words per nominee, a company will be required to include the nominee or nominees, provided that the eligibility requirements are met, but the company may exclude the statement in support from its proxy materials provided it provides notice to the staff of its intent to do so.[528]

As noted above, we proposed to require certain representations to be provided in the Schedule 14N, either in the form of representations or as certifications. As adopted, we are including the proposed representations and certifications as direct requirements in Rule 14a–11.[529] Consequently, we have simplified the requirements so that under the final rules a nominating shareholder or group will be required to certify, in its notice on Schedule 14N filed with the Commission, that it does not have a change in control intent or an intent to gain more than the maximum number of board seats provided for under Rule 14a–11 and that the nominating shareholder and the nominee satisfies the applicable requirements of Rule 14a–11.[530] We have retained the certification with regard to no change in control intent or intent to gain more than the maximum number of board seats provided for under Rule 14a–11, even though this is also a direct requirement in Rule 14a–11 as adopted, because we believe it is important to highlight this requirement for nominating shareholders or groups signing the certification. As was proposed, the nominating shareholder or each member of the nominating shareholder group (or authorized representative) will be required to certify when signing the Schedule 14N that, "after reasonable inquiry and to the best of my knowledge and belief," the information in the statement is "true, complete and correct." Though all disclosure in the Schedule 14N would be covered by this representation, we have specifically included it in the certifications concerning compliance with the requirements of Rule 14a–11 as well.

We have revised the rule to delete the provision that had the effect of allowing exclusion of a nominee if any required representation or certification was materially false or misleading.[531] Rather than allowing companies to exclude Rule 14a–11 nominees on that basis, we believe companies should address any concerns regarding false or misleading disclosures through their own disclosures, as in traditional proxy contests. This change will limit the bases on which a company may exclude a nominee,[532] but we emphasize that the nominating shareholder or group will

[522] *See* the Instruction to Item 4 of new Schedule 14N.

[523] In this regard, we note that providing proper proof of ownership has proved to be an area of confusion for some shareholder proponents using Rule 14a–8 who must obtain a written statement from the "record" holder of the proponent's securities. Thus, we believe that providing a form of written statement that may be used to provide proof of ownership for purposes of Rule 14a–11(b)(3) will alleviate any potential confusion that could arise in this context.

[524] *See* letters from CII; Florida State Board of Administration.

[525] *See* letters from ACSI; AFSCME; Hermes; Pax World; USPE.

[526] *See* letters from AFSCME; L. Dallas; P. Neuhauser; USPE.

[527] We are adopting this modification in Item 5(i) of Schedule 14N.

[528] *See* new Rule 14a–11(c) and Rule 14a–11(g).

[529] *See also* Section II.B.4. and Section II.B.5. above, regarding nominating shareholder and nominee eligibility.

[530] *See* new Rule 14a–11(b)(11) and Item 8(a) of new Schedule 14N. We note that in some cases, an authorized representative may file a Schedule 14N for each member of a nominating shareholder group and would provide the required disclosures and certifications. In such cases, each member of the nominating shareholder group represented by the authorized representative will be deemed to have provided the certifications.

[531] *See* proposed Rule 14a–11(a)(5).

[532] *See* Section II.B.9. below for a discussion of the requirements for a company receiving a nomination submitted pursuant to Rule 14a–11 and the process for seeking a staff no-action letter with respect to a company's decision to exclude a nominee. As noted below, assertions that a certification or disclosure provided by a nominating shareholder or group is false or misleading will not be a basis for excluding a nominee or nominees. A company seeking a no-action letter from the staff with regard to a determination to exclude a nominee or nominees would need to assert that a requirement of the rule has not been met.

have Rule 14a–9 liability for any statement included in the Schedule 14N or which it causes to be included in a company's proxy materials which, at the time and in light of the circumstances under which it is made, is false or misleading with respect to any material fact or that omits to state any material fact necessary to make the statements therein not false or misleading. In addition, as discussed in Section II.E. below, we have provided in the final rules that the company is not responsible for the information provided by the nominating shareholder or group in its Schedule 14N and included by the company in its proxy materials.

ii. Schedule 14N Filing Requirements

We proposed to require the notice to be provided to the company and filed with the Commission by the date specified in the company's advance notice bylaw provision, or where no such provision is in place, no later than 120 calendar days before the date the company mailed its proxy materials for the prior year's annual meeting. A significant number of commenters suggested using a uniform deadline for all companies, as is the case in Rule 14a–8.[533] Many of these commenters believed that the proposed timing requirement would create difficulties for companies with advance notice bylaws providing a later deadline and, thus, would preclude those companies from engaging in the proposed staff process.[534] Some commenters supported the proposed default 120 calendar day deadline,[535] while others argued that the 120 calendar day deadline would provide too little time for companies.[536] Some commenters worried that the proposed deadline would not give sufficient time for companies to resolve any eligibility issues presented by potential nominees, including resolution through the Rule 14a–11 no-action process, Commission appeals, and litigation.[537]

We are adopting a uniform deadline of no later than 120 calendar days before the anniversary of the date that the company mailed its proxy materials for the prior year's annual meeting for all companies subject to the rule.[538] We believe that a uniform deadline will benefit shareholders by providing them with one standard to comply with at all companies and should address concerns of companies that an advance notice bylaw deadline would provide too little time. We also believe that a deadline of 120 calendar days will provide adequate time for companies to take the steps necessary to include or, where appropriate, to exclude a shareholder nominee for director that is submitted pursuant to Rule 14a–11.[539]

In the Proposing Release, we solicited comment as to whether a window period should be provided for the submission of the notice on Schedule 14N and the appropriate time period for the window. A number of commenters recommended a window period during which a nominating shareholder or group could submit its Rule 14a–11 nomination.[540] These commenters believed that including such a requirement would prevent a race to file among shareholders that could discourage dialogue with the board and force the board to address nominations throughout the year.[541] We agree and are adopting a window period for the submission of the notice to the company. Limiting the time period during which Rule 14a–11 nominations could be made should help reduce disruptions that might occur when a company receives shareholder nominations for director submitted pursuant to Rule 14a–11. In this regard, as noted above, commenters generally supported a 30-day window period. We believe that a window of 30 days is sufficient for the submission of the notice on Schedule 14N because it provides shareholders with an opportunity to submit a nomination, as well as the opportunity to consider any nominations that have been submitted and whether the shareholder would like to submit a nomination, either individually or as a group. Therefore, we are adopting a requirement that the notice on Schedule 14N be transmitted to the company and filed with the Commission no earlier than 150 calendar days, and no later than 120 calendar days, before the anniversary of the date that the company mailed its proxy materials for the prior year's annual meeting. As proposed, we are adopting a requirement that if the company did not hold an annual meeting during the prior year, or if the date of the meeting has changed by more than 30 calendar days from the prior year, then the nominating shareholder must provide notice a reasonable time before the company mails its proxy materials.[542] In that case,

[533] *See* letters from 26 Corporate Secretaries; ABA; Alaska Air; American Express; Anadarko; Boeing; BorgWarner; BRT; Caterpillar; CIGNA; CII; Dewey; Florida State Board of Administration; FPL Group; Honeywell; JPMorgan Chase; Keating Muething; P. Neuhauser; PepsiCo; Pfizer; Praxair; Schulte Roth & Zabel; Seven Law Firms; Shearman & Sterling; Sidley Austin; Society of Corporate Securities; Thompson Hine LLP ("Thompson Hine"); TI; USPE; Wells Fargo; Xerox.

[534] *See* letters from ABA; Alaska Air; BRT; Caterpillar; CIGNA; Dewey; Honeywell; JPMorgan Chase; Keating Muething; PepsiCo; Sidley Austin; Society of Corporate Securities; Thompson Hine; TI; Wells Fargo.

[535] *See* letters from Alaska Air; Boeing; BorgWarner; CII; Dewey; JPMorgan Chase; P. Neuhauser; O'Melveny & Myers; PepsiCo; Praxair; Seven Law Firms; Shearman & Sterling; Society of Corporate Secretaries; Thompson Hine; USPE.

[536] *See* letters from 26 Corporate Secretaries; ABA; Alcoa; Allstate; American Express; Boeing; BRT; Con Edison; Davis Polk; FPL Group; JPMorgan Chase; McDonald's; P. Neuhauser; Pfizer; Protective; RiskMetrics; Seven Law Firms; TI; Xerox.

[537] *See* letters from ABA; BRT; Con Edison; TI.

[538] *See* new Rule 14a–11(b)(10). The Schedule 14N would, of course, have to contain all required disclosure as of the date of filing.

[539] We note that as with Rule 14a–8, Rule 14a–11 requires a company to provide notice to the Commission if it intends to exclude a nominee. Also as with Rule 14a–8, if a company determines that it may exclude a nominee, the rule does not require the company to seek a no-action letter from the staff with regard to the determination to exclude the nominee. In this regard, we note that the 120-day deadline in Rule 14a–8 appears to provide companies with sufficient time in which to consider complex matters. For example, companies routinely consider whether a proposal submitted pursuant to Rule 14a–8 would cause the company to violate Federal or State law and submit requests for no-action letters, along with detailed legal opinions, with respect to those proposals. We believe that a company will consider nominees submitted pursuant to Rule 14a–11 in a similar manner. Thus, we believe a deadline of 120 calendar days before the date that the company mailed its proxy materials the prior year is sufficient.

[540] *See* letters from 26 Corporate Secretaries; Aetna; Allstate; Boeing; BorgWarner; L. Dallas; DuPont; Florida State Board of Administration; FPL Group; Kirkland & Ellis; Leggett; P. Neuhauser; PepsiCo; Pfizer; S. Quinlivan; RiskMetrics; Schulte Roth & Zabel; Shearman & Sterling; SIFMA; Society of Corporate Secretaries; Southern Company; TI; USPE; Wells Fargo; Xerox.

[541] The commenters generally mentioned various 30-day ranges that we requested comment on (*e.g.,* no earlier than 180 days and no later than 150 days before the date that the company mailed its proxy materials for the prior year's annual meeting; no earlier than 150 calendar days and no later than 120 calendar days before the date that the company mailed its proxy materials for the prior year's annual meeting; no earlier than 120 calendar days and no later than 90 calendar days prior to the anniversary of the company's last annual meeting). One commenter suggested that the Commission limit the nomination process to a 45-day window period commencing four months after the company's annual shareholder meeting. *See* letter from Aetna. Another commenter suggested that nominations be submitted within a 30-day period commencing five months after the company's annual meeting. *See* letter from SIFMA. We believe that starting the period for nominations earlier than 150 calendar days before the anniversary of the date the company mailed its proxy materials for the prior year's annual meeting would not provide the current board with sufficient opportunity to perform its duties and demonstrate its performance, nor would it provide shareholders with enough time to evaluate the board's performance, to make an informed decision with respect to a potential nomination.

[542] In addition, if a company is holding a special meeting in lieu of an annual meeting, the nominating shareholder must provide notice a reasonable time before the company mails its proxy materials.

the company will be required to disclose the date by which the shareholder must submit the required notice in a Form 8–K filed pursuant to new Item 5.08 within four business days after the company determines the anticipated meeting date.[543]

As noted, the notice on Schedule 14N must be transmitted to the company[544] and filed with the Commission on the same day.[545] Consistent with the Proposal, the Schedule 14N must be filed with the Commission on EDGAR. To file the Schedule 14N on EDGAR, a nominating shareholder or group and any nominee will need to have or obtain EDGAR filing codes and user identification numbers, which may be obtained by filing electronically a Form ID in advance of filing the Schedule 14N.[546] We encourage nominating shareholders and groups to take the steps necessary to obtain an EDGAR filing code and CIK code well in advance of the deadline for filing a notice on Schedule 14N.

The Schedule 14N will:

- Include a cover page in the form set forth in Schedule 14N with the appropriate box on the cover page marked to specify that the filing relates to a Rule 14a–11 nomination;[547]
- Be made under the subject company's Exchange Act file number (or in the case of a registered investment company, under the subject company's Investment Company Act file number); and
- Be made on the date the notice is first transmitted to the company.

We are adopting, as proposed, a requirement that the Schedule 14N be amended promptly for any material change to the disclosure and certifications provided in the originally-filed Schedule 14N.[548] In this regard, we would view withdrawal of a nominating shareholder or group (or any member of the group), or of a director nominee, and the reasons for any such withdrawal, as a material change. For example, such a withdrawal could be material because it may result in a group no longer meeting the required ownership threshold under Rule 14a–11. We also would view as material entering into an agreement between the company and the nominating shareholder or group for the company to include a nominee in the company's proxy materials as a company nominee.[549] The nominating shareholder or group also will be required, as proposed, to file a final amendment to the Schedule 14N disclosing within 10 days of the final results of the election being announced by the company the nominating shareholder's or group's intention with regard to continued ownership of its shares.[550] As discussed above, the nominating shareholder or group would be required to disclose its intent with regard to continued ownership of the company's securities in its original notice on Schedule 14N.[551] Filing an amendment to the Schedule 14N within 10 days after the announcement of the final results of the election will provide shareholders with information as to whether the outcome of the election may have altered the intent of the nominating shareholder or group and what further plans the nominating shareholder or group may have with regard to the company.

As was proposed,[552] the Schedule 14N may be signed either by each person on whose behalf the statement is filed or his or her authorized representative. We assume that in many cases group members will choose to appoint an authorized representative from among the group. If the statement is signed on behalf of a person by his authorized representative other than an executive officer or general partner of the filing person, evidence of the representative's authority to sign on behalf of such person must be filed with the statement, provided, however, that a power of attorney for this purpose which is already on file with the Commission may be incorporated by reference.

The Schedule 14N, as filed with the Commission, as well as any amendments to the Schedule 14N, will be subject to the liability provisions of Exchange Act Rule 14a–9 pursuant to new paragraph (c) to the rule.[553]

9. Requirements for a Company That Receives a Notice From a Nominating Shareholder or Group

a. Procedure if Company Plans To Include Rule 14a–11 Nominee

In the Proposing Release, we proposed a process for a company to follow once it received a nomination submitted pursuant to Rule 14a–11. Upon receipt of a shareholder's or group's notice of its intent to require the company to include in its proxy materials a shareholder nominee or nominees pursuant to Rule 14a–11, the company would determine whether it would include the nominee or whether it believed it would be desirable to, and that the company had a basis upon which it could rely to, exclude a nominee. If a company determined it would include the nominee, the company would notify in writing the nominating shareholder or group no later than 30 calendar days before the

[543] *See* new Rule 14a–11(b)(10). *See also* proposed Instruction 2 to Rule 14a–11(a) and Rule 14a–18. This would be similar to the requirement currently included in Rule 14a–5(f), which specifies that, where the date of the next annual meeting is advanced or delayed by more than 30 calendar days from the date of the annual meeting to which the proxy statement relates, the company must disclose the new meeting date in the company's earliest possible quarterly report on Form 10–Q. Although registered investment companies generally are not required to file Form 8–K, we are requiring them to file a Form 8–K disclosing the date by which the shareholder notice must be provided if the company did not hold an annual meeting during the prior year, or if the date of the meeting has changed by more than 30 calendar days from the prior year. For a further discussion of the Form 8–K filing requirement for registered investment companies, *see* Section II.D.1.

[544] Rule 14n–3 specifies that the Schedule 14N must be transmitted to the company at its principal executive office.

[545] *See* new Rule 14n–1. In this regard, we are adopting an amendment to Rule 13(a)(4) of Regulation S–T, as proposed, to provide that a Schedule 14N will be deemed to be filed on the same business day if it is filed on or before 10 p.m. Eastern Standard Time or Eastern Daylight Saving Time, whichever is currently in effect. This will allow nominating shareholders additional time to file the notice on Schedule 14N and transmit the notice to the company.

[546] To file the Schedule 14N on EDGAR, a nominating shareholder or group and any nominee that does not already have EDGAR filing codes, and to which the Commission has not previously assigned a user identification number, which we call a "Central Index Key (CIK)" code, will need to obtain the codes by filing electronically a Form ID (17 CFR 293.63; 249.446; and 274.402) at *https://www.filermanagement.edgarfiling.sec.gov*. The applicant also will be required to submit a notarized authenticating document. If the authenticating document is prepared before the applicant makes the Form ID filing, the authenticating document may be uploaded as a Portable Document Format (PDF) attachment to the electronic filing. An applicant also may submit the authenticating document by faxing it to the Commission within two business days before or after electronically filing the Form ID. The authenticating document would need to be manually signed by the applicant over the applicant's typed signature, include the information contained in the Form ID, and confirm the authenticity of the Form ID. If the authenticating document is filed after electronically filing the Form ID, it would need to include the accession number assigned to the electronically filed Form ID as a result of its filing. *See* 17 CFR 232.10(b)(2).

[547] The Schedule 14N also would be used for disclosure concerning the inclusion of shareholder nominees in company proxy materials when made pursuant to an applicable state or foreign law provision or a company's governing documents. *See* new Rule 14a–18 and proposed Rule 14a–19, as discussed in Section II.C.5. below.

[548] *See* new Rule 14n–2(a).

[549] We note that if this occurs, the nominee would no longer be a Rule 14a–11 nominee. *See* Section II.B.6.c. for a discussion of how this would affect the calculation of the maximum number of Rule 14a–11 nominees.

[550] *See* new Rule 14n–2(b).

[551] *See* Item 4(b) of new Schedule 14N.

[552] While the proposed Schedule 14N included the instruction regarding the signing of the Schedule by an authorized representative, we did not discuss this aspect of the proposed rule text in the narrative portion of the release.

[553] For further discussion, *see* Section II.E.

company files its definitive proxy statement and form of proxy with the Commission that it will include the nominee or nominees.[554] The company would be required to provide this notice in a manner that provides evidence of timely receipt by the nominating shareholder or group.

We are adopting this requirement as proposed, with a clarification regarding the timing of the company's transmission of the notice and receipt by the nominating shareholder or group.[555] As adopted, if a company will include a shareholder nominee, a company will be required to notify the nominating shareholder or group (or their authorized representative). Rather than including the proposed requirement that the company must provide the notice in a manner that evidences timely receipt by the shareholder, we are adopting a requirement that the notification must be postmarked or transmitted electronically no later than 30 calendar days before it files its definitive proxy materials with the Commission.[556] We believe this will provide for ease of use and administration because it should be clear when the notice was transmitted. We also note that it is consistent with the transmission standard we are adopting for submitting a notice of intent with respect to a nomination pursuant to Rule 14a–11(b)(10). We note that while we are not adopting a requirement regarding the evidence of timely receipt by the nominating shareholder or group, we believe it is in a company's interest to send the notice to the nominating shareholder or group in a manner that will allow the company to demonstrate that the nominating shareholder or group received the notice, as doing so may avoid potential disputes.

b. Procedure if Company Plans To Exclude Rule 14a–11 Nominee

The Proposal also included a process for a company to follow if it determined that it could exclude a nominee submitted pursuant to Rule 14a–11.[557] As proposed, a company could determine that it is not required under Rule 14a–11 to include a nominee from a nominating shareholder or group in its proxy materials if:

- Proposed Rule 14a–11 is not applicable to the company;
- The nominating shareholder or group has not complied with the requirements of Rule 14a–11;
- The nominee does not meet the requirements of Rule 14a–11;
- Any representation required to be included in the notice to the company is false or misleading in any material respect; or
- The company has received more nominees than it is required to include by proposed Rule 14a–11 and the nominating shareholder or group is not entitled to have its nominee included under the criteria proposed in Rule 14a–11(d)(3).[558]

Under the Proposal, the nominating shareholder or group would need to be notified of the company's determination not to include the shareholder nominee in sufficient time to consider the validity of any determination to exclude the nominee and respond to such a notice.[559] In this regard, we noted the time-sensitive nature of Rule 14a–11 and the interpretive issues that may arise in applying the new rule. After the company provided such a notice to a nominating shareholder or group and afforded the nominating shareholder or group the opportunity to respond, the company would be required to provide a notice to the Commission regarding its intent not to include a shareholder nominee in its proxy materials. The company could seek a no-action letter from the staff with respect to its decision to exclude the nominee.[560]

The proposed process would have afforded a nominating shareholder or group the opportunity to remedy certain eligibility or procedural deficiencies in a nomination.[561] The various time deadlines set out in the proposed process were determined by considering the appropriate balance between companies' needs in meeting printing and filing deadlines for their shareholder meetings with shareholders' need for adequate time to satisfy the requirements of the rule.[562] Specifically, as proposed, a company determining that the nominating shareholder or group or nominee or nominees has not satisfied the eligibility requirements could exclude the shareholder nominee or nominees, subject to the following requirements:

- The company would notify in writing the nominating shareholder or group of its determination. The notice would be required to be postmarked or transmitted electronically no later than 14 calendar days after the company receives the shareholder notice of intent to nominate. The company would have to provide the notice in a manner that provides evidence of receipt by the nominating shareholder or group;[563]
- The company's notice to the nominating shareholder or group that it determined that the company may exclude a shareholder nominee or nominees would be required to include an explanation of the company's basis for determining that it may exclude the nominee or nominees;[564]
- The nominating shareholder or group would have 14 calendar days after receipt of the written notice of deficiency to respond to the notice and correct any eligibility or procedural deficiencies identified in the notice. The nominating shareholder or group would have to provide the response in a manner that provides evidence of its receipt by the company;[565]
- If, upon review of the nominating shareholder's or group's response, the company determines that the company still may exclude the shareholder nominee or nominees, after providing the requisite notice of and time for the nominating shareholder or group to remedy any eligibility or procedural deficiencies in the nomination, the company would be required to provide notice of the basis for its determination to the Commission no later than 80 calendar days before it files its definitive proxy statement and form of proxy with the Commission. The Commission staff could permit the company to make its submission later

[554] *See* proposed Rule 14a–11(f)(2).

[555] *See* new Rule 14a–11(g)(1) and Instruction 1 to Rule 14a–11(g).

[556] This 30-day deadline for this notice should provide a nominating shareholder or group with sufficient time to engage in soliciting activities with respect to its nominee or nominees, if it has not done so already, or pursue any legal remedies that may be available if the company determines it will exclude the nominating shareholder's or group's nominee or nominees.

[557] The process was modeled after the staff no-action process used in connection with shareholder proposals under Rule 14a–8.

[558] *See* proposed Rule 14a–11(a). More specifically, under the proposal a company would not be required to include a nominee where (1) applicable State law or the company's governing documents prohibit the company's shareholders from nominating a candidate for director; (2) the nominee's candidacy, or if elected, board membership, would violate controlling State law, Federal law or rules of a national securities exchange or national securities association; (3) the nominating shareholder or group does not meet the rule's eligibility requirements; (4) the nominating shareholder's or group's notice is deficient; (5) any representation in the nominating shareholder's or group's notice is false in any material respect; or (6) the nominee is not required to be included in the company's proxy materials due to the proposed limitation on the number of nominees required to be included.

[559] *See* proposed Rule 14a–11(f).

[560] *See* proposed Rule 14a–11(f)(7)–(14).

[561] *See* proposed Rule 14a–11(f)(3)–(6).

[562] We considered the timing requirements and deadlines in Rule 14a–8 when crafting the proposed requirements and deadlines for Rule 14a–11; however, due to the potential complexity of the nomination process, we determined in the proposal that it would be appropriate to provide additional time for the process.

[563] *See* proposed Rule 14a–11(f)(3).

[564] *See* proposed Rule 14a–11(f)(4).

[565] *See* proposed Rule 14a–11(f)(5).

than 80 calendar days before the company files its definitive proxy statement and form of proxy if the company demonstrates good cause for missing the deadline;[566]

- The company's notice to the Commission would be required to include:
- Identification of the nominating shareholder or each member of the nominating shareholder group, as applicable;
- The name of the nominee or nominees;
- An explanation of the company's basis for determining that it may exclude the nominee or nominees; and
- A supporting opinion of counsel when the company's basis for excluding a nominee or nominees relies on a matter of State law;[567]
- The company would be required to file its notice of intent to exclude with the Commission and simultaneously provide a copy to the nominating shareholder or each member of the nominating shareholder or group;[568]
- The nominating shareholder or group could submit a response to the company's notice to the Commission. The response would be required to be postmarked or transmitted electronically no later than 14 calendar days after the nominating shareholder's or group's receipt of the company's notice to the Commission. The nominating shareholder or group would be required to provide a copy of its response to the Commission simultaneously to the company;[569]
- If requested by the company, the Commission staff would, at its discretion, provide an informal statement of its views (commonly known as a no-action letter) to the company and the nominating shareholder or group;[570]
- The company would provide the nominating shareholder or group with notice, no later than 30 calendar days before it files its definitive proxy statement and form of proxy with the Commission, of whether it will include or exclude the shareholder nominee or nominees.[571]

Some commenters supported the proposed staff review process for handling disputes regarding a company's determination to exclude a shareholder nominee.[572] Other commenters expressed concerns about the staff's expertise and ability to handle disputes in a timely manner.[573] With respect to the timing requirements in the proposed process, two commenters supported the proposed 14-day time period for the company to respond to a nominating shareholder's or group's notice.[574] A number of commenters criticized the proposed 14-day time period as too short or requested a longer time period for the company to respond.[575] Commenters explained that boards would need time to consider various issues, such as if the election of a shareholder nominee would trigger issues under the laws and regulations relevant to the company's business (*e.g.,* antitrust laws, government procurement, security clearances and export control) as well as under listing standards and State law.[576] Two commenters supported the proposed 14-day time period for a nominating shareholder or group to respond to a company's notice of deficiency.[577] Two commenters worried the 14-day time period would give too little time for a response and recommended instead a 21-day time period.[578] One commenter warned that the Commission is underestimating the number of boards that would challenge shareholder nominees and the level of intensity of these challenges.[579] This commenter suggested that such challenges and possible litigation would demand significant time and resources from the Commission's staff.[580] Commenters also argued that challenges to Rule 14a–11 nominations likely would raise highly complex issues that fall outside the scope of the staff's expertise (*e.g.,* whether a candidacy would violate State law).[581] One commenter pointed to difficulties arising from the "dueling" legal opinions situation in the Rule 14a–8 no-action process.[582] A couple commenters believed that courts, rather than the staff, would be better able to resolve disputes regarding shareholder director nominations.[583]

After considering the comments, we believe that it is in shareholders' and companies' interest to have a process available for seeking to resolve certain disputes regarding nominations submitted pursuant to Rule 14a–11.[584] Therefore, the rules we are adopting set out the process by which a company would determine whether to include a shareholder nominee and notify the nominating shareholder or group (or their authorized representative) of its determination.[585] The rules also include a process by which a company would notify a nominating shareholder or group (or their authorized representative) of a deficiency in its notice on Schedule 14N, the nominating shareholder or group would have the opportunity to respond, and the company would send a notice to the Commission if the company intends to exclude a shareholder nominee from its proxy materials. Consistent with the Proposal, a company making the determination to exclude a shareholder nominee will be required to submit a notice to the Commission regarding its determination, and it may also choose to avail itself of the process to seek a no-action letter from the staff with respect to its decision.[586] While we understand the concerns raised by commenters regarding the rule's timing requirements, we believe the requirements are appropriate in light of the need to facilitate the process between a company and its shareholders in time for an annual meeting.[587] In

[566] *See* proposed Rule 14a–11(f)(7).

[567] *See* proposed Rule 14a–11(f)(8).

[568] *See* proposed Rule 14a–11(f)(10).

[569] *See* proposed Rule 14a–11(f)(11).

[570] *See* proposed Rule 14a–11(f)(12).

[571] *See* proposed Rule 14a–11(f)(13).

[572] *See* letters from CFA Institute; CII; P. Neuhauser; Schulte Roth & Zabel; Universities Superannuation.

[573] *See* letters from ABA; Anadarko; BRT; Cleary; Davis Polk; Delaware Bar; ExxonMobil; E.J. Kullman; Protective; S. Quinlivan; Seven Law Firms; Weyerhaeuser.

[574] *See* letters from CFA Institute; CII.

[575] *See* letters from 26 Corporate Secretaries; Boeing; Con Edison; Honeywell; Kirkland & Ellis; Pfizer; Protective; UnitedHealth; USPE; Wells Fargo; Whirlpool.

[576] *See* letters from Boeing; Honeywell.

[577] *See* letters from CFA Institute; CII.

[578] *See* letters from Protective; USPE.

[579] *See* letter from BRT.

[580] *Id.*

[581] *See* letters from ABA; BRT.

[582] *See* letter from ABA.

[583] *See* letters from ABA; Delaware Bar.

[584] In this regard, we note that the staff process for aiding in the resolution of disputes related to nominations made pursuant to Rule 14a–11 is non-exclusive. As discussed throughout this release, a company can seek the staff's view with regard to its determination to exclude a nominee from its proxy materials, but it is not required to do so. A company could engage in negotiations with a nominating shareholder or group and ultimately reach a resolution outside of the staff process, or the parties could avail themselves of other alternatives, such as litigation.

[585] Other than the modifications to the standards relating to transmission and receipt of notices and responses, which are described below, we are adopting the process as proposed.

[586] We encourage companies and shareholders to attempt to resolve disputes independently. To the extent that a company and nominating shareholder or group are able to resolve an issue at any point during the staff process, the company should withdraw its request for a no-action letter from the staff.

[587] The final rule does not include the proposed 30-calendar day notice requirement when a company determines to exclude a nominee. We believe this requirement is rendered unnecessary by the requirement in paragraph (g)(3) of Rule 14a–11 that the company provide notice to the Commission staff and nominating shareholder or group no later than 80 calendar days before the company files its definitive proxy statement and form of proxy. In addition, if a company seeks the staff's informal view with respect to the company's determination to exclude a nominee, promptly following receipt

addition, the staff is committed to timely addressing these matters.

We are changing and clarifying the requirements related to the timing of sending and receiving notifications. As proposed, if a company determined that it could exclude a shareholder nominee, it would be required to notify the nominating shareholder or group and the notification would be required to be postmarked or transmitted electronically no later than 14 calendar days after the company received the notice on Schedule 14N. The proposed rule stated that the company would be responsible for providing the notice in a manner that evidences timely receipt by the nominating shareholder or group. The proposed rule also included similar requirements for a response to the notice by the nominating shareholder or group. As adopted, the rules will keep the deadlines as they were proposed but will use a transmission standard in determining the deadlines, similar to the standard discussed above for new Rule 14a–11(g)(1). We believe using such a uniform standard for all notification aspects of the rule will provide clarity and ease of use. Under the final rule, a company's notification must be postmarked or transmitted electronically no later than 14 calendar days after the close of the window period for submission of nominations pursuant to Rule 14a–11. We believe this change from the Proposal is appropriate because it will allow shareholders to submit their nominations, and companies to receive all the nominations, before requiring a company to send a notice to the nominating shareholder or group (or their authorized representative) as to whether it will include or exclude a nominee. Thus, a company will be able to make an informed decision with respect to individual nominations because it will be able to evaluate and respond to all the nominations it has received at one time, rather than evaluating and responding to the nominations as they are received. This approach should help reduce the possibility of any confusion that could result from requiring a company to respond to each nomination no later than 14 days after it is transmitted.[588] A nominating shareholder's or group's response to the company's notice must be postmarked or transmitted electronically no later than 14 calendar days after receipt of the company's notification. We note that a timely transmission standard applies in both instances; however, we urge companies to send the notification, and nominating shareholders or groups to send a response, in a manner that will allow them to demonstrate when the communication is received, as doing so may avoid potential disputes.

Under new Rule 14a–11(g), a company may exclude a shareholder nominee because:

- Rule 14a–11 is not applicable to the company;
- The nominating shareholder or group or nominee failed to satisfy the eligibility requirements in Rule 14a–11(b);) [589] or
- Including the nominee or nominees would result in the company exceeding the maximum number of nominees it is required to include in its proxy statement and form of proxy.[590]

In addition, a company would be permitted to exclude a statement in support of a nominee or nominees if the statement in support exceeds 500 words for each nominee.[591] In such cases, a company would be required to include the nominee or nominees, provided the eligibility requirements were satisfied, but would be permitted to exclude the statement in support. Although we did not propose to allow for exclusion of a supporting statement that exceeds the length specified in the rule, we believe that it is appropriate to provide the ability to do so in the final rule.[592]

We note that, in a change from the Proposal, under the final rule a company may not exclude a nominee or a statement in support on the basis that, in the company's view, the Schedule 14N (which will include the statement in support) contains materially false or misleading statements. Nominating shareholders and groups will have liability for any materially false or misleading information or for making a false or misleading certification in the notice filed on Schedule 14N, and companies will not be responsible for this information.[593] We believe that such disputes concerning whether information is false or misleading should be handled through disclosure, and if necessary, through private litigation, rather than through exclusion of the nominee under our rule. A company and the nominating shareholder or group will be in possession of the facts and circumstances regarding any disputes that arise about the truthfulness or accuracy of information or representations made by a nominating shareholder or group; thus, they will be in a better position than the staff to resolve those disputes. In addition, we note that in traditional proxy contests, companies and insurgents regularly use disclosure to communicate with a company's shareholders about an insurgent's nominee(s) and provide related information, including disclosure disputing the information provided by the other party. We believe that it is appropriate for companies and nominating shareholders engaged in the Rule 14a–11 nomination process to work together to resolve these types of issues. While we encourage private parties to resolve disputes under this provision, the Commission could, of course, bring enforcement actions in appropriate instances. All filings associated with a nomination included in the company's proxy materials pursuant to Rule 14a–11, including the Schedule 14N, the company's proxy statement and any additional soliciting materials provided by the company or the nominating shareholder, will be subject to the staff's proxy contest review procedures and, as noted, will be subject to the Rule 14a–9 prohibition

of the staff's response a company would be required to provide a notice to the nominating shareholder or group stating whether it will include or exclude the nominee.

[588] For example, suppose a company decided it did not have a reason to exclude a nominee submitted by a nominating shareholder during the first week of the window period. If we were to require that a company must respond to a nomination no later than 14 days after it was transmitted, the company would be required to respond to the nominating shareholder or group before the window period closed, and the company would inform the nominating shareholder that it intends to include the nominee. If, subsequent to the company sending a notice to the nominating shareholder of its intent to include the nominee, a nominating shareholder with a higher qualifying ownership percentage submits a nomination for the maximum number of nominees the company would be required to include under the rule, the company would be required to include those nominees assuming that the company determined that it did not have a reason to exclude the nominees. In that situation, confusion could result because, under the rule, the company would no longer be required to include the nominee submitted by the nominating shareholder during the first week of the window period, even though the company had informed the nominating shareholder it would include its nominee.

[589] Specifically, the final rule provides that a company could exclude a shareholder nominee because the nominating shareholder or group, or the nominee, fails to satisfy the applicable eligibility requirements in Rule 14a–11(b). In this regard, we note that the nominating shareholder or each member of the nominating shareholder group (or authorized representative) would be required to certify that, after reasonable inquiry and to the best of its knowledge and belief, the nominating shareholder or member of the nominating shareholder or group and the nominee satisfied the applicable requirements of Rule 14a–11(b).

[590] *See* new Rule 14a–11(d).

[591] *See* new Rule 14a–11(c).

[592] In this regard, we note that this is consistent with Rule 14a–8, which specifies that a company may exclude a proposal if the proposal, including any accompanying supporting statement, exceeds 500 words.

[593] *See* new Rule 14a–9(c) and Rule 14a–11(f).

against materially false or misleading statements.

In the Proposing Release, we noted that:

- Unless otherwise provided in Rule 14a–11 (*e.g.,* the nominating shareholder's or group's obligation to demonstrate that it responded to a company's notice of deficiency, where applicable, within 14 calendar days after receipt of the notice of deficiency), the burden would be on the company to demonstrate that it may exclude a nominee or nominees; and
- All materials submitted to the Commission in relation to proposed Rule 14a–11(g) would be publicly available upon submission.

We are adopting these aspects of the rules as proposed. We did not receive significant comment on these aspects of the proposed rules, although two commenters requested that companies bear the burden of proof when objecting to a nominee.[594] The rule, as adopted and proposed, specifies that the burden is on the company to demonstrate that it may exclude a nominee or statement of support, unless otherwise specified.[595] In addition, as we discussed in the Proposing Release, the staff's responses to the submissions made pursuant to new Rule 14a–11(g) would reflect only informal views. The staff determinations reached in these responses would not, and cannot, adjudicate the merits of a company's position with respect to exclusion of a shareholder nominee under Rule 14a–11. Accordingly, a discretionary staff determination would not preclude an interested person from pursuing a judicial determination regarding the application of Rule 14a–11.

As noted above, if a nominee withdraws or is disqualified, a company will be required to include an otherwise eligible nominee submitted by the shareholder or group with the next highest qualifying ownership percentage, if any. The company would be required to continue replacing withdrawn or disqualified nominees until it included the maximum number of nominees it is required to include in its proxy materials or the list of shareholder nominees is exhausted. As described above, a company will be required to give notice that it plans to exclude a nominee for any nominee that it intends to exclude, and the notice must include the reasons for the exclusion. If a company anticipates that it would seek a no-action letter from the staff with respect to its decision to exclude any Rule 14a–11 nominee or nominees, it should seek a no-action letter with regard to all nominees that it wishes to exclude at the outset and should assert all available bases for exclusion at that time. For example, if a company receives more nominees than it is required to include, its reasons for exclusion would note that basis. In addition, if the company believes it has other bases to exclude the nominee, it should note those other bases in its notice and include the other bases in its request for a no-action letter.

c. Timing of Process

The process generally would operate as follows:

Due date	Action required
No earlier than 150 calendar days, and no later than 120 calendar days, before the anniversary of the date that the company mailed its proxy materials for the prior year's annual meeting.	Nominating shareholder or group must provide notice on Schedule 14N to the company and file the Schedule 14N with the Commission.
No later than 14 calendar days after the close of the window period for submission of nominations.	Company must notify the nominating shareholder or group (or its authorized representative) of any determination not to include the nominee or nominees.
No later than 14 calendar days after the nominating shareholder's or group's receipt of the company's deficiency notice.	Nominating shareholder or group must respond to the company's deficiency notice and, where applicable, cure any defects in the nomination.
No later than 80 calendar days before the company files its definitive proxy statement and form of proxy with the Commission.	Company must provide notice of its intent to exclude the nominating shareholder's or group's nominee or nominees and the basis for its determination to the Commission and, if desired, seek a no-action letter from the staff with regard to its determination.
No later than 14 calendar days after the nominating shareholder's or group's receipt of the company's notice to the Commission.	Nominating shareholder or group may submit a response to the company's notice to the Commission staff.
As soon as practicable	If requested by the company, Commission staff would, at its discretion, provide an informal statement of its views to the company and the nominating shareholder or group.
Promptly following receipt of the staff's informal statement of its views	Company must provide notice to the nominating shareholder or group stating whether it will include or exclude the nominee.

d. Information Required in Company Proxy Materials

i. Proxy Statement

As discussed in Section II.B.8. above, we proposed and are adopting a requirement that a company that is including a shareholder director nominee in its proxy statement and form of proxy pursuant to Rule 14a–11 include certain disclosure about the nominating shareholder or group and the nominee in the company proxy statement. This disclosure will be provided by the nominating shareholder or group in its notice on Schedule 14N in response to Item 5 of that Schedule and will be included in the company's proxy statement pursuant to Item 7(e) (and, in the case of investment companies, Item 22(b)(18)) of Schedule 14A.[596] As we proposed, the company will not be responsible for the disclosure; rather, the nominating shareholder or group will have liability for any materially false or misleading statements.[597]

As discussed in Section II.B.8., the disclosures to be included in the company's proxy statement include:

- A statement that the nominee consents to be named in the company's proxy statement and form of proxy and, if elected, to serve on the company's board of directors;
- Disclosure about the nominee as would be provided in response to the disclosure requirements of Items 4(b),

[594] *See* letters from CII; Universities Superannuation.

[595] In the Proposal, we noted that the exclusion of a nominee or nominees where the exclusion was not permissible would result in a violation of the rule. We are adopting that provision as proposed.

[596] Refer to Section II.B.8. for a discussion of comments received on the proposed disclosure and changes made in response to these comments. We did not receive comment specifically on new Items 7(e) or 22(b)(18) of Schedule 14A.

[597] *See* new Rule 14a–11(f).

5(b), 7(a), (b) and (c) and, for investment companies, Item 22(b) of Schedule 14A, as applicable;

• Disclosure about the nominating shareholder or each member of a nominating shareholder group as would be required of a participant in response to the disclosure requirements of Items 4(b) and 5(b) of Schedule 14A, as applicable;

• Disclosure about whether the nominating shareholder or any member of a nominating shareholder group has been involved in any legal proceeding during the past ten years, as specified in Item 401(f) of Regulation S–K;

• Disclosure about whether, to the best of the nominating shareholder's or group's knowledge, the nominee meets the director qualifications set forth in the company's governing documents, if any;

• A statement that, to the best of the nominating shareholder's or group's knowledge, in the case of a registrant other than an investment company, the nominee meets the objective criteria for "independence" of the national securities exchange or national securities association rules applicable to the company, if any, or, in the case of a registrant that is an investment company, the nominee is not an "interested person" of the registrant as defined in Section 2(a)(19) of the Investment Company Act of 1940;

• The following information regarding the nature and extent of the relationships between the nominating shareholder or group, the nominee, and/or the company or any affiliate of the company:

• Any direct or indirect material interest in any contract or agreement between the nominating shareholder or any member of the nominating shareholder group, the nominee, and/or the company or any affiliate of the company (including any employment agreement, collective bargaining agreement, or consulting agreement);

• Any material pending or threatened litigation in which the nominating shareholder or any member of the nominating shareholder group and/or the nominee is a party or a material participant, and that involves the company, any of its officers or directors, or any affiliate of the company;

• Any other material relationship between the nominating shareholder or any member of the nominating shareholder group, the nominee, and/or the company or any affiliate of the company not otherwise disclosed; and

• The Web site address on which the nominating shareholder or nominating shareholder group may publish soliciting materials, if any.

The disclosures set out in Items 4(b) and 5(b) of Schedule 14A are specifically tailored to contested elections and currently are provided by both companies and insurgents in traditional proxy contests. The disclosures required pursuant to Item 4(b) include:

• Who is making the solicitation and the methods of solicitation;

• If employees of the soliciting party are engaged in the solicitation, what types of employees are engaged in the solicitation and the manner and nature of their employment;

• If specially engaged employees are engaged in the solicitation, the material features of the engagement, the cost, and the number of employees;

• The total amount estimated to be spent and the total expenditures to date for the solicitation;

• Who will bear the cost of the solicitation; and

• The terms of any settlement between the company and the soliciting parties, including the cost to the company.

The disclosures included pursuant to Item 5(b) include:

• Any substantial interest of the soliciting party in the matter to be voted on;

• Certain biographical information about the soliciting party, such as name and business address, principal occupation, and any criminal convictions in the past 10 years;

• The amount of company securities beneficially owned and owned of record;

• Dates and amounts of any securities purchased or sold within the past two years and the amount of funds borrowed and owed to purchase the securities;

• Whether the soliciting person is or was within the past year a party to any contracts, arrangements or understandings with respect to the company's securities and the terms of the contract, arrangement or understanding;

• Beneficial ownership of company securities by any associate of the soliciting person;

• Beneficial ownership by the soliciting person of any parent or subsidiary of the company;

• Disclosure responsive to Item 404(a) of Regulation S–K with regard to the soliciting person and any associate;

• Disclosure of any arrangements concerning future employment or transactions with the company; and

• Any substantial interest in the vote, either by security holdings or otherwise, held by a party to an arrangement or understanding related to a director nominee.

The company also will include in its proxy statement disclosure about the management nominees responsive to Items 4(b), 5(b), 7(a), (b) and (c) and, for investment companies, Item 22(b) of Schedule 14A, as applicable, as well as disclosure concerning the persons making the solicitation for the management nominees responsive to Items 4(b) and 5(b) of Schedule 14A, as applicable. We did not amend the disclosure requirements in this regard, as companies are already required to make these disclosures in the context of a "solicitation in opposition," under Rule 14a–12(c).[598]

In addition, as discussed in Section II.B.8., we proposed and adopted a requirement that the company include in its proxy statement the nominating shareholder's or group's statement in support of the shareholder nominee or nominees, if the nominating shareholder or group elects to have such statement included in the company's proxy materials. As discussed in Section II.B.8., we had proposed that this statement not exceed 500 words total, but in response to commenters' concerns, we have revised this provision in the final rule to enable a nominating shareholder or group to include up to 500 words for each nominee. The company also would have the option to include a statement of support for the management nominees.[599]

ii. Form of Proxy

Under the Proposal, a company that is required to include a shareholder nominee or nominees on its form of proxy could identify the shareholder nominees as such and recommend

[598] We have clarified in new Instruction 3 to Rule 14a–12 that inclusion of a shareholder director nominee pursuant to Rule 14a–11, an applicable state or foreign law provision, or a company's governing documents as they relate to the inclusion of shareholder director nominees in the company's proxy materials, or solicitations that are made in connection with that nomination, constitute solicitations subject to Rule 14a–12(c), except for purposes of the requirement for the company to file their proxy statement in preliminary form pursuant to Rule 14a–6(a).

[599] In the Proxy Disclosure Enhancements Adopting Release, we amended our rules to require disclosure about directors that will provide investors with more meaningful disclosure to enable them to determine whether and why a director or nominee is an appropriate choice for a particular company. The information is required in the company's proxy statement for each director nominee and each director who will continue to serve after the shareholder meeting. Under revised Item 401 of Regulation S–K, a nominating shareholder or group will be required to discuss the particular experience, qualifications, attributes or skills of the nominee or nominees that led the nominating shareholder or group to conclude that the person should be put forward as a candidate for director on the company's board of directors.

whether shareholders should vote for, against, or withhold votes on those nominees and management nominees on the form of proxy.[600] In addition, the company could determine the order in which its nominees and any shareholder nominees are listed in the form of proxy. The company would otherwise be required to present the nominees in an impartial manner in accordance with Rule 14a–4.

Under the current rules, a company may provide shareholders with the option to vote for or withhold authority to vote for the company's nominees as a group, provided that shareholders also are given a means to withhold authority for specific nominees in the group. In our view, as we stated in the Proposal, this option would not be appropriate where the company's form of proxy includes shareholder nominees, as grouping the company's nominees may make it easier to vote for all of the company's nominees than to vote for the shareholder nominees in addition to some of the company nominees. Accordingly, when a shareholder nominee is included (either pursuant to Rule 14a–11, an applicable State law provision, or a company's governing documents), we proposed an amendment to Rule 14a–4 to provide that a company may not give shareholders the option of voting for or withholding authority to vote for the company nominees as a group, but instead must require that shareholders vote on each nominee separately.

Commenters were mixed on the appropriate presentation of nominees on the form of proxy. Several commenters supported the proposed amendments to Rule 14a–4 to prohibit the option of voting for management's slate as a whole,[601] with one of these commenters characterizing the current option of "elect all directors" as "a convenience in uncontested director elections" but warning that providing that option in contested elections "tilts the scales unduly in favor of management."[602] The commenter believed that shareholders would not have any difficulty in identifying the management nominees and disagreed with the argument that a form of proxy listing all nominees would be confusing. As a possible solution, the commenter suggested a legend such as "There are six candidates. Vote for no more than five." Another commenter argued that the advantage of voting for each individual nominee is the de facto plurality voting standard that would result.[603] Numerous commenters opposed the proposed amendments to Rule 14a–4 and argued that the form of proxy should allow shareholders to vote for the entire slate of management nominees.[604] Many of these commenters believed that such an option is needed to minimize shareholder confusion,[605] with several commenters justifying such an option on the basis that boards expend considerable efforts in selecting the complete slate of management nominees (*e.g.,* considering issues as the independence of the board as whole).[606] One commenter stated that individual shareholders (unlike large institutional investors who have outsourced the actual proxy voting process for their portfolio) would be discouraged from voting if the proxy voting process becomes overly tedious as a result of the inability to vote for (or withhold votes for) a group of nominees.[607] The commenter analogized to the shareholders' voting options for shareholder proposals, where shareholders are allowed to vote on all matters as recommended by management through the exercise of discretionary voting authority. It noted that, under the existing proxy rules, companies often allow shareholders to vote "For All, except" and then allow them to identify the specific nominees for whom the proxy is not authorized to vote. The commenter recommended that companies be permitted to have this same option when there are shareholder nominees included in the proxy materials (with a clear statement in the form of proxy that the shareholder should indicate a vote for the shareholder nominee in the space provided for that nominee). One commenter argued that the ability to vote on the entire slate is essential in the event that the proposed rules are applied to investment companies, as such entities have a far higher proportion of retail shareholders than most operating companies and consequently have more difficulty in achieving a quorum.[608]

We are adopting this aspect of the Proposal largely as proposed,[609] because we continue to believe that grouping the company's nominees and permitting them to be voted on as a group would make it easier to vote for all of the company's nominees than to vote for the shareholder nominees in addition to some of the company nominees. This would result in an advantage to the management nominees and would be inconsistent with an impartial approach and the goals of Rule 14a–11. The final rule clarifies that the change would apply not only when a nominee is included pursuant to Rule 14a–11, applicable State law, or a company's governing documents, but also where a nominee is included pursuant to a provision in foreign law.

We believe that potential confusion that may result from not providing the option to vote for the company's slate can be mitigated to the extent that companies provide clear voting instructions, particularly with respect to the number of candidates for which a shareholder can vote. In addition, we do not believe that requiring shareholders to vote for candidates individually, rather than as a group, creates a burden that will result in discouraging shareholders from voting at all in director elections. In this regard, we note that a company could clearly designate the nominees on its form of proxy as company nominees or shareholder nominees.

e. No Preliminary Proxy Statement

Under the Proposal, inclusion of a shareholder nominee in the company's proxy materials would not require the company to file a preliminary proxy statement provided that the company was otherwise qualified to file directly in definitive form. In this regard, the Proposal made clear that inclusion of a shareholder nominee would not be deemed a solicitation in opposition.[610] We did not receive a significant amount of comment on this aspect of the rule, although two commenters agreed that inclusion of a Rule 14a–11 shareholder nominee should not require the company to file preliminary proxy

[600] This would be similar to the current practice with regard to shareholder proposals submitted pursuant to Rule 14a–8 where companies identify the shareholder proposals and provide a recommendation to shareholders as to how they should vote on each of those proposals.

[601] *See* letters from CII; COPERA; P. Neuhauser; RiskMetrics; USPE.

[602] Letter from CII.

[603] *See* letter from RiskMetrics.

[604] *See* letters from 26 Corporate Secretaries; ABA; Aetna; Alcoa; American Express; Anadarko; Boeing; BorgWarner; BRT; ExxonMobil; Fenwick; Honeywell; ICI; Intel; JPMorgan Chase; Pfizer; Seven Law Firms; Society of Corporate Secretaries; Tenet; U.S. Bancorp.

[605] *See* letters from Aetna; American Express; Boeing; BorgWarner; JPMorgan Chase; Seven Law Firms; Society of Corporate Secretaries; U.S. Bancorp.

[606] *See* letters from BorgWarner; Pfizer; Society of Corporate Secretaries; Tenet.

[607] *See* letter from ABA.

[608] *See* letter from ICI.

[609] *See* new Rule 14a–4(b)(2)(iv). We anticipate that companies would continue to be able to solicit discretionary authority to vote a shareholder's shares for the company nominees, as well as to cumulate votes for the company nominees in accordance with applicable State law, where such State law or the company's governing documents provide for cumulative voting.

[610] *See* proposed revisions to Rule 14a–6(a)(4) and Note 3 to that rule.

materials.[611] We are adopting this provision largely as proposed. As adopted, a company would not be required to file a preliminary proxy statement in connection with a nomination made pursuant to Rule 14a–11, an applicable state or foreign law provision, or a company's governing documents.[612]

10. Application of the Other Proxy Rules to Solicitations by the Nominating Shareholder or Group

a. Rule 14a–2(b)(7)

As noted in the Proposing Release, we anticipate that shareholders may engage in communications with other shareholders in an effort to form a nominating shareholder group to aggregate their holdings to meet the applicable minimum ownership threshold to nominate a director. While consistent with the purpose of Rule 14a–11, such communications would be deemed solicitations under the proxy rules. Accordingly, we proposed an exemption from the proxy rules for written communications made in connection with using proposed Rule 14a–11 [613] that are limited in content and filed with the Commission.[614] As noted in the Proposal, we believed this limited exemption would facilitate shareholders' use of proposed Rule 14a–11 and remove concerns shareholders seeking to use the rule may have regarding certain communications with other shareholders regarding their intent to submit a nomination pursuant to the rule.

Some commenters supported the proposed exemption for soliciting activities by shareholders seeking to form a group for purposes of Rule 14a–11.[615] One of these commenters stated that because "many institutional investors lack incentives to invest actively in seeking governance benefits that would be shared by their fellow shareholders," the rule should avoid imposing unnecessary hurdles or costs on shareholders organizing or joining a nominating group.[616] Another supporter of the exemption stated that soliciting activities to form a group for the purpose of submitting nominations under Rule 14a–11, State law, or a company's governing documents generally should be exempt, with no filing requirement prior to giving the company notice and filing a Schedule 14N.[617] Another commenter also recommended that any exemption also cover solicitations for nominations submitted under State law or a company's governing documents.[618] Finally, one commenter expressed support for the proposed exemption so shareholders could communicate with other investors to explain their nominee's qualifications and the rationale for submitting their nominations as long as they file all materials with the Commission and do not solicit proxies on behalf of their nominees.[619]

On the other hand, several commenters opposed the creation of a new exemption for soliciting activities to form a nominating group.[620] Two of these commenters stated that the proposed exemption in Rule 14a–2(b)(7) is unnecessary, given the existing exemptions available to nominating shareholders (*e.g.,* Rule 14a–2(b)(2) exemption for communications with up to 10 shareholders and Rule 14a–2(b)(6) for communications in an electronic shareholder forum).[621] One commenter indicated that a solicitation to form a "control" group could have significant implications affecting control of a company if there are no limits on the number of shareholders or aggregated holdings of a nominating group.[622] The commenter asserted that, absent these limits, a shareholder could build a nominating group with hundreds of shareholders owning far in excess of the ownership threshold needed to use Rule 14a–11. The commenter warned that the proposed exemption could facilitate avoidance of the proposed requirements of Rule 14a–11 because the exempt solicitations could be the first stage of a campaign against incumbent directors and in favor of shareholder nominees. This commenter also believed that the exemption should not apply to solicitations undertaken by shareholders to form a nominating shareholder group in order to submit nominees pursuant to State law or a company's governing documents.[623]

Commenters also suggested the following changes to the proposed exemption:

- The exemption should not be available if the shareholder or any member of the nominating group uses another available exemption for a nomination to be presented at the same shareholder meeting;[624]
- The exemption should not be available for a "data gathering strategy" in which a shareholder is "testing the waters" for other purposes, such as for a traditional proxy contest;[625]
- The shareholder should certify that it has a bona fide intent to present a Rule 14a–11 nomination and the shareholder should be prohibited from nominating directors at the same meeting through means other than Rule 14a–11;[626] and
- The exemption should not be available if the company or another shareholder has publicly announced that the company would be facing a traditional proxy contest.[627]

One commenter stated generally that allowing the "permitted activity among shareholders wishing to nominate a director" would "increase the need for the Commission to police group activity that may be undertaken with an undisclosed control intent." [628]

Two commenters agreed with the Commission that the Rule 14a–2(b)(7) exemption should not be available for solicitations conducted through oral communications.[629] These commenters warned that there would be no way to ensure that orally-communicated information is being provided to shareholders in a consistent manner and in accordance with the rule's requirements. One commenter recommended specific changes to the rule to clarify that the exemption is not available for oral communications.[630] On the other hand, several commenters believed that oral communications should be exempt.[631] Some commenters pointed out that such communications are exempt in other contexts and are difficult to monitor in any case.[632] To mitigate the risk of inappropriate communications, one commenter suggested that the Commission require that oral communications made in reliance on the exemption not be inconsistent with any communications

[611] *See* letters from ABA; CII.

[612] *See also* discussion in footnote 598 above.

[613] Under the Proposal, the exemption would not apply to solicitations made when seeking to have a nominee included in a company's proxy materials pursuant to a procedure specified in the company's governing documents or pursuant to applicable State law (as opposed to pursuant to Rule 14a–11).

[614] *See* proposed Rule 14a–2(b)(7)(i).

[615] *See* letters from Group of 80 Professors of Law, Business, Economics and Finance ("Bebchuk, *et al.*"); CalSTRS; CII; P. Neuhauser; RiskMetrics; Schulte Roth & Zabel; USPE.

[616] Letter from Bebchuk, *et al.*

[617] *See* letter from CII.

[618] *See* letter from P. Neuhauser.

[619] *See* letter from RiskMetrics.

[620] *See* letters from ABA; Anadarko; BRT; Seven Law Firms.

[621] *See* letters from ABA; Seven Law Firms.

[622] *See* letter from ABA.

[623] *Id.*

[624] *See* letters from ABA; Seven Law Firms.

[625] *Id.*

[626] *See* letter from ABA.

[627] *See* letters from ABA; Seven Law Firms.

[628] Letter from Biogen.

[629] *See* letters from ABA; Seven Law Firms.

[630] *See* letter from Seven Law Firms.

[631] *See* letters from CII; Cleary; P. Neuhauser; Schulte Roth & Zabel; USPE.

[632] *See* letters from CII; USPE.

previously filed by the shareholder in connection with the nomination.[633]

Two commenters expressed general support for the proposal requiring that a nominating shareholder or group file any soliciting materials published, sent or given to shareholders pursuant to the exemption no later than the date that the material is first published, sent, or given.[634] One commenter argued that if the Commission retains the requirement that solicitations be in writing, then it should relax the "date of first use" filing deadline (with a three business day deadline being its preference).[635] One commenter supported the filing requirement ofRule 14a–2(b)(7)(ii) for soliciting materials published, sent or given to shareholders solicited to become part of a nominating group,[636] while three commenters opposed the filing requirement.[637] Of those opposing the requirement, one commenter noted that under the Williams Act, persons contemplating an actual change in control are not required to publicly disclose their activities until a group owning 5% of the company's shares has been formed.[638] One commenter stated that it is possible that a group of shareholders ultimately may decide not to submit a shareholder nominee.[639] Therefore, this commenter believed, any requirement for filings before the group submits a nominee would place an unfair disadvantage on the process of first determining if a nomination is the right course of action, and if so, who the nominee should be. Another commenter suggested that the filing requirement be triggered on the date the shareholder proposes a nominee, not on the date of solicitation.[640] The commenter believed that a shareholder should not be burdened with the filing requirement at the initial stages of determining the feasibility of forming a group.

Three commenters recommended that communications made for the purpose of forming a nominating shareholder group should be permitted to identify possible or proposed nominees,[641] with one commenter adding the condition that the nominee first agree to being named.[642] Two commenters recommended the following additional disclosure in any written soliciting materials used in reliance on the Rule 14a–2(b)(7) exemption:

- The period that the soliciting shareholder held the specified number of shares;
- A description of any short positions or other hedging arrangements through which the soliciting shareholder reduced or otherwise altered its economic stake in the company;
- A description of any contracts, arrangements, understandings or relationships between the soliciting shareholder and any other person with respect to any securities of the company; and
- A description of any plans or proposals of the shareholder or group with respect to the organization, business or operations of the company.[643]

One commenter added that the required disclosure should be consistent with that required by Items 4 and 6 of Schedule 13D,[644] while another commenter stated that shareholders should be permitted to include a brief statement of the reasons for the formation of the nominating group.[645]

After considering the comments, we are adopting the proposed exemption with certain modifications, including modifications to enable shareholders to communicate orally, to require the filing of a cover page in the form set forth in Schedule 14N (with the appropriate box on the cover page marked) no later than when the solicitation commences, and to clarify the circumstances under which the exemption will be available.[646] We believe that this limited exemption will facilitate shareholders' use of Rule 14a–11 and remove concerns shareholders seeking to use the rule may have regarding certain communications with other shareholders regarding their intent to submit a nomination pursuant to the rule.

New Rule 14a–2(b)(7) provides an exemption from the generally applicable disclosure, filing, and other requirements of the proxy rules for solicitations by or on behalf of any shareholder in connection with the formation of a nominating shareholder group, provided that the shareholder is not holding the company's securities with the purpose, or with the effect, of changing control of the company or to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the registrant could be required to include under Rule 14a–11(d). In addition, any written communication may include no more than:

- A statement of the shareholder's intent to form a nominating shareholder group in order to nominate a director under Rule 14a–11;
- Identification of, and a brief statement regarding, the potential nominee or nominees or, where no nominee or nominees have been identified, the characteristics of the nominee or nominees that the shareholder intends to nominate, if any;
- The percentage of voting power of the company's securities that are entitled to be voted on the election of directors that each soliciting shareholder holds or the aggregate percentage held by any group to which the shareholder belongs; and
- The means by which shareholders may contact the soliciting party.

Any written soliciting material published, sent or given to shareholders in accordance with the terms of this provision must be filed with the Commission by the nominating shareholder or group, under the company's Exchange Act file number (or in the case of a registered investment company, under the company's Investment Company Act file number), no later than the date the material is first published, sent or given to shareholders. The soliciting material would be required to be filed with a cover page in the form set forth in Schedule 14N, with the appropriate box on the cover page marked to identify the filing as soliciting material pursuant to Rule 14a–2(b)(7).[647] This requirement is largely consistent with the Proposal; however, under the final rule, the solicitation will be filed on Schedule 14N rather than as definitive additional

[633] *See* letter from Cleary.

[634] *See* letters from ABA; CII.

[635] *See* letter from Schulte Roth & Zabel.

[636] *See* letter from ABA.

[637] *See* letters from CalSTRS; COPERA; P. Neuhauser.

[638] *See* letter from P. Neuhauser.

[639] *See* letter from COPERA.

[640] *See* letter from CalSTRS.

[641] *See* letters from ABA; CII; USPE.

[642] *See* letter from ABA.

[643] *See* letters from ABA; Seven Law Firms.

[644] *See* letter from ABA.

[645] *See* letter from Schulte Roth & Zabel.

[646] Shareholders also would have the option to structure their solicitations in connection with the formation of a nominating shareholder group, whether written or oral, to comply with an existing exemption from the proxy rules, including the exemption for solicitations of no more than 10 shareholders (Exchange Act Rule 14a–2(b)(2)) and the exemption for certain communications that take place in an electronic shareholder forum (Exchange Act Rule 14a–2(b)(6)). For example, a shareholder could rely on Rule 14a–2(b)(2) to solicit no more than 10 shareholders in an effort to form a nominating shareholder group. If the shareholder's efforts did not result in the formation of a group large enough to meet the ownership thresholds, the shareholder could then rely on Rule 14a–2(b)(7) to continue its efforts to form a nominating shareholder group for the purpose of submitting a nomination pursuant to Rule 14a–11.

[647] Materials filed in connection with the new solicitation exemptions will be filed under a cover page of Schedule 14N and will appear as a Schedule 14N–S on EDGAR. *See* new Rule 14a–2(b)(7)(ii). We note that written communications include electronic communications, such as e-mails and Web site postings, and scripts used in connection with oral solicitations.

soliciting materials on Schedule 14A, as was proposed. We have made this change to avoid confusion between soliciting materials filed in connection with the formation of a nominating shareholder group under Rule 14a–11 (or in connection with a Rule 14a–11 nomination), as discussed further below, and other proxy materials that may be filed by companies or by participants in a traditional proxy contest.

We also have expanded the exemption to cover oral solicitations. As noted in the Proposal, we originally proposed to limit the exclusion to written communications to address our concern that oral communications could not easily satisfy the filing requirement (which would make it more difficult to monitor use of the exemption). However, after further consideration, we agree with commenters that oral communications should be included within the exemption because it is likely that shareholders will need to speak to each other in order to effectively form a nominating shareholder group. Oral communications will not be limited in content in the way that written communications are limited. In an effort to better monitor and avoid abuse under the exemption, however, a shareholder seeking to form a nominating shareholder group in reliance on the exemption in Rule 14a–2(b)(7) will be required to file a Schedule 14N notice of commencement of the oral solicitation. Because there are no limits on the number of holders that can be solicited in reliance on the new rule, or the contents of the oral communications, we believe it is important for our staff and the markets to be aware of the commencement of these activities.

The Schedule 14N filing for oral solicitations will consist of a cover page in the form set forth in Schedule 14N, with the appropriate box on the cover page marked to identify the filing as a notice of solicitation pursuant to Rule 14a–2(b)(7). This filing would be made under the company's Exchange Act file number (or in the case of a registered investment company, under the company's Investment Company Act file number), no later than the date of the first communication made in reliance on the rule.

As noted above, some commenters were opposed to the filing requirement for solicitations for various reasons. We have decided to adopt the filing requirement because we believe it is important to provide companies and shareholders with information about potential nominations under Rule 14a–11 when the new solicitation exemption is used to pursue such a nomination. We do not believe that the filing requirement is burdensome, particularly in light of the fact that we are providing shareholders with the opportunity to engage in activities for which they would otherwise need to file a proxy statement or have another exemption available.

More generally, we understand commenters' concerns regarding the solicitation exemptions, including the exemption for oral communications when seeking to form a group, being used as a means to engage in a contest for control, but we believe that requiring a nominating shareholder or group to file a Schedule 14N to provide notice of such communications, along with the other limitations in the rule we are adopting, should mitigate these concerns. In response to commenters' concerns, we have clarified in the rule that a shareholder or group that chooses to rely on new Rule 14a–2(b)(7) would lose that exemption if they subsequently engaged in a non-Rule 14a–11 nomination or solicitation in connection with the subject election of directors other than solicitations exempt under Rule 14a–2(b)(8), or if they become a member of a group, as determined under Section 13(d)(3) of the Exchange Act and Rule 13d–5(b)(1), or otherwise, with persons engaged in soliciting or other nominating activities in connection with the subject election of directors.[648] This could result in the shareholder or group being deemed to have engaged in a non-exempt solicitation in violation of the proxy rules. In addition, we have clarified that, consistent with Rule 14a–11, the exemption is available only where the shareholder is not holding the company's securities with the purpose, or with the effect, of changing control of the company or to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the registrant could be required to include under Rule 14a–11(d). Thus, we do not believe that it is likely that a shareholder or group will use the exemption as a means to engage in a contest for control.

Consistent with the Proposal, neither this exemption nor the exemption set forth in Rule 14a–2(b)(8) (discussed below) will apply to solicitations made when seeking to have a nominee included in a company's proxy materials pursuant to a procedure specified in the company's governing documents (as opposed to pursuant to Rule 14a–11). As we noted in the Proposal, in this instance, companies and/or shareholders would have determined the parameters of the shareholder's or group's access to the company's proxy materials. Given the range of possible criteria companies and/or shareholders could establish for nominations, we continue to believe it would not be appropriate to extend the exemption to those circumstances. Also consistent with the Proposal, we have not extended the exemption to nominations made pursuant to applicable State law provisions,[649] again because State law could establish any number of possible criteria for nominations. A shareholder would need to determine whether one of the existing exemptions applies to their solicitation conducted in connection with a nomination made pursuant to a company's governing documents or State law.

b. Rule 14a–2(b)(8)

Both the nominating shareholder or group and the company may wish to solicit in favor of their nominees for director by various means, including orally, by U.S. mail, electronic mail, and Web site postings. While the company ultimately would file a proxy statement and therefore could rely on the existing proxy rules to solicit outside the proxy statement,[650] shareholders could be limited in their soliciting activities under the current proxy rules. Accordingly, our Proposal included a new exemption to the proxy rules for solicitations by or on behalf of a nominating shareholder or group in support of its nominee who is included in the company's proxy statement and form of proxy.

As proposed, the exemption would be available only where the shareholder is not seeking proxy authority. In addition, any written communications would be required to include specified disclosures, including:

- The identity of the nominating shareholder or group;
- A description of his or her direct or indirect interests, by security holdings or otherwise; and
- A legend advising shareholders that a shareholder nominee is or will be included in the company's proxy statement and that they should read the company's proxy statement when available and that the proxy statement, other soliciting material, and any other relevant documents are or will be available at no charge on the Commission's Web site.

[648] *See* new Instruction to Rule 14a–2(b)(7).

[649] Similarly, the exemption would not be available for solicitations in connection with nominations made pursuant to foreign law provisions.

[650] *See* Exchange Act Rule 14a–12.

Under the Proposal, written soliciting materials also would be required to be filed with the Commission under the company's Exchange Act file number no later than the date the material is first published, sent or given to shareholders.[651] The soliciting material would be required to include a cover page in the form set forth in Schedule 14A, with the appropriate box on the cover page marked.[652]

Three commenters supported the proposed Rule 14a–2(b)(8) exemption for soliciting activities by or on behalf of a nominating shareholder or group in support of the shareholder nominees included in a company's proxy materials, with soliciting materials filed no later than the date that the materials are first used.[653] Two of these commenters explained that because management would solicit votes against the shareholder nominees and for their own nominees, the nominating shareholder, group, and shareholder nominees should have the same ability to solicit, so long as they do not request proxy authority.[654] Another commenter stated that the exemption should apply to solicitations for nominations made pursuant to Rule 14a–11, State law, or a company's governing documents.[655] The commenter opposed any limitations on the soliciting activities by a nominating shareholder or group and viewed such soliciting activities as the same as a company's disclosure opposing a shareholder proposal. One commenter supported the Rule 14a–2(b)(8) exemption for solicitations by a nominating shareholder or group in favor of a shareholder nominee who is included in a company's proxy materials (or against a management nominee), but recommended that the rule specify that the exemption only applies to solicitations in favor of a shareholder nominee (or against a board nominee) that occur after the distribution of the company's proxy materials—this would help avoid confusion and misunderstandings about whether solicitation may occur before the company's proxy materials are available.[656] This commenter also recommended that the exemption not be available if the company or another shareholder has publicly announced that the company would be facing a traditional proxy contest, even from an unrelated shareholder. The commenter also believed that the exemption should be available for any written solicitation by or on behalf of a nominating shareholder or group in support of a nominee included in a company's proxy materials pursuant to State law or the company's governing documents, as long as the nominating shareholder or group does not use a form of proxy that differs from that of the company, does not furnish or otherwise request a form of revocation, abstention, consent or authorization, and files its solicitation material for its nominees (or against the management nominees) with the Commission on the date of first use.

To the extent that it is not included in either the company's proxy materials or Schedule 14N, the commenter also recommended that additional disclosure be required to be included in solicitations made pursuant to Rule 14a–2(b)(8).[657] Another commenter also stated that Rule 14a–2(b)(8) should apply only to solicitations in favor of a shareholder nominee that occur after the mailing of a company's proxy materials.[658] Further, the commenter explained that solicitations should not occur at a time when shareholders do not have access to the more complete and balanced disclosure about all of the nominees in a company's proxy materials.

As adopted, Rule 14a–2(b)(8) provides an exemption from the generally applicable disclosure, filing, and other requirements of the proxy rules for solicitations by or on behalf of a nominating shareholder or group, provided that:

- The soliciting party does not, at any time during such solicitation, seek directly or indirectly, either on its own or another's behalf, the power to act as proxy for a shareholder and does not furnish or otherwise request, or act on behalf of a person who furnishes or requests, a form of revocation, abstention, consent or authorization;[659]
- Each written communication includes:[660]
  - The identity of the nominating shareholder or group and a description of his or her direct or indirect interests, by security holdings or otherwise;
  - A prominent legend in clear, plain language advising shareholders that a shareholder nominee is or will be included in the company's proxy statement and that they should read the company's proxy statement when available because it includes important information. The legend also must explain to shareholders that they can find the proxy statement, other soliciting material, and any other relevant documents at no charge on the Commission's Web site; and
- Any soliciting material published, sent or given to shareholders in accordance with this exemption must be filed by the nominating shareholder or group with the Commission on Schedule 14N, under the company's Exchange Act file number or, in the case of an investment company registered under the Investment Company Act of 1940, under the company's Investment Company Act file number, no later than the date the material is first published, sent or given to shareholders. Three copies of the material would at the same time be filed with, or mailed for filing to, each national securities exchange upon which any class of securities of the company is listed and registered. The soliciting material would be required to include a cover page in the form set forth in Schedule 14N, with the appropriate box on the cover page marked.[661]

We are adopting certain modifications to Rule 14a–2(b)(8) from the Proposal to clarify when a party may begin to rely on the exemption and to require that all soliciting material be filed on new Schedule 14N.[662] The exemption is otherwise consistent with the Proposal.

We have added a new instruction to the exemption clarifying that a

[651] For a registered investment company, the filing would be made under the company's Investment Company Act file number.

[652] *See* proposed Rule 14a–2(b)(8)(iii).

[653] *See* letters from CII; COPERA; P. Neuhauser.

[654] *See* letters from COPERA; P. Neuhauser.

[655] *See* letter from CII.

[656] *See* letter from ABA.

[657] The recommended disclosures included: the period that the soliciting shareholder held the specified number of shares; a description of any short positions or other hedging arrangements through which the soliciting shareholder reduced or otherwise altered its economic stake in the company; a description of any contracts, arrangements, understandings or relationships between the soliciting shareholder and any other person with respect to any securities of the company; and a description of any plans or proposals of the shareholder or group with respect to the organization, business or operations of the company.

[658] *See* letter from Seven Law Firms.

[659] *See* new Rule 14a–2(b)(8)(i). The language in this provision generally follows the language in Rule 14a–2(b)(1) and, therefore, we interpret both provisions in the same manner. In this regard, we note the discussion in the *Proxy Disclosure and Solicitation Enhancements* proposing release of our view of the scope of the term "form of revocation" within the meaning of Rule 14a–2(b)(1) and the proposed amendment to that rule to clarify that the term does not include an unmarked copy of the company's proxy card that is requested to be returned directly to management. *See* Securities Act Release No. 33–9052; 34–60280 (July 10, 2009) [74 FR 35076]. If we act on the proposed amendments to Rule 14a–2(b)(1), we would expect to make conforming changes to Rule 14a–2(b)(8).

[660] *See* new Rule 14a–2(b)(8)(ii).

[661] *See* new Rule 14a–2(b)(8)(iii).

[662] As noted above, the soliciting material will be filed under cover of Schedule 14N and will appear as Schedule 14N–S on EDGAR.

nominating shareholder or group may rely on the exemption provided in Rule 14a–2(b)(8) after receiving notice from the company in accordance with Rule 14a–11(g)(1) or (g)(3)(iv) that the company will include the nominating shareholder's or group's nominee or nominees.[663] As proposed, a nominating shareholder or group would not have been able to rely on the exemption until their nominee or nominees are actually included in the company's proxy materials. We received little comment on the appropriate timing for commencement of soliciting activities under the proposed exemption, with one commenter suggesting that Rule 14a–2(b)(8) apply only to solicitations that occur after the mailing of a company's proxy materials,[664] and another suggesting generally that there should be no limitations on soliciting activities by nominating shareholders or groups.[665]

After further consideration, we have determined that a nominating shareholder or group should be able to begin soliciting once there is certainty as to whether their nominees will be included in the company's proxy materials rather than being required to wait for the company to furnish its proxy materials. In this regard, we note that the exemption is consistent with the treatment of insurgent soliciting materials in a traditional proxy contest, as an insurgent may rely on Rule 14a–12(a) to engage in soliciting activities before furnishing shareholders with a proxy statement provided that the soliciting party provides certain disclosure and files a definitive proxy statement before or at the same time as the forms of proxy, consent or authorization are furnished to or requested from shareholders.[666] We have included the requirement that the nominating shareholder or group have received notice that their nominee or nominees will be included in the company's proxy materials before commencing solicitations to avoid confusion and potential abuse of the exemption.

We also have modified the filing requirements for written soliciting materials. Similar to the filing requirements for relying on Rule 14a–2(b)(7), any written soliciting material published, sent or given to shareholders in accordance with the terms of Rule 14a–2(b)(8) must be filed with the Commission on a Schedule 14N, under the company's Exchange Act file number (or in the case of a registered investment company, under the company's Investment Company Act file number), no later than the date the material is first published, sent or given to shareholders. The soliciting material would be required to be filed with a cover page in the form set forth in Schedule 14N, with the appropriate box on the cover page marked to identify the filing as soliciting material pursuant to Rule 14a–2(b)(8). This requirement is largely consistent with the Proposal, however, under the final rule, the solicitation will be filed on Schedule 14N rather than as definitive additional soliciting materials on Schedule 14A, as was proposed. As noted above, we received comment supporting the filing of soliciting materials,[667] however, the commenters did not specifically address whether the filing should be made under cover of Schedule 14N or Schedule 14A. As discussed above with respect to filings made pursuant to Rule 14a–2(b)(7),we have made the change to Schedule 14N to avoid confusion between soliciting materials filed in connection with the formation of a nominating shareholder group under Rule 14a–11 (or in connection with a Rule 14a–11 nomination) and other proxy materials that may be filed by companies or by participants in a traditional proxy contest.

As described in Section II.B.2.e. above, the rules we are adopting today will not prohibit shareholders from submitting Rule 14a–11 nominations for inclusion in company proxy materials when a proxy contest is being conducted by another person concurrently. We are, however, adding a clarification to new Rule 14a–2(b)(8), similar to Rule 14a–2(b)(7), in response to commenters' concern that the exemptions could be used as the first stage of a contest for control. As adopted, the exemption will be lost if a shareholder or group subsequently engages in a non-Rule 14a–11 nomination or solicitation in connection with the subject election of directors or if they become a member of a group, as determined under Section 13(d)(3) of the Exchange Act and Rule 13d–5(b)(1), or otherwise, with persons engaged in soliciting or other nominating activities in connection with the subject election of directors. The risk of losing the Rule 14a–2(b)(8) exemption and potential liability for engaging in non-exempt solicitations should prevent nominating shareholders or groups from soliciting in relation to any other person's nominees.[668] Further, as discussed in Sections II.B.2.e. and II.B.10.a. above, under Rule 14a–11 a company will not be required to include a nominee or nominees if the nominating shareholder or group is a member of any other group with persons engaged in solicitations in connection with the subject election of directors or other nominating activities; separately conducts a solicitation in connection with the subject election of directors other than a Rule 14a–2(b)(8) exempt solicitation in relation to those nominees it has nominated pursuant to Rule 14a–11 or for or against the company's nominees; or is acting as a participant in another person's solicitation in connection with the subject election of directors. All of these restrictions are designed to address commenters' concerns about collusion and potential abuse of the process. We also believe these restrictions are consistent with the desire to limit Rule 14a–11 to those shareholders or groups that do not have an intent to change the control of the company or to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the registrant could be required to include under Rule 14a–11. Finally, we have clarified in an instruction to Rule 14a–2(b)(8)[669] that Rule 14a–2(b)(8) is the only exemption upon which Rule 14a–11 nominating shareholders or groups may rely for their soliciting activities in support of nominees that are or will be included in the company's proxy materials or for or against company nominees. This will help ensure that these persons will not seek proxy authority and will file written communications in connection with their soliciting efforts and, we believe, will help to address some of commenters' concerns with regard to confusion and potential abuse of the exemption.

Consistent with the Proposal and as discussed above with regard to Rule 14a–2(b)(7), the exemption will not apply to solicitations made when seeking to have a nominee included in a company's proxy materials pursuant to a procedure specified in the company's governing documents (as opposed to pursuant to Rule 14a–11). As we noted in the Proposal, in this instance, companies and/or shareholders would have determined the parameters of the shareholder's or group's access to the company's proxy materials. Given the range of possible criteria that companies and/or shareholders could establish for nominations, we continue to believe it would not be appropriate to extend the exemption to those circumstances. Also

[663] *See* Instruction 1 to Rule 14a–2(b)(8).

[664] *See* letter from ABA.

[665] *See* letter from CII.

[666] *See* Exchange Act Rule 14a–12(a).

[667] *See* letters from CII; COPERA; P. Neuhauser.

[668] *See* Instruction 3 to Rule 14a–2(b)(8).

[669] *See* Instruction 2 to Rule 14a–2(b)(8).

consistent with the Proposal, we have not extended the exemption to nominations made pursuant to applicable State law provisions, again because State law could establish any number of possible criteria for nominations.[670] A shareholder would need to determine whether one of the existing exemptions applies to their solicitation conducted in connection with a nomination made pursuant to a company's governing documents or State law.

11. 2011 Proxy Season Transition Issues

Rule 14a–11 contains a window period for submission of shareholder nominees for inclusion in company proxy materials of no earlier than 150 calendar days, and no later than 120 calendar days, before the anniversary of the date that the company mailed its proxy materials for the prior year's annual meeting.[671] Shareholders seeking to use new Rule 14a–11 would be able to do so if the window period for submitting nominees for a particular company is open after the effective date of the rules. For some companies, the window period may open and close before the effective date of the new rules. In those cases, shareholders would not be permitted to submit nominees pursuant to Rule 14a–11 for inclusion in the company's proxy materials for the 2011 proxy season. For other companies, the window period may open before the effective date of the rules, but close after the effective date. In those cases, shareholders would be able to submit a nominee between the effective date and the close of the window period.

C. Exchange Act Rule 14a–8(i)(8)

1. Background

Currently, Rule 14a–8(i)(8) allows a company to exclude from its proxy statement a shareholder proposal that relates to a nomination or an election for membership on the company's board of directors or a procedure for such nomination or election. This provision currently permits the exclusion of a proposal that would result in an immediate election contest or would set up a process for shareholders to conduct an election contest in the future by requiring the company to include shareholders' director nominees in the company's proxy materials for subsequent meetings.

When the Commission adopted the current language of Rule 14a–8(i)(8) in December 2007,[672] it noted that many disclosures are required for election contests that are not provided for in Rule 14a–8.[673] In this regard, several Commission rules, including Exchange Act Rule 14a–12, regulate contested proxy solicitations to assure that investors receive disclosure to enable them to make informed voting decisions in elections. The requirements to provide these disclosures to shareholders from whom proxy authority is sought are grounded in Rule 14a–3, which requires that any party conducting a proxy solicitation file with the Commission, and furnish to each person solicited, a proxy statement containing the information in Schedule 14A. Items 4(b) and 5(b) of Schedule 14A require numerous specified disclosures if the solicitation is subject to Rule 14a–12(c), and Item 7 of Schedule 14A also requires important specified disclosures for any director nominee. Finally, all of these disclosures are covered by the prohibition on making a solicitation containing materially false or misleading statements or omissions that is found in Rule 14a–9.

2. Proposed Amendment

In the Proposal, we proposed an amendment to Rule 14a–8(i)(8), the election exclusion, to enable shareholders, under certain circumstances, to require companies to include in their proxy materials shareholder proposals that would amend, or that request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations, provided the proposal does not conflict with proposed Rule 14a–11.[674] The purpose of the proposed amendment was to further facilitate shareholders' rights to nominate directors and promote fair corporate suffrage, while still providing appropriate disclosure and liability protections.

Under the proposed amendment, the shareholder proposal would have to meet the procedural requirements of Rule 14a–8 (*e.g.,* the proposal could be excluded if the shareholder proponent did not meet the ownership threshold under Rule 14a–8) and not be subject to one of the other substantive bases for exclusion in the rule.[675] The proposed revision of Rule 14a–8(i)(8) would not restrict the types of amendments that a shareholder could propose to a company's governing documents to address the company's provisions regarding nomination procedures or disclosures related to shareholder nominations, although any such proposals that conflict with proposed Rule 14a–11 or State law could be excluded.[676]

In the Proposal, we stated that we continued to believe that, under certain circumstances, companies should have the right to exclude proposals related to particular elections and nominations for director from company proxy materials where those proposals could result in an election contest between company and shareholder nominees without the important protections provided for in the proxy rules. Therefore, while proposing the revision to Rule 14a–8(i)(8) as discussed above, we also proposed to codify certain prior staff interpretations with respect to the types of proposals that would continue to be excludable pursuant to Rule 14a–8(i)(8). As proposed, a company would be permitted to exclude a proposal under Rule 14a–8(i)(8) if it:

- Would disqualify a nominee who is standing for election;
- Would remove a director from office before his or her term expired;
- Questions the competence, business judgment, or character of one or more nominees or directors;
- Nominates a specific individual for election to the board of directors, other than pursuant to Rule 14a–11, an applicable State law provision, or a company's governing documents; or
- Otherwise could affect the outcome of the upcoming election of directors.

[670] Similarly, the exemption would not be available for solicitations in connection with nominations made pursuant to foreign law provisions.

[671] *See* Rule 14a–11(b)(10) and discussion in Section II.B.8.c.ii. above.

[672] *See* Election of Directors Adopting Release.

[673] *See* Election of Directors Adopting Release.

[674] Under the Proposal, Rule 14a–8(i)(8) would allow shareholders to propose additional means, other than Rule 14a–11, for inclusion of shareholder nominees in company proxy materials. Therefore, under the Proposal, a shareholder proposal that sought to provide an additional means for including shareholder nominees in the company's proxy materials pursuant to the company's governing documents would not be deemed to conflict with Rule 14a–11 simply because it would establish different eligibility thresholds or require more extensive disclosures about a nominee or nominating shareholder than would be required under Rule 14a–11. A shareholder proposal would conflict with proposed Rule 14a–11, however, to the extent that the proposal would purport to prevent a shareholder or shareholder group that met the requirements of proposed Rule 14a–11 from having their nominee for director included in the company's proxy materials.

[675] Currently, Rule 14a–8 requires that a shareholder proponent have continuously held at least $2,000 in market value, or 1%, of the company's securities entitled to be voted on the proposal at the meeting for a period of at least one year by the date the proponent submits the proposal. *See* Rule 14a–8(b). These requirements would remain the same.

[676] In this regard, the proposed revision to Rule 14a–8(i)(8) would not make a distinction between binding and non-binding proposals.

The proposed codification was not intended to change the staff's prior interpretations or limit the application of the exclusion; it was intended to provide more clarity to companies and shareholders regarding the application of the exclusion.

3. Comments on the Proposal

The proposal to amend Rule 14a–8 to revise the election exclusion received widespread support. Numerous commenters expressed general support for the proposed amendments to Rule 14a–8(i)(8), with many of the commenters supporting the Commission's proposal as a whole[677] and other commenters supporting the amendments while opposing Rule 14a–11.[678] Some commenters expressly supported the adoption of both Rule 14a–11 and amendments to Rule 14a–8(i)(8).[679] Some commenters indicated that the adoption of only the proposed amendments to Rule 14a–8(i)(8), without Rule 14a–11, would not address current shortcomings in corporate governance and achieve the Commission's stated objectives.[680] Of the commenters that supported the Rule 14a–8 amendments but opposed Rule 14a–11, many believed the amendments to Rule 14a–8 would allow procedures for the inclusion of shareholder nominees in company proxy materials to evolve and private ordering under State law to continue, unfettered by the complexities of a Federal standard that would apply uniformly to differently situated companies operating under diverse State law regimes.[681]

While supporting the amendments to Rule 14a–8(i)(8), some commenters expressed concerns about certain aspects of the amendments or recommended certain changes.[682] Two commenters expressed concerns about the codification of staff policies and interpretations under the current version of Rule 14a–8(i)(8).[683] One commenter expressed concerns that the proposed amendments to Rule 14a–8(i)(8) are broader than necessary to allow proposals seeking to establish access to a company's proxy materials and have the potential of significantly changing the administration of Rule 14a–8(i)(8) with respect to other types of proposals.[684] The commenter also noted that the fact that only four types of proposals have been addressed by the staff in the Rule 14a–8 process could be attributed to the fact that the current standard under Rule 14a–8(i)(8) operated to avoid other impermissible proposals from being presented in the first place. If the current standard is repealed, this commenter worried that the staff would have no basis upon which to assess proposals that attempt to circumvent or supplement the Commission's proxy solicitation rules. The commenter believed that eliminating the current standard would go beyond what is needed to permit shareholders to submit proposals seeking to amend, or request an amendment to, a company's governing documents to establish a procedure for including shareholder-nominated candidates for director in a company's proxy materials. The commenter suggested retaining the current standard in Rule 14a–8(i)(8) and amending the language only to specifically authorize proposals seeking to establish access to a company's proxy materials and require the disclosure provided in proposed Rule 14a–19.

4. Final Rule Amendment

As noted above in Section I.A., we do not believe that adopting changes to Rule 14a–8(i)(8) alone, without adopting Rule 14a–11, will achieve our goal of facilitating shareholders' ability to exercise their traditional State law rights to nominate directors. We believe that revising Rule 14a–8 will provide an additional avenue for shareholders to indirectly exercise those rights; therefore, the final rules include a revision to Rule 14a–8(i)(8). As adopted, companies will no longer be able to rely on Rule 14a–8(i)(8) to exclude a proposal seeking to establish a procedure in a company's governing documents for the inclusion of one or more shareholder nominees for director in the company's proxy materials.[685]

[677] *See* letters from 13D Monitor; ACSI; AFL–CIO; AFSCME; Joseph Ahearn ("J. Ahearn"); Rahim Ali ("R. Ali"); AllianceBernstein; Amalgamated Bank; Americans for Financial Reform; Australian Reward Investment Alliance ("ARIA"); AUST(Q) Superannuation ("AUST(Q)"); W. Baker; Barclays; BCIA; Bebchuk, *et al.;* R. Blake; William B. Bledsoe ("W. Bledsoe"); Brigham and Associates, LLC ("Brigham"); British Insurers; Ethan S. Burger ("E. Burger"); J. Burke; CalPERS; CalSTRS; Calvert; Cbus ("Cbus"); CFA Institute; John P. Chaney ("J. Chaney"); The Christopher Reynolds Foundation of New York ("Christopher Reynolds Foundation"); CII; COPERA; Corporate Library; Central Pension Fund of the International Union of Operating Engineers ("CPF"); CRMC; L. Dallas; Mike G. Dill ("M. Dill"); T. DiNapoli; Dominican Sisters of Hope; Andrew H. Dral ("A. Dral"); D. Eshelman; First Affirmative; Florida State Board of Administration; Martin Fox ("M. Fox"); Raymond E. Frechette ("R. Frechette"); Glass Lewis; James J. Givens ("J. Givens"); Governance for Owners ("Governance for Owners"); GovernanceMetrics; Michael D. Grabowski ("M. Grabowski"); Greenlining Institute ("Greenlining"); Hermes; HESTA Super Fund ("HESTA"); Sheryl Hogan ("S. Hogan"); David G. Hood ("D. Hood"); IAM; ICGN; Frank Coleman Inman ("F. Inman"); Ironfire; Melinda Katz ("M. Katz"); Michael E. Kelley ("M. Kelley"); Peter C. Kelly ("P. Kelly"); Key Equity Investors, Inc. ("Key Equity Investors"); Victor Kimball ("V. Kimball"); Jeffery Kondracki ("J. Kondracki"); A. Krakovsky; Paul E. Kritzer ("P. Kritzer"); LACERA; C. Levin; Lanny D. Levin ("L. Levin"); LIUNA; LUCRF; Marco Consulting; Maine Securities Corporation ("Maine Securities"); B. McDonnell; James McRitchie ("J. McRitchie"); Mercy Investment Program; M. Metz; David B. Moore ("D. Moore"); Karen L. Morris ("K. Morris"); Robert Moulton-Ely ("R. Moulton-Ely"); Motor Trades Association of Australia Superannuation Fund Pty Limited ("MTAA"); Murray & Murray & Co., LPA ("Murray & Murray"); William J. Nassif ("W. Nassif"); Tom Nappi ("T. Nappi"); D. Nappier; Nathan Cummings Foundation; P. Neuhauser; Nine Law Firms; New Jersey State Investment Council ("NJSIC"); Norges Bank; Non-Government School Superannuation Fund ("Non-Government"); Ontario Teachers' Pension Plan Board ("Ontario Teachers"); OPERS; Thomas Paine ("T. Paine"); Pax World; Pershing Square; Karl Putnam ("K. Putnam"); S. Ranzini; RacetotheBottom; Joan Reekie ("J. Reekie"); Relational; RiskMetrics; D. Roberts; D. Romine; Joseph Rozbicki ("J. Rozbicki"); Schulte Roth & Zabel; Shamrock; Shareowners.org; Sheet Metal Workers; Sisters of Mercy; Social Investment Forum; Sodali; Solutions; Laszlo Sterbinszky ("L. Sterbinszky"); Stringer Photography ("Stringer"); SWIB; J. Taub; Teamsters; Aleta Thielmeyer ("A. Thielmeyer"); TIAA–CREF; Trillium; TriState Coalition; T. Rowe Price; L. Tyson; Ursuline Sisters of Tildonk; Universities Supernnuation; USPE; ValueAct Capital; The Value Alliance and Corporate Governance Alliance ("Value Alliance"); R. VanEngelenhoven; Walden; B. Wilson; Leslie Wolfe ("L. Wolfe"); Steve Wolfe ("S. Wolfe"); Neil Wollman ("N. Wollman"); WSIB; Marcelo Zinn ("M. Zinn").

[678] *See* letters from 26 Corporate Secretaries; 3M; ABA; Advance Auto Parts; Aetna; AGL; Alcoa; Allstate; Alston & Bird; Ameriprise; American Bankers Association; American Express; Anadarko; Applied Materials; Association of Corporate Counsel; Avis Budget; Best Buy; Boeing; Boston Scientific; Brink's; BRT; Burlington Northern; California Bar; Callaway; Caterpillar; Chevron; P. Clapman; Comcast; CSX; Cummins; Davis Polk; Deere; Devon; DTE Energy; DuPont; Eaton; Einstein Noah; Eli Lilly; ExxonMobil; FedEx; Financial Services Roundtable; FMC Corp.; FPL Group; Frontier; GE; General Mills; A. Goolsby; C. Holliday; Home Depot; Honeywell; IBM; ICI; Intel; JPMorgan Chase; E. J. Kullman; N. Lautenbach; MetLife; Microsoft; J. Miller; Motorola; NACD; NIRI; O'Melveny & Myers; Office Depot; P&G; PepsiCo; Pfizer; Piedmont; Praxair; Protective; Ryder; S&C; Safeway; Seven Law Firms; Shearman & Sterling; Sherwin-Williams; SIFMA; Simpson Thacher; Society of Corporate Secretaries; Southern Company; Tenet; Tesoro; Textron; Theragenics; Tidewater; Tompkins; G. Tooker; tw telecom; United Brotherhood of Carpenters; U.S. Bancorp; The Valspar Corporation ("Valspar"); Wachtell; Wells Fargo; Xerox.

[679] *See* letters from AFL–CIO; CFA Institute; CII; Governance for Owners; C. Levin; Marco Consulting; SWIB.

[680] *See* letters from CII; USPE.

[681] *See* letters from American Express; Brink's; BRT; CSX; Davis Polk; DuPont; C. Holliday; GE; General Mills; MetLife; Safeway; Tenet; Verizon.

[682] *See* letters from ABA; BorgWarner; CII; J. McRitchie; P. Neuhauser; O'Melveny & Myers; Seven Law Firms.

[683] *See* letters from ABA; Seven Law Firms.

[684] *See* letter from ABA.

[685] As we stated in the Proposing Release, a proposal would continue to be subject to exclusion under other provisions of Rule 14a–8. For example, a proposal would be excludable under Rule 14a–8(i)(2) if its implementation would cause the company to violate any State, Federal, or foreign law to which it is subject, or under Rule 14a–8(i)(3),

Continued

In addition, we are adopting the proposed amendment to codify the prior staff interpretations largely as proposed. As adopted, companies will be permitted to exclude a shareholder proposal pursuant to Rule 14a–8(i)(8) if it:

- Would disqualify a nominee who is standing for election;
- Would remove a director from office before his or her term expired;
- Questions the competence, business judgment, or character of one or more nominees or directors;
- Seeks to include a specific individual in the company's proxy materials for election to the board of directors; or
- Otherwise could affect the outcome of the upcoming election of directors.[686]

We believe that shareholders and companies will benefit from the enhanced clarity that the amended rule will provide concerning the application of the rule. We do not believe that the amendments will result in confusion with regard to the rule's application because the amendments do not change the manner in which Rule 14a–8(i)(8) has been, and will continue to be, interpreted by the staff with respect to other types of proposals.

The amendments to Rule 14a–8(i)(8) could result in shareholders proposing amendments to a company's governing documents that would establish procedures under a company's governing documents for the inclusion of one or more shareholder nominees for director in company proxy materials. These proposals could seek to include a number of provisions relating to nominating directors for inclusion in company proxy materials, and disclosures related to such nominations, that require a different ownership threshold, holding period, or other qualifications or representations than those contained in Rule 14a–11. To the extent that shareholders are successful in adopting amendments to a company's governing documents to establish procedures for the inclusion of one or more shareholder nominees for director in the company's proxy materials, we note that the provision would be an additional avenue for shareholders to submit nominees for inclusion in company proxy materials, not a substitute for, or restriction on, Rule 14a–11. While such amendments proposed by shareholders through Rule 14a–8 would not be excludable under Rule 14a–8(i)(8) as amended, a company may seek to exclude such a proposal on another basis. For example, to the extent a proposal sought to limit the application of Rule 14a–11, a company could seek to exclude the proposal pursuant to Rule 14a–8(i)(3) on the basis that it is contrary to the proxy rules. We considered whether permitting proposals to allow additional means for shareholder director nominees to be included in company proxy materials would create confusion or lack of certainty for companies and their shareholders in light of the final provisions of Rule 14a–11. In the end, however, we have concluded that this possibility of confusion can be addressed through disclosure and is more than offset by the benefits of facilitating shareholders' ability to determine that their companies should have additional provisions allowing for inclusion of shareholder nominees in company proxy materials.

One commenter opposed the application of proposed Rule 14a–8(i)(8) to investment companies for the same reasons that it opposed the application of proposed Rule 14a–11 to investment companies.[687] We have decided to make amended Rule 14a–8(i)(8) applicable to investment companies for the same reasons that we are making Rule 14a–11 applicable to investment companies. Rule 14a–8(i)(8) is intended to further facilitate shareholders' traditional State law rights to nominate directors, which apply to the shareholders of investment companies. As discussed above, we do not believe that the regulatory protections offered by the Investment Company Act or the fact that open-end management investment companies are not required by State law to hold annual meetings serves to decrease the importance of the rights that are granted to shareholders under State law. For further discussion of our reasons for applying the rule to investment companies, see Section II.B.3.b.

5. Disclosure Requirements

We did not propose any new disclosure requirements for a shareholder that submits a proposal that would amend, or that requests an amendment to, a company's governing documents to address the company's nomination procedures for inclusion of shareholder nominees in company proxy materials or disclosures related to those shareholder provisions.[688] We solicited comment on whether additional disclosure from a shareholder submitting such a proposal would be appropriate. Three commenters opposed requiring disclosure from shareholders who submit such a proposal pursuant to Rule 14a–8 that differs from disclosure required of shareholders who submit other types of Rule 14a–8 proposals.[689] Three commenters recommended generally that a shareholder who submits a Rule 14a–8 proposal regarding a procedure to include shareholder nominees for director in a company's proxy materials should be required to provide additional disclosure (*e.g.,* disclosure about its long-term interest in the company and intentions regarding the shareholder proposal) so that other shareholders could make a fully-informed voting decision.[690] They argued that disclosure at the time of a nomination pursuant to such a procedure would relate only to the election of specific nominees; it would not provide shareholders with enough information to make a voting decision on the proposed procedure and its effect.

As we stated in the Proposing Release, it is our view that disclosure at the time a nominee is submitted and an actual vote is taken on a shareholder nominee is sufficient. Therefore, we are not adopting any new disclosure requirements for a shareholder simply submitting such a proposal because we believe that a shareholder may simply want to amend the company's procedures for including shareholder nominees in company proxy materials, but may not intend to nominate any particular individual.[691]

if the proposal or supporting statement was contrary to any of the Commission's proxy rules.

[686] We note that the rule text adopted differs slightly from the proposed rule text as a result of technical modifications we made to better reflect our intent with respect to the rule. We are adopting amended Rule 14a–8(i)(8) with the language "seeks to include a specific individual in the company's proxy materials for election to the board of directors" rather than "nominates a specific individual for election to the board of directors, other than pursuant to Rule 14a–11, an applicable State law provision, or a company's governing documents." The change in the language from "nominates" to "seeks to include" more accurately reflects the fact that Rule 14a–8 cannot be used as a means to nominate a candidate for election to the board of directors. We also deleted the language regarding Rule 14a–11, an applicable State law provision, or a company's governing documents because we believe it is unnecessary.

[687] *See* letter from ICI.

[688] Shareholders submitting a proposal that seeks to establish a procedure under a company's governing documents for the inclusion of one or more shareholder director nominees in the company's proxy materials would be subject to Rule 14a–8's current requirements. *See* footnote 685 above.

[689] *See* letters from CII; Florida State Board of Administration; United Brotherhood of Carpenters.

[690] *See* letters from ICI; Keating Muething; O'Melveny & Myers.

[691] This approach is different from the disclosure requirements the Commission proposed in the Shareholder Proposals Release in 2007; however, it is consistent with the overall requirements relating to the submission of shareholder proposals—

In proposing amendments to Rule 14a–8(i)(8), we noted that the amendments could result in shareholder proposals that would establish procedures for nominating directors and disclosures related to such nominations that require a different ownership threshold, holding period, or other qualifications or representations than those proposed in Rule 14a–11. In addition, a state could set forth in its corporate code,[692] or a company may choose to amend its governing documents, to establish nomination or disclosure provisions in addition to those provided pursuant to Rule 14a–11 (*e.g.,* a company could choose to allow shareholders to have their nominees included in the company's proxy materials regardless of ownership—in that instance, the company's provision would apply for certain shareholders who otherwise could not have their nominees included in the company's proxy materials pursuant to Rule 14a–11). Accordingly, we proposed amendments to our proxy rules to address the disclosure requirements when a nomination is made pursuant to such a provision.[693]

As proposed, Rule 14a–19 would apply to a shareholder nomination for director for inclusion in the company's proxy materials made pursuant to procedures established pursuant to State law or by a company's governing documents. The proposed rule would require a nominating shareholder or group to include in its shareholder notice on Schedule 14N (which, under the Proposal, also would be filed with the Commission on the date provided to the company) disclosures about the nominating shareholder or group and their nominee that are similar to what would be required in an election contest.[694]

Specifically, the notice on Schedule 14N, as proposed, would be required to include:

- A statement that the nominee consents to be named in the company's proxy statement and to serve on the board if elected, for inclusion in the company's proxy statement;[695]
- Disclosure about the nominee complying with the requirements of Item 4(b), Item 5(b), and Items 7(a), (b) and (c) and, for investment companies, Item 22(b) of Exchange Act Schedule 14A, as applicable, for inclusion in the company's proxy statement;[696]
- Disclosure about the nominating shareholder or members of a nominating shareholder group consistent with the disclosure currently required pursuant to Item 4(b) and Item 5(b) of Schedule 14A;[697]
- Disclosure about whether the nominating shareholder or any member of a nominating shareholder group has been involved in any legal proceeding during the past five years, as specified in Item 401(f) of Regulation S–K. Disclosure pursuant to this section need not be provided if provided in response to Items 4(b) and 5(b) of Schedule 14A;[698]
- The following disclosure regarding the nature and extent of the relationships between the nominating shareholder or group and nominee and the company or any affiliate of the company:
  - Any direct or indirect material interest in any contract or agreement between the nominating shareholder or group or the nominee and the company or any affiliate of the company (including any employment agreement, collective bargaining agreement, or consulting agreement);
  - Any material pending or threatened litigation in which the nominating shareholder or group or nominee is a party or a material participant, and that involves the company, any of its officers or directors, or any affiliate of the company; and
  - Any other material relationship between the nominating shareholder or group or the nominee and the company or any affiliate of the company not otherwise disclosed;[699] and
- Disclosure of any Web site address on which the nominating shareholder or group may publish soliciting materials.[700]

These disclosures would be included in the company's proxy materials pursuant to proposed new Item 7(f) of Schedule 14A, or in the case of investment companies, proposed Item 22(b)(19) of Schedule 14A.

In addition, under the Proposal, the nominating shareholder or group would be required to identify the shareholder or group making the nomination and the amount of their ownership in the company on Schedule 14N. The filing would be required to include, among other disclosures:

- The name and address of the nominating shareholder or each member of the nominating shareholder group; and
- Information regarding the aggregate number and percentage of the securities entitled to be voted, including the amount beneficially owned and the number of shares over which the nominating shareholder or each member of the nominating shareholder group has or shares voting or disposition power.

We did not receive a significant amount of comment specifically addressing proposed Rule 14a–19. One commenter believed that the disclosure requirements of Rules 14a–18 and 14a–19 should be virtually identical.[701] The commenter highlighted certain discrepancies, such as the intent to retain the requisite shares through, and subsequent to, the date of election. Another commenter saw no need for a separate rule to deal with nominations submitted under State law or a company's governing documents and therefore urged the Commission not to adopt Rule 14a–19.[702] The commenter believed there are no policy grounds to justify disparate treatment of nominations submitted under State law or a company's governing documents. It warned that a separate rule would only create confusion. Another commenter

generally, shareholder proponents are not required to provide any specific type of disclosure along with their proposal.

[692] *See* North Dakota Publicly Traded Corporations Act, N.D. Cent. Code § 10–35–08 (2009). In 2007, North Dakota amended its corporate code to permit five percent shareholders to provide a company notice of intent to nominate directors and require the company to include each such shareholder nominee in its proxy statement and form of proxy. *See* N.D. Cent. Code § 10–35 *et al.* (2007).

[693] *See* proposed Rule 14a–19.

[694] *See* proposed Rule 14a–19.

[695] *See* proposed Rule 14a–19(a).

[696] *See* proposed Rule 14a–19(b). This information would identify the nominee, describe certain legal proceedings, if any, related to the nominee, and describe certain of the nominee's transactions and relationships with the company. *See* Items 7(a), (b), and (c) of Schedule 14A. This information also would include biographical information and information concerning interests of the nominee. *See* Item 5(b) of Schedule 14A. With respect to a nominee for director of an investment company, the disclosure would include certain basic information about the nominee and any arrangement or understanding between the nominee and any other person pursuant to which he was selected as a nominee; information about the positions, interests, and transactions and relationships of the nominee and his immediate family members with the company and persons related to the company; information about the amount of equity securities of funds in a fund complex owned by the nominee; and information describing certain legal proceedings related to the nominee, including legal proceedings in which the nominee is a party adverse to, or has a material interest adverse to, the company or any of its affiliated persons. *See* paragraph (b) of Item 22 of Schedule 14A.

[697] *See* proposed Rule 14a–19(c).

[698] *See* proposed Rule 14a–19(d).

[699] *See* proposed Rule 14a–19(e).

[700] *See* proposed Rule 14a–19(f).

[701] *See* letter from P. Neuhauser.

[702] *See* letter from Cleary.

suggested that we extend the disclosure requirement to nominations submitted pursuant to a provision under foreign law.[703]

As we stated in the Proposing Release, we believe the proposed additional disclosure requirements are necessary to provide shareholders with full and fair disclosure of information that is material when a choice among directors to be elected is presented; thus, we are adopting the disclosure requirement largely as proposed.[704] As noted above, one commenter suggested that the disclosure standard should apply to nominations made pursuant to foreign law. We agree that the disclosure is necessary regardless of the source of the ability to nominate candidates for director. We therefore have clarified that the disclosure requirement extends not only to nominations made pursuant to State law or a company's governing documents, but also pursuant to foreign law (in the case of a non-U.S. domiciled company that does not qualify as a foreign private issuer). We continue to believe that these disclosures will assist shareholders in making an informed voting decision with regard to any nominee or nominees put forth by the nominating shareholder or group, in that the disclosures would enable shareholders to gauge the nominating shareholder's or group's interest in the company. We understand the concern that a separate disclosure rule for nominations made pursuant to State or foreign law provisions, or a company's governing documents could create confusion. We note, however, that certain disclosure provisions or certifications applicable to Rule 14a–11 nominations may not be applicable to nominations made pursuant to other provisions. For example, State or foreign law provisions, or the company's governing documents may require different ownership thresholds or holding periods. Therefore, we believe it is necessary to have separate disclosure requirements for nominations made pursuant to State or foreign law, or a company's governing documents. As with disclosures made in connection with a Rule 14a–11 nomination, the nominating shareholder or group would be liable for any materially false or misleading statements in these disclosures pursuant to new paragraph (c) of Rule 14a–9.[705]

As noted above, we have restructured Rule 14a–11, Rule 14a–18, and Schedule 14N. Similarly, while we are adopting the disclosure requirements largely as proposed in Rule 14a–19,[706] they are now included in Item 6 of Schedule 14N. In addition, because we moved the disclosure requirements for Rule 14a–11 from proposed Rule 14a–18 into Schedule 14N, the requirements for shareholders submitting nominations pursuant to a provision in State law or a company's governing documents are being adopted as new Rule 14a–18.

Under the Proposal, a shareholder submitting a nomination pursuant to a State law provision or a provision in a company's governing documents would be required to file a Schedule 14N (with the disclosures required by that Schedule) by the date specified in the advance notice provision, or where no such provision is in place, no later than 120 calendar days before the date the company mailed its proxy materials for the prior year's annual meeting.[707] We are adopting this requirement as proposed. We note that it is likely that a State or foreign law provision or a provision in a company's governing documents will provide a deadline for submission of nominations made pursuant to those provisions. While we believe that shareholders submitting nominations pursuant to those provisions should provide the disclosure required by Schedule 14N, we believe it is appropriate to defer to the deadline, if any, set forth in those provisions. In this regard, we note that timing concerns present in the Rule 14a–11 nomination context (*e.g.,* timing requirements for engaging in the staff no-action process) are not present in this context.

D. Other Rule Changes

1. Disclosure of Dates and Voting Information

As proposed, if a company did not hold an annual meeting during the prior year, or if the date of the meeting has changed by more than 30 days from the prior year, within four business days of determining the anticipated meeting date a company would be required to file a Form 8–K to disclose the date by which a nominating shareholder or group must submit notice to include a nominee in the company's proxy materials pursuant to Rule 14a–11.[708] The date disclosed as the deadline for such shareholder nominations for director would be required to be a reasonable time before the company mails its proxy materials for the meeting. We also proposed to require a registered investment company that is a series company to file a Form 8–K disclosing the company's net assets as of June 30 of the calendar year immediately preceding the calendar year of the meeting and the total number of the company's shares that are outstanding and entitled to vote for the election of directors (or if votes are to be cast on a basis other than one vote per share, then the total number of votes entitled to be voted and the basis for allocating votes) at the annual meeting of shareholders (or, in lieu of such an annual meeting, a special meeting of shareholders) as of the end of the most recent calendar quarter.

We did not receive much comment on this aspect of the rule. One commenter urged the Commission not to require the Form 8–K filing for investment companies, which generally are not required to file Form 8–K.[709] The commenter favored instead a requirement for investment companies to inform shareholders through another method (or combination of methods) of disclosure reasonably designed to provide notice of the date, including via a press release or posting information on the company's Web site. One commenter supported the proposed instruction to Item 5.07 of Form 8–K.[710]

We are adopting this requirement substantially as proposed, although the requirement will be in new Item 5.08 of Form 8–K. A company will be required to file a Form 8–K, within four business days of determining the anticipated date of the meeting, disclosing the date by which a nominating shareholder or group must submit notice to include a nominee in the company's proxy

[703] *See* letter from Curtis.

[704] As noted in footnote 511 above, the applicable disclosure requirement in Item 401(f) of Regulation S–K was amended in the Proxy Disclosure Enhancements Adopting Release to require disclosure regarding legal proceedings for the past 10 years as opposed to past five years. Thus, disclosure would be required about a nominee's or nominating shareholder's participation in legal proceedings during the past 10 years. We also are making clarifying changes to the disclosure required regarding the nature and extent of relationships between the nominating shareholder or group and/or nominee and/or the company or its affiliates. *See* footnote 514 and accompanying text in Section II.B.8.c.i. above.

[705] *See* proposed Rule 14a–9(c).

[706] As adopted, Item 6(d) of Schedule 14N will require disclosure about a nominating shareholder's involvement in legal proceedings during the past ten years, rather than five years as was proposed. This is due to the Commission's recent amendment of Item 401(f) of Regulation S–K. *See* footnotes 511 and 704 above.

[707] If a company did not hold an annual meeting during the prior year, or if the date of the meeting has changed by more than 30 calendar days from the prior year, then the nominating shareholder or group must provide notice a reasonable time before the registrant mails its proxy materials.

[708] *See* proposed Item 5.07 to Form 8–K.

[709] *See* letter from ICI.

[710] *See* letter from ABA.

materials pursuant to Rule 14a–11, which date shall be a reasonable time before the registrant mails its proxy materials for the meeting.[711] We also have clarified that where a company is required to include shareholder director nominees in the company's proxy materials pursuant to an applicable state or foreign law provision, or a provision in the company's governing documents then the company is required to disclose the date by which a nominating shareholder or nominating shareholder group must submit the Schedule 14N required pursuant to Rule 14a–18.

A registered investment company that is a series company also must disclose the total number of the company's shares that are outstanding and entitled to vote for the election of directors (or if votes are to be cast on a basis other than one vote per share, then the total number of votes entitled to be voted and the basis for allocating such votes) at the shareholder meeting as of the end of the most recent calendar quarter.[712] We believe it is important to provide shareholders with information regarding the deadline for submitting such nominations in the event that the date of the meeting at which the election of directors will take place changes significantly. Moreover, we have decided to require registered investment companies to make the disclosures on Form 8–K, as proposed, rather than through another method or combination of methods because we believe that the information that we are requiring is important information that should be filed with the Commission and accessible on EDGAR rather than merely disclosed on a Web site or in a press release.[713]

Exchange Act Rule 14a–5 requires registrants to disclose in a proxy statement the deadlines for submitting shareholder proposals and matters submitted pursuant to advance notice bylaws. We are amending Rule 14a–5 to also require companies to disclose the deadline for submitting nominees for inclusion in the company's proxy materials for the company's next annual meeting of shareholders. This provision will apply with respect to inclusion of nominations in a company's proxy materials pursuant to Rule 14a–11, an applicable state or foreign law provision, or a company's governing documents.[714] We believe that it is necessary to conform the existing requirements in Rule 14a–5, consistent with the proposal to give adequate notice to shareholders about their ability to submit a nominee or nominees for inclusion in a company's proxy materials pursuant to Rule 14a–11. The change should help to avoid any potential confusion regarding the date by which shareholders seeking to have a nominee included in a company's proxy materials would need to submit a Schedule 14N pursuant to Rule 14a–11 or Rule 14a–18.

2. Beneficial Ownership Reporting Requirements

As adopted, Rule 14a–11 requires that a nominating shareholder or group hold at least 3% of the voting power of the company's securities entitled to be voted on the election of directors. Although unnecessary to be able to use the rule, it is possible that in aggregating shares to meet the ownership requirement, a nominating shareholder or group will trigger the reporting requirements of Regulation 13D–G, which requires that a shareholder or group that beneficially owns more than 5% of a voting class of any equity security registered pursuant to Section 12 file beneficial ownership reports.[715] Therefore, nominating shareholders will need to consider whether they have formed a group under Exchange Act Section 13(d)(3) and Rule 13d–5(b)(1) that is required to file beneficial ownership reports. Any person (which includes a group as defined in Rule 13d–5(b)(1)) who is directly or indirectly the beneficial owner of more than 5% of a class of equity securities registered under Exchange Act Section 12 must report that ownership by filing an Exchange Act Schedule 13D with the Commission.[716] There are exceptions to this requirement, however, that permit such a person to report that ownership on Schedule 13G rather than Schedule 13D. One exception permits filings on Schedule 13G for a specified list of qualified institutional investors who have acquired the securities in the ordinary course of their business and with neither the purpose nor the effect of changing or influencing control of the company.[717] A second exception applies to persons who beneficially own more than 5% of a subject class of securities if they acquired the securities with neither the purpose nor the effect of changing or influencing control of the company and they are not directly or indirectly the beneficial owner of 20% or more of the subject class of securities.[718]

Central to Schedule 13G eligibility under the exceptions discussed above is that the shareholder be a passive investor that has acquired the securities without the purpose, or the effect, of changing or influencing control of the company. In addition, shareholders who are filing as qualified institutional investors must have acquired the securities in the ordinary course of their business. Typically, persons who seek to nominate candidates for a company's board of directors would be unable to meet these eligibility requirements to file on Schedule 13G. As we stated in the Proposing Release, however, we believe that the formation of a shareholder group solely for the purpose of nominating one or more directors pursuant to proposed Rule 14a–11, the nomination of one or more directors pursuant to proposed Rule 14a–11, or soliciting activities in connection with such a nomination (including soliciting in opposition to a company's nominees) should not result in a nominating shareholder or nominating shareholder group losing its eligibility to file on Schedule 13G. As a result, we proposed to revise the requirement that the first and second categories of persons who may report their ownership on Schedule 13G must have acquired the securities without the purpose or effect of changing or influencing control of the company and, in the case of Rule 13d–1(b), in the ordinary course of business, to provide an exception for activities solely in connection with a nomination under Rule 14a–11.

[711] *See* new Item 5.08 of Form 8–K and new General Instruction B.1. to Form 8–K. A late filing of such form would result in the registrant not being current or timely for purposes of rules and regulations related to form eligibility and the resale of securities. The company would be deemed current once the Form 8–K is filed.

[712] *See* General Instruction B.1 and Item 5.08(b) of Form 8–K; Rules 13a–11(b)(3) and 15d–11(b)(3); and Instruction 2 to Rule 14a–11(b)(1). In the case of registered investment companies, nominating shareholders may rely on the information contained in the Form 8–K filed in connection with the meeting, unless the nominating shareholder or group knows or has reason to know that the information contained therein is inaccurate. *See* discussion in footnote 280.

[713] We are not adopting the proposed requirement that a registered investment company that is a series company file a Form 8–K disclosing the company's net assets as of June 30 of the calendar year immediately preceding the calendar year of the meeting. We proposed this requirement in connection with our proposal to use tiered thresholds based on net assets to determine eligibility under Rule 14a–11. Since the rule we are adopting does not use tiered thresholds, the proposed requirement is no longer necessary.

[714] *See* new Rule 14a–5(e)(3).

[715] The term equity security also includes any equity security of any insurance company which would have been required to be registered pursuant to Section 12 of the Exchange Act except for the exemption contained in Section 12(g)(2)(G) of the Act or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940. *See* Exchange Act Rule 13d–1(i).

[716] *See* Exchange Act Rule 13d–1.

[717] *See* Exchange Act Rule 13d–1(b).

[718] *See* Exchange Act Rule 13d–1(c).

Comments on the proposal were mixed. Some commenters generally supported the proposed exceptions from the Schedule 13D filing obligation for a nominating shareholder or group conducting activities solely in connection with a Rule 14a–11 nomination so that it would be eligible to report on Schedule 13G rather than Schedule 13D.[719] One such commenter added that the exceptions also should be available to a nominating shareholder or group submitting nominees pursuant to State law or a company's governing documents.[720] One commenter predicted the amendment would encourage use of Rule 14a–11 by large shareholders who are knowledgeable about the company but may be reluctant to take action that may jeopardize their Schedule 13G filer status.[721] One commenter observed more generally that a Schedule 13D filing is unnecessary if the filing requirement of Rule 14a–2(b)(7) is retained because such filings would provide sufficient notice to the market.[722] Even if such filing requirement is not retained, the commenter believed that a Schedule 13D is unnecessary because the underlying assumption of Rule 14a–11 is that there is no control intent.

On the other hand, other commenters opposed generally the proposed exceptions from the Schedule 13D filing obligation.[723] Some of these commenters expressed reservations about creating a broad exemption or carve-out from Exchange Act Section 13(d) "control" concepts.[724] One commenter noted that Rules 13d–1(b), (c) and (e) track the use of the phrase "changing or influencing control of the issuer" from Exchange Act Section 13(d)(5).[725] This commenter did not believe there is a persuasive basis for the Commission to provide that, under all circumstances, a shareholder or group seeking to nominate a director, in opposition to the election of incumbent directors, is not seeking to "influence" control of the company. One commenter stated that most election contests would fall within the concept of "influencing the control of the issuer" because they focus on the governance, strategic direction and policy initiatives of the company.[726] Another commenter noted that the Schedule 14N certifications require only that a nominating shareholder has no intention of "changing control" of the company, but does not require the nominating shareholder to certify that it has no intention of "influencing control."[727] Several commenters expressed concerns about inadequate disclosures that would result from the proposed exceptions or pointed to the useful disclosure required by Schedule 13D.[728] One commenter observed that if a nominating shareholder or group has no plans regarding significant changes in the company or relationships with other parties regarding securities of the company, a Schedule 13D filing would not require significant information from a nominating shareholder or group beyond that required by Schedule 14N.[729] This commenter noted that if a nominating shareholder or group, however, has more complicated relationships or intentions relating to the company or its securities, the Schedule 13D filing would provide additional information that shareholders would find useful.[730]

We continue to believe that it is appropriate to provide an exception for activities solely in connection with a nomination pursuant to Rule 14a–11 to allow a nominating shareholder or group to report on Schedule 13G. Accordingly, we are adopting, as proposed, the exception from the requirement to file a Schedule 13D (and therefore permitting filing on Schedule 13G) for activities undertaken solely in connection with a nomination under Rule 14a–11. In addition, we are adopting a change to the certifications in Schedule 13G to reflect this exception.[731]

It is important to note that any activity other than those provided for under Rule 14a–11 would make the exception inapplicable. For example, approaching a company's board and urging them to consider strategic alternatives (*e.g.,* sale of non-core assets or a leveraged recapitalization) would constitute activities outside of the Rule 14a–11 nomination, and any nominating shareholder or group engaging in such activities most likely would be ineligible to file on Schedule 13G. The rule changes will not apply to nominating shareholders or groups that submit a nomination pursuant to an applicable state or foreign law provision, or a company's governing documents because in those instances the applicable provisions may not limit the number of board seats for which a shareholder or group could nominate candidates or include a requirement that the nominating shareholder or group lack intent to change the control of the issuer or to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the registrant could be required to include under Rule 14a–11 (as is the case under Rule 14a–11). Accordingly, we do not believe it would be appropriate to make a general determination by rule as to whether a nominating shareholder or group under an applicable state or foreign law provision, or a company's governing documents would be eligible to file on Schedule 13G. Instead, this would be a fact-specific inquiry.

We believe that the disclosures about the nominating shareholder or group required by Rule 14a–11 and Schedule 14N are adequate to allow shareholders to make an informed decision and to keep the market apprised of developments regarding board nomination activities, and do not believe that requiring the additional disclosures in Schedule 13D is necessary for activities solely in connection with a nomination under Rule 14a–11. Because this exception is only available for purposes of the nomination, a nominating shareholder or group would need to reassess its eligibility to continue to report on Schedule 13G as a passive or qualified institutional investor after the election. For example, if a nominating shareholder is also the nominee and is successfully elected to the board, then the shareholder would likely be ineligible to continue filing on Schedule 13G due to its ability as a director to directly or indirectly influence the management and policies of the company. We believe the limited scope of the exemption addresses commenters'

[719] *See* letters from CalSTRS; CFA Institute; CII; Florida State Board of Administration; ICI; Schulte Roth & Zabel. Another commenter, ICGN, did not expressly address the proposed amendment but asked the Commission to clarify the definition of "group" so that shareholders would not be dissuaded from acting collectively to use Rule 14a–11 out of concern that a Schedule 13D filing obligation would arise.

[720] *See* letter from CII. In contrast, two commenters stated that the proposed exceptions should not be extended outside the context of Rule 14a–11, and agreed that it would not be possible to address the eligibility standards in provisions of State law or a company's governing documents or ensure that there is no change in control attempt. *See* letters from ABA; Alston & Bird.

[721] *See* letter from Schulte Roth & Zabel.

[722] *See* letter from P. Neuhauser.

[723] *See* letters from ABA; Alston & Bird; BRT; Cleary; Microsoft; Seven Law Firms; Shearman & Sterling; Society of Corporate Secretaries; Vinson & Elkins.

[724] *See* letters from ABA; Cleary; Microsoft; Seven Law Firm; Shearman & Sterling.

[725] *See* letter from ABA.

[726] *See* letter from Seven Law Firms.

[727] *See* letter from ABA.

[728] *See* letters from ABA; Alston & Bird; BRT; Seven Law Firms; Society of Corporate Secretaries; Vinson & Elkins.

[729] *See* letter from ABA.

[730] *Id*

[731] We did not propose the change to the certifications in Schedule 13G; however, we believe this conforming change is necessary to reflect the intent of the exception.

concerns about nominating shareholders or groups influencing control of the issuer while reporting on Schedule 13G.

3. Exchange Act Section 16

Section 16[732] applies to every person who is the beneficial owner of more than 10% of any class of equity security registered under Exchange Act Section 12 ("10% owners"), and each officer and director (collectively with 10% owners, "insiders") of the issuer of such security. We did not propose an exemption from Section 16 for groups formed solely for the purpose of nominating a director pursuant to Rule 14a–11.[733] In the Proposal, we explained that we believed the existing analysis of whether a group has formed[734] and whether Section 16 applies[735] should continue to apply. We also explained that because the proposed ownership thresholds for Rule 14a–11 were significantly lower than 10%, we did not believe that the lack of an exclusion would have a deterrent effect on the formation of groups, and therefore did not believe it was necessary to propose an exclusion from Section 16.

We also noted in the Proposal that some shareholders, particularly institutions and other entities, may be concerned that successful use of Rule 14a–11 to include a director nominee in company proxy materials may result in the nominating person also being deemed a director under the "deputization" theory developed by courts in Section 16(b) short-swing profit recovery cases.[736] Under this theory it is possible for a person to be deemed a director subject to Section 16, even though the issuer has not formally elected or otherwise named that person a director. We did not propose standards for establishing the independence of the nominee from the nominating shareholder, or members of the nominating shareholder group.

Although we did not propose an exemption from Section 16, we requested comment on, among other things, whether a nominating shareholder group should be excluded from Section 16 and whether subjecting such groups to Section 16 would be a disincentive to using Rule 14a–11. A few commenters recommended that the Commission create an exemption from Section 16 for a group of shareholders that aggregated their holdings in order to submit a nominee pursuant to Rule 14a–11.[737] Commenters reasoned that members of a nominating group that owns more than 10% of the shares could not reasonably be considered company "insiders."[738] These commenters noted that the group would exist for the sole purpose of nominating a candidate and, absent special facts, would have no access to inside information about the company. Thus, these commenters argued that the statutory purpose of Section 16—the prevention of insider trading—would not be relevant to such groups. Other commenters did not support an exemption from Section 16.[739] Some of these commenters further agreed that no standard should be adopted regarding application of the judicial doctrine concerning "deputized directors."[740]

After considering the comments, we continue to believe that an exclusion from Section 16 is not appropriate for groups formed solely for the purpose of nominating a director pursuant to Rule 14a–11, soliciting in connection with the election of that nominee, or having that nominee elected as director. We also believe that it is not necessary to change the existing analysis of whether a group has formed and whether Section 16 applies. Because the ownership threshold we are adopting for Rule 14a–11 eligibility is significantly less than 10%, shareholders will be able to form groups with holdings sufficient to meet the Rule 14a–11 threshold without reaching the 10% threshold in Section 16. Thus, we do not believe that Section 16 commonly will be a deterrent to use of Rule 14a–11. As such, we believe that shareholders forming a group to submit a nominee for director pursuant to Rule 14a–11 should be analyzed in the same way as any other group for purposes of determining whether group members are 10% owners subject to Section 16. Similarly, we are not adopting standards regarding application of the "deputized director" doctrine, which will be left to existing case law and courts.

4. Nominating Shareholder or Group Status as Affiliates of the Company

We proposed that Rule 14a–11(a) contain a safe harbor providing that a nominating shareholder would not be deemed an "affiliate" of the company under the Securities Act or the Exchange Act solely as a result of using Rule 14a–11.[741] Under the Proposal, this safe harbor would apply not only to the nomination of a candidate, but also where that candidate is elected, provided that the nominating shareholder or group does not have an agreement or relationship with that director otherwise than relating to the nomination. We were concerned that, without such a safe harbor, some nominating shareholders may be deterred from using Rule 14a–11.

We solicited comment on the appropriateness of the proposed safe harbor and posed some specific questions concerning its application. We also asked whether we should include a similar safe harbor provision for nominating shareholders that submit a nominee for inclusion in a company's proxy materials pursuant to an applicable State law provision or a company's governing documents rather than using the proposed rule.

Three commenters provided statements of general support for the proposed safe harbor.[742] One commenter believed that a safe harbor also would be warranted for shareholders submitting nominees pursuant to State law or a company's governing documents.[743] Another commenter believed the safe harbor should not be available once the shareholder nominee is elected.[744] One commenter recommended that Instruction 1 to Rule 14a–11(a) clarify that the presence of agreements, other than those relating only to the nomination, between a nominating shareholder and a candidate or director

[732] 15 U.S.C. 78p.

[733] As discussed in the Proposing Release, the Commission had previously proposed, in 2003, that a group formed solely for the purpose of nominating a director pursuant to Rule 14a–11, soliciting in connection with the election of that nominee, or having that nominee elected as a director be exempted from Exchange Act Section 16 reporting.

[734] *See* Exchange Act Rule 13d–5(b) [17 CFR 240.13d–5(b)].

[735] *See* Exchange Act Rule 16a–1(a)(1) [17 CFR 240.16a–1(a)(1)].

[736] *See Feder v. Martin Marietta Corp.,* 406 F.2d 260 (2d Cir. 1969), *cert. denied,* 396 U.S. 1036 (1970); *Blau v. Lehman,* 368 U.S. 403 (1962); and *Rattner v. Lehman,* 193 F.2d 564 (2d Cir. 1952). The judicial decisions in which this theory was applied do not establish precise standards for determining when "deputization" may exist. However, the express purpose of Section 16(b) is to prevent the unfair use of information by insiders through their relationships to the issuer. Accordingly, one factor that courts may consider in determining if Section 16(b) liability applies is whether, by virtue of the "deputization" relationship, the "deputizing" entity's transactions in issuer securities may benefit from the deputized director's access to inside information.

[737] *See* letters from ICI; Schulte Roth & Zabel; ValueAct Capital.

[738] *See* letters from ICI; Schulte Roth & Zabel.

[739] *See* letters from ABA; Alston & Bird; CII; Seven Law Firms.

[740] *See* letters from ABA; CII; Seven Law Firms.

[741] This safe harbor was set forth in Instruction 1 to proposed Rule 14a–11(a). The safe harbor was intended to operate such that the determination of whether a shareholder or group is an "affiliate" of the company would continue to be made based upon all of the facts and circumstances regarding the relationship of the shareholder or group to the company, but a shareholder or group would not be deemed an affiliate "solely" by virtue of having nominated that director.

[742] *See* letters from CII; Protective; Schulte Roth & Zabel.

[743] *See* letter from CII.

[744] *See* letter from Protective.

would not necessarily confer affiliate status on the nominating shareholder, and that Rule 14a–11 is not intended to change the current law regarding affiliate status.[745]

Two commenters opposed the safe harbor.[746] One commenter believed that we should not adopt such a safe harbor without addressing the issue of affiliate status more broadly.[747] It argued that as long as the Commission follows the historical, facts-and-circumstances analysis for the determination of affiliate status in other contexts, it also should follow this practice in the context of Rule 14a–11. Both commenters opposing the safe harbor also did not believe that proposed Instruction 1 to Rule 14a–11(a) would significantly reduce the interpretive analysis needed to determine whether a nominating shareholder is an "affiliate."[748] They argued that it rarely would be clear whether a nominating shareholder's relationship with the company would consist "solely" of its nominating and soliciting activities, no matter how a safe harbor may be worded. They also expressed concern that the safe harbor would discourage nominating shareholders from participating in potentially fruitful discussions with the company, for fear that such participation would go beyond "solely" nominating and soliciting for a director candidate.

After considering the comments, we do not believe that the proposed safe harbor would provide a level of certainty to nominating shareholders concerning their potential "affiliate" status sufficient to warrant a departure from the current application of the term. We believe it is more appropriate to conduct a facts-and-circumstances analysis in this regard, as would currently be the case in other situations. We agree with commenters' views on the limited utility of the safe harbor's application in practice, acknowledging that a nominating shareholder would be obligated to conduct a facts-and-circumstance analysis to determine affiliate status even if we were to adopt the safe harbor as proposed. We also recognize that some nominating shareholders or members of nominating shareholder groups may be reluctant to engage in certain activities that would further the general purpose of Rule 14a–11 due to concerns that such activities would jeopardize their ability to use the safe harbor.

In this light, it does not appear that the proposed safe harbor would meaningfully facilitate use of Rule 14a–11, if at all, and may, in fact, deter it because some nominating shareholders or members of nominating shareholder groups may limit their activities out of concern that their activities would jeopardize reliance on the safe harbor. Accordingly, we have decided neither to adopt a safe harbor under the rule nor to adopt a similar safe harbor for shareholders submitting nominees pursuant to State law or a company's governing instruments. Instead, as is currently the case in other contests, those who use the rule will need to analyze affiliate status on a case-by-case basis, taking into consideration all relevant facts and circumstances, including the circumstances surrounding a nomination and election of a shareholder nominee.

E. Application of the Liability Provisions in the Federal Securities Laws to Statements Made by a Nominating Shareholder or Nominating Shareholder Group

It is our intent that a nominating shareholder or group relying on Rule 14a–11, an applicable state or foreign law provision, or a company's governing documents to include a nominee in company proxy materials be liable for any statement included in the Schedule 14N or other related communications, or which it causes to be included in a company's proxy materials, which, at the time and in light of the circumstances under which it is made, is false or misleading with respect to any material fact or omits to state any material fact necessary to make the statements therein not false or misleading. To this end, we proposed to add a new paragraph (c) to Rule 14a–9 to specifically address a nominating shareholder's or group's liability when providing information on a Schedule 14N to be included in a company's proxy materials pursuant to Rule 14a–11.

As proposed, new paragraph (c) stated that "no nominee, nominating shareholder or nominating shareholder group, or any member thereof, shall cause to be included in a registrant's proxy materials, either pursuant to the Federal proxy rules, an applicable State law provision, or a registrant's governing documents as they relate to including shareholder nominees for director in registrant proxy materials, any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to a solicitation for the same meeting or subject matter which has become false or misleading."

Commenters generally supported the proposal to impose Rule 14a–9 liability on nominating shareholders or groups that caused false or misleading statements to be included in a company's proxy materials. One commenter supported the use of Rule 14a–9 as the standard for assigning liability, as the standards under that rule are well known and therefore would promote uniformity.[749] The commenter further stated that Rule 14a–9(c) makes sufficiently clear that a nominating shareholder or group would be liable for statements included in its Schedule 14N or notice to the company that is included in the company's proxy materials. As for the consequences of providing materially false information or representations in a Schedule 14N, the commenter stated that such a situation should be handled in the same way as materially false statements or omissions in a Schedule 14A or other soliciting material filed in connection with a proxy contest. Another commenter suggested that the disclosure provided to the company by the nominating shareholder or group and included in the company's proxy materials be treated as the shareholder's or group's soliciting materials.[750] The commenter did not believe that Rule 14a–9(c) makes clear that the nominating shareholder or group would be liable for any information included in its Schedule 14N or notice to the company that is included in the company's proxy materials. One commenter stated that members of a nominating group should be jointly and severally liable to the company for material misstatements or omissions provided to the company about the group or its members.[751] Another commenter, noting investors' concerns about exposure to joint liability from participating with other investors to nominate a candidate, requested that the Commission add additional commentary about the limits of joint liability for unapproved statements of other members of a nominating

[745] *See* letter from Schulte Roth & Zabel. The commenter explained that nominees often request agreements, such as indemnification agreements, that clearly relate only to their nomination. In other situations, however, nominees and nominating shareholders enter into other agreements, including compensation agreements, which may not relate exclusively to the nomination.

[746] *See* letters from ABA; Seven Law Firms.

[747] *See* letter from ABA.

[748] *See* letters from ABA; Seven Law Firms.

[749] *See* letter from CII.

[750] *See* letter from Protective.

[751] *See* letter from Verizon.

group.[752] One commenter suggested that a nominating shareholder or group should be required to indemnify the company for any costs incurred in connection with any misstatements or omissions in the information provided to the company for inclusion in the company's proxy materials.[753]

We are adopting Rule 14a–9(c) largely as proposed, but with specific references to statements made in the Schedule 14N and other related communications and a clarification that the rule would apply where a nominee is submitted pursuant to a foreign law provision in addition to a State law provision or the company's governing documents. New Rule 14a–9(c) provides that "no nominee, nominating shareholder or nominating shareholder group, or any member thereof, shall cause to be included in a registrant's proxy materials, either pursuant to the Federal proxy rules, an applicable state or foreign law provision, or a registrant's governing documents as they relate to including shareholder nominees for director in registrant proxy materials, include in a notice on Schedule 14N, or include in any other related communication, any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to a solicitation for the same meeting or subject matter which has become false or misleading." The changes to the rule text are intended to clarify that a nominating shareholder or group would be liable for statements it makes regarding the nomination, regardless of whether those statements ultimately appear in the company's proxy statement, as we consider any statements that are made in the Schedule 14N or in other communications to be part of the solicitation by the nominating shareholder or group. Consistent with this view, the Schedule 14N filing (as well as any other related communications) would be considering soliciting materials for purposes of Section 14(a) liability.

Under the Proposal, the rule also included express language providing that the company would not be responsible for information that is provided by the nominating shareholder or group under Rule 14a–11 and then repeated by the company in its proxy statement, except where the company knows or has reason to know that the information is false or misleading.[754] A similar provision was proposed in Rule 14a–19 with regard to information provided by the nominating shareholder or group in connection with a nomination made pursuant to an applicable State law provision or a company's governing documents.[755]

A number of commenters opposed the "knows or has reason to know" standard.[756] Many commenters argued generally that because the Commission's Proposal would eliminate the board's involvement in selecting the shareholder nominees and prevent a company from excluding any information from its proxy materials, the company should not be liable for information provided by the nominating shareholder, group, or nominee.[757] Commenters further noted that companies would not have adequate time or sufficient means to investigate the statements made by the nominating shareholder, group, or nominee.[758] Therefore, these commenters argued that it would be inappropriate to shift onto companies any liability for statements made by a nominating shareholder, group, or nominee or impose a duty to investigate or otherwise confirm the accuracy of the information provided by a nominating shareholder, group, or nominee.[759] One commenter predicted that if a company is liable for information provided by a nominating shareholder or group and included in a company's proxy materials pursuant to Rule 14a–11, an applicable State law provision, or a provision in a company's governing documents, it would challenge in court any information provided by a nominating shareholder, group, or nominee that it suspects is materially false or misleading.[760] The commenter asserted that this type of expensive and time-consuming litigation likely would undermine the Commission's goals for the rule. Some commenters believed that the appropriate standard would be the standard in Rule 14a–8(*l*)(2) and Rule 14a–7(a)(2)(i): "the company is not responsible for the contents of [the shareholder proponent's] proposal or supporting statement."[761] Other commenters recommended generally that the Commission allow companies to provide certain disclaimers in their proxy materials regarding the statements provided by the nominating shareholder or group,[762] with one commenter suggesting that companies also should be able to set the nominating shareholder's or group's statements apart from their own statements by using different fonts, colors, graphics or other visual devices.[763]

Two commenters addressed the issue of a company's liability for disclosure provided by a nominating shareholder or group that is determined to be materially false or misleading after the proxy materials have been sent.[764] One commenter stated that companies should not have liability for failing to correct or recirculate proxy materials if, after the company mails its proxy materials, it is notified (or learns) that the information provided by a nominating shareholder or group is (or has become) materially false or misleading.[765] The commenter noted that the burden of updating and correcting information provided by a nominating shareholder or group should be solely the obligation of that shareholder or group. Another commenter provided similar views, noting that "[i]n situations where the registrant's changes have not been permitted, and certainly after the proxy materials have been published, we think the burden [of correcting or recirculating proxy materials] should be on the nominating shareholder and that the exception imposing liability on the registrant should not apply."[766] One commenter recommended that if Rule 14a–11 is adopted, the rule should state that liability is only attached when "the company knows or is grossly negligent in not knowing that the information is false or misleading."[767] Another commenter asked that the company be liable for false and misleading

[752] *See* letter from Universities Superannuation.

[753] *See* letter from Verizon.

[754] *See* proposed Rule 14a–11(e).

[755] *See* Note to proposed Rule 14a–19.

[756] *See* letters from ABA; Alaska Air; American Bankers Association; Ameriprise; BorgWarner; BRT; Caterpillar; Cleary; DTE Energy; ExxonMobil; Honeywell; ICI; Protective; S. Quinlivan; Seven Law Firms; Sidley Austin; Society of Corporate Secretaries; Southern Company; UnitedHealth; Verizon.

[757] *See* letters from American Bankers Association; Ameriprise; BorgWarner; BRT; Caterpillar; ExxonMobil; Honeywell; S. Quinlivan; UnitedHealth; Verizon.

[758] *See* letters from Alaska Air; BorgWarner; BRT; DTE Energy; Protective; Seven Law Firms; Society of Corporate Secretaries.

[759] *See* letters from Alaska Air; BorgWarner; BRT; DTE Energy; Protective; Seven Law Firms; Sidley Austin; Society of Corporate Secretaries; Southern Company; United Health; Verizon.

[760] *See* letter from ABA.

[761] *See* letters from ABA; BorgWarner; BRT; Caterpillar; Society of Corporate Secretaries; Southern Company.

[762] *See* letters from Alaska Air; BorgWarner; BRT; ICI; Protective.

[763] *See* letter from BRT.

[764] *See* letters from ABA; Sidley Austin.

[765] *See* letter from ABA.

[766] Letter from Sidley Austin.

[767] *See* letter from Ameriprise.

information provided by a nominating shareholder or group only if it knew the information was false or misleading.[768]

After considering the comments, we are adopting the proposed provision stating that companies will not be responsible for information that is provided by the nominating shareholder or group under Rule 14a–11 and then repeated by the company in its proxy statement. This is the same standard used in Rule 14a–8. We modified the proposed provision in response to commenters to remove the reference to information that the company knows or has reason to know is false or misleading. We believe that the standard that currently is used in Rule 14a–8 is well understood and that it would add unnecessary confusion and create significant uncertainty for companies to alter the standard in the context of Rule 14a–11. Using the Rule 14a–8 standard also is consistent with our revision to Rule 14a–11 to remove as a basis for exclusion of a nominee that information in the Schedule 14N is false or misleading. Accordingly, the final rule contains express language providing that the company will not be responsible for information that is provided by the nominating shareholder or group under Rule 14a–11 and then reproduced by the company in its proxy statement.[769] A similar provision is included in an instruction to new Rule 14a–18 with regard to information that is provided by the nominating shareholder or group in connection with a nomination made pursuant to an applicable state or foreign law provision, or the company's governing documents.[770]

As noted above, commenters raised concerns about correcting or recirculating proxy materials and potential liability for failing to correct or recirculate proxy materials after learning that material a nominating shareholder or group provided is false or misleading. As discussed above, under the rules as adopted, a company will not be responsible for any information that is provided by the nominating shareholder or group under Rule 14a–11 and then reproduced by the company in its proxy statement—the nominating shareholder or group will have liability for that information. Accordingly, a company will not be required to recirculate or correct proxy materials if it learns that the materials provided to shareholders included false or misleading information from the nominating shareholder or group.

Under the Proposal, any information provided to the company in the notice from the nominating shareholder or group under Rule 14a–11 (and, as required, filed with the Commission by the nominating shareholder or group) and then included in the company's proxy materials would not be incorporated by reference into any filing under the Securities Act, the Exchange Act, or the Investment Company Act unless the company determines to incorporate that information by reference specifically into that filing.[771] A similar provision was proposed regarding information provided by the nominating shareholder or group in connection with a nomination made pursuant to an applicable State law provision or a company's governing documents.[772]

Those commenting on this provision stated that information provided by a nominating shareholder, group, or nominee should not be deemed to be incorporated by reference into Securities Act, Exchange Act or Investment Company Act filings,[773] but if it is, it should be treated as the responsibility of the nominating shareholder, group, or nominee rather than the company.[774]

We are adopting this provision as proposed.[775] To the extent the company does specifically incorporate the information by reference or otherwise adopt the information as its own, however, we will consider the company's disclosure of that information as the company's own statements for purposes of the anti-fraud and civil liability provisions of the Securities Act, the Exchange Act, or the Investment Company Act, as applicable.

III. Paperwork Reduction Act

A. Background

Certain provisions of the final rules contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995.[776] We published a notice requesting comment on the collection of information requirements in the Proposing Release for the rules, and we submitted these requirements to the Office of Management and Budget for review in accordance with the PRA.[777] The titles for the collections of information are:

(1) "Proxy Statements—Regulation 14A and Schedule 14A" (OMB Control No. 3235–0059);

(2) "Information Statements—Regulation 14C and Schedule 14C" (OMB Control No. 3235–0057);

(3) "Form ID" (OMB Control No. 3235–0328);

(4) "Schedule 14N";

(5) "Securities Ownership—Regulation 13D and 13G (Commission Rules 13d–1 through 13d–7 and Schedules 13D and 13G)" (OMB Control No. 3235–0145);

(6) "Form 8–K" (OMB Control No. 3235–0060); and

(7) "Rule 20a–1 under the Investment Company Act of 1940, Solicitations of Proxies, Consents, and Authorizations" (OMB Control No. 3235–0158).

These regulations, rules and forms were adopted pursuant to the Exchange Act and the Investment Company Act, among other statutes, and set forth the disclosure requirements for securities ownership reports filed by investors, proxy and information statements,[778] and current reports filed by companies to provide investors with the information they need to make informed voting or investing decisions. The hours and costs associated with preparing, filing, and sending these schedules and forms constitute reporting and cost burdens imposed by each 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 OMB control number. Compliance with the rules is mandatory. Responses to the

[768] *See* letter from ICI.

[769] *See* Rule 14a–11(f).

[770] *See* Instruction to new Rule 14a–18. *See also* Note to proposed Rule 14a–19.

[771] *See* the Instruction to proposed Item 7(e) of Schedule 14A; Instruction to proposed Item 22(b)(18) of Schedule 14A.

[772] *See* the Instruction to proposed Item 7(f) of Schedule 14A; Instruction to proposed Item 22(b)(19) of Schedule 14A.

[773] *See* letters from ABA; CII; Protective.

[774] *See* letters from ABA; Protective.

[775] *See* the Instruction to Item 7(e) of Schedule 14A and Instruction to Item 22(b)(18) of Schedule 14A with regard to information provided in connection with a Rule 14a–11 nomination. *See* the Instruction to Item 7(f) of Schedule 14A and Instruction to Item 22(b)(19) of Schedule 14A with regard to information provided in connection with a nomination made pursuant to applicable State law or a company's governing documents.

[776] 44 U.S.C. 3501 *et seq.*

[777] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[778] The proxy rules apply only to domestic companies with securities registered under Section 12 of the Exchange Act and to investment companies registered under the Investment Company Act. The number of annual reports by reporting companies may differ from the number of proxy and information statements filed with the Commission in any given year. This is because some companies are subject to reporting requirements by virtue of Section 15(d) of the Exchange Act, and therefore are not covered by the proxy rules. Also, some companies are subject to the proxy rules only because they have a class of debt registered under Section 12. These companies generally are not required to hold annual meetings for the election of directors. In addition, companies that are not listed on a national securities exchange or national securities association may not hold annual meetings and therefore would not be required to file a proxy or information statement.

information collection will not be kept confidential and there is no mandatory retention period for the information disclosed.

B. Summary of the Final Rules and Amendments

As discussed above in more detail, the final rules provide shareholders with two ways to more fully exercise their traditional State law rights to nominate and elect directors. First, new Exchange Act Rule 14a–11 will, under certain circumstances, require companies to include in their proxy materials shareholder nominees for director submitted by long-term shareholders or groups of shareholders with significant holdings. Rule 14a–11 will apply to all reporting companies subject to the Exchange Act proxy rules, with a few exceptions. Rule 14a–11 will apply only when applicable state or foreign law or a company's governing documents do not prohibit shareholders from nominating a candidate for election as a director. Further, Rule 14a–11 will not apply to companies subject to the proxy rules solely because they have a class of debt securities registered under Section 12 of the Exchange Act. Rule 14a–11 will apply to smaller reporting companies, but on a delayed basis. Consistent with the Proposal, companies are not able to "opt out" of the rule in favor of a different framework for including shareholder director nominees in company proxy materials. In addition, as was proposed, the rule will apply regardless of whether any specified event has occurred to trigger the rule and regardless of whether the company is subject to a concurrent proxy contest.

A nominating shareholder or group seeking to use Rule 14a–11 to require a company to include a nominee or nominees in the company's proxy materials will be required to meet certain conditions, including an ownership threshold and holding period and filing a Schedule 14N to provide required disclosures and certifications. Under the rule, a company will not be required to include a shareholder nominee or nominees for director in the company's proxy materials where the nominating shareholder or group holds the securities with the purpose, or with the effect, of changing control of the company or to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the company could be required to include under Rule 14a–11. A company also will not be required to include a nominee submitted pursuant to Rule 14a–11 who does not meet the requirements of the rule. For example, a company would not be required to include a nominee if that nominee's candidacy, or if elected, board membership, would violate applicable Federal law, State law, foreign law, or the rules of a national securities exchange or a national securities association (other than the rules related to director independence) and such violation could not be cured during the time period provided in the rule.[779]

Second, the new amendment to Exchange Act Rule 14a–8(i)(8)[780] will preclude a company from relying on Rule 14a–8(i)(8) to exclude from its proxy materials shareholder proposals by qualifying shareholders seeking to establish procedures under a company's governing documents for the inclusion of one or more shareholder nominees in a company's proxy materials including, for example, proposals to allow lower ownership thresholds or higher numbers of shareholder director nominees.[781]

In connection with Rule 14a–11 and the amendment to Rule 14a–8(i)(8), we also are adopting new rules that will require a notice to be filed with the Commission on new Schedule 14N, and transmitted to the company, when a shareholder seeks to submit a nomination to a company pursuant to Rule 14a–11 or pursuant to applicable state or foreign law provision or the company's governing documents.[782] The Schedule 14N will require a nominating shareholder or group to provide disclosure similar to the disclosure currently required in a contested election. The company will be required to include the disclosure provided by the nominating shareholder or group in its proxy materials. Thus, the new rules will require a company to provide additional disclosure on Schedules 14A and 14C,[783] as well as Form 8–K, and a nominating shareholder or group to provide disclosure on new Schedule 14N.

When filed in connection with Rule 14a–11, Schedule 14N requires disclosure about the amount and percentage of securities entitled to be voted on the election of directors by the nominating shareholder or group and the length of ownership of such securities. Schedule 14N also requires disclosure similar to the disclosure currently required for a contested election and disclosure of whether the nominee satisfies the company's director qualifications.[784] Schedule 14N also requires a certification that the nominating shareholder or group is not holding any of the company's securities with the purpose, or with the effect, of changing control of the company or to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the company could be required to include under Rule 14a–11. A nominating shareholder or group also will be required to certify that the nominating shareholder or group and the nominee satisfy the applicable requirements of Rule 14a–11.

When a Schedule 14N is filed in connection with a nomination pursuant to an applicable state or foreign law provision or a company's governing documents providing for the inclusion of one or more shareholder director nominees in company proxy materials, the Schedule 14N requires similar, but more limited, disclosures than a Schedule 14N filed in connection with a nomination pursuant to Rule 14a–11.[785] In addition, a nominating shareholder or group filing a Schedule 14N in connection with a nomination submitted for inclusion in a company's proxy materials pursuant to applicable state or foreign law or a company's governing documents will be required to provide a more limited certification

[779] For an additional discussion of the Rule 14a–11 eligibility requirements, *see* Section II.B.4 above.

[780] Exchange Act Rule 14a–8 requires a company to include a shareholder proposal in its Schedule 14A unless the shareholder has not complied with the procedural requirements in Rule 14a–8 or the proposal falls within one of the 13 substantive bases for exclusion in Rule 14a–8, including Rule 14a–8(i)(8).

[781] In this regard, we note that to the extent that a shareholder proposal seeks to establish a procedure for the inclusion of shareholder nominees for director in a company's proxy materials, generally any such proposal adopted by shareholders would not affect the availability of Rule 14a–11. To the extent that a proposal seeks to restrict shareholder reliance on Rule 14a–11, the proposal would be subject to exclusion pursuant to Rule 14a–8(i)(2) because it would cause the company to violate Federal law or pursuant to Rule 14a–8(i)(3) because the proposal would be contrary to the proxy rules.

[782] *See* Sections II.B.8 and II.C.5 above.

[783] Schedule 14A prescribes the information that a company with a class of securities registered under Exchange Act Section 12, or a person soliciting shareholders of such a company, must include in its proxy statement to provide shareholders with material information relating to voting decisions.

Schedule 14C prescribes the information that a company with a class of securities registered under Exchange Act Section 12 must include in its information statement in advance of a shareholders' meeting when it is not soliciting proxies from its shareholders, including when it takes corporate action by written authorization or consent of shareholders.

Investment Company Act Rule 20a1 requires registered investment companies to comply with Exchange Act Regulation 14A or 14C, as applicable. The annual responses to Investment Company Act Rule 20a–1 reflect the number of proxy and information statements that are filed by registered investment companies.

[784] *See* Item 5 of Schedule 14N.

[785] *See* Item 6 of Schedule 14N.

than is required for a nomination pursuant to Rule 14a–11.[786]

We also are adopting two new exemptions from the proxy rules for solicitations by a shareholder or group in connection with a nomination pursuant to Rule 14a–11.[787] The first exemption addresses written and oral solicitations by shareholders that are seeking to form a nominating shareholder group, provided that certain requirements are met.[788] The second new exemption will apply to written and oral solicitations by or on behalf of a nominating shareholder or group that has met the requirements of Rule 14a–11 in favor of shareholder nominees or for or against company nominees.[789] Each of these new exemptions requires the shareholder or group soliciting in connection with a nomination pursuant to Rule 14a–11 to file under cover of Schedule 14N any written materials published, sent or given to shareholders no later than the date such materials are first published, sent or given to shareholders. In addition, persons relying on Rule 14a–2(b)(7) to commence oral solicitations must file a notice of such solicitation under cover of Schedule 14N.

C. Summary of Comment Letters and Revisions to Proposal

We requested comment on the PRA analysis in the Proposing Release. Three commenters addressed our estimate of 30 burden hours for a company that is associated with including a nominee in its proxy materials.[790] According to a survey that BRT conducted, two commenters noted that if a company determines that it will include a shareholder nominee, the costs of preparing a written notice to the nominating shareholder or group, as well as including in the company's proxy materials the name of, and other disclosures concerning, the nominee, and preparing the company's own statement regarding the shareholder nominee would require a total of an average of 99 hours of company personnel time and outside costs of $1,159,073 per company for each shareholder nominee.[791] One commenter asserted that we underestimated the burden associated with these three actions because our estimate did not account for the fact that a company or its corporate governance committee is likely to undertake a lengthy process before determining whether to support the candidate.[792] This commenter asserted that our estimate began only once a company has already determined to include the nominee, and did not account for the amount of time necessary for a company to fully and completely evaluate shareholder nominees. This would include, for example, determinations about the nominee's eligibility, investigation and verification of information provided by the nominee, research into the nominee's background, analysis of the relative merits of the shareholder nominee as compared to management's own nominees, multiple meetings of the relevant board committees, and analysis of whether a nomination would conflict with any Federal law, State law or director qualification standards.

The commenter asserted that our burden estimate of 65 hours for a company that determines not to include a nominee in its proxy materials does not account for "significant" costs and the "enormous" amount of time that management and the board will likely spend on the proxy contest itself.[793] The commenter also indicated that our estimates did not account for the burdens on registered investment companies as a result of their unique circumstances. The commenter noted that subjecting registered investment companies to Rule 14a–11 will result in significant administrative burdens on open-end funds and fund complexes, and increased costs. This commenter, however, did not provide alternative cost estimates. Another commenter questioned our assumption that the cost of submitting a no-action request pursuant to Rule 14a–11 is comparable to that of a no-action request submitted pursuant to Rule 14a–8.[794] This commenter argued that due to the fundamental issues at stake, boards will likely expend significantly more resources to challenge shareholder nominees and elect their own nominees than they will to oppose a shareholder proposal submitted pursuant to Rule 14a–8.

One commenter submitted the results of a survey it conducted in which the participants predicted that, on average, 15% of companies listed on U.S. exchanges could expect to face a shareholder director nomination under Rule 14a–11 in 2011.[795] As explained in greater detail below, we believe the actual number of shareholders or groups of shareholders that will seek to use Rule 14a–11 may be much smaller. While we note that there are inherent uncertainties involved in providing this estimate, we estimate for purposes of the PRA requirements, based on available data on the number of contested elections, that 45 companies other than registered investment companies and six registered investment companies with shareholders eligible to submit nominees pursuant to Rule 14a–11 will receive such a nomination each year.

D. Revisions to PRA Reporting and Cost Burden Estimates

As discussed above, the rules we are adopting include several substantive modifications to the Proposal; however, the Schedule 14N disclosure requirements we are adopting are substantially similar to the proposed disclosure requirements. In addition to the disclosure we proposed to be included in Schedule 14N, the schedule also will require disclosure of whether the shareholder nominee satisfies the company's director qualifications.[796] As discussed more fully below, we are revising our estimates in response to commenters' suggestions and the modifications to the Proposal that we are adopting in the final rules. The burden estimates discussed below relate to the hours and costs associated with preparing, filing and sending the above schedules and forms, and constitute estimates of reporting and cost burdens imposed by each collection of information.

For purposes of the PRA, we estimate the total annual incremental paperwork burden resulting from new Rule 14a–11 and the related rule changes for reporting companies (other than registered investment companies) and registered investment companies to be approximately 4,113 hours of internal company or management time and a cost of approximately $548,200 for the services of outside professionals.[797] For purposes of the PRA, we estimate the

[786] *See* Item 8(b) of Schedule 14N.

[787] For further discussion of these exemptions, *see* Section II.B.10 above.

[788] *See* new Rule 14a–2(b)(7).

[789] *See* new Rule 14a–2(b)(8).

[790] *See* letters from BRT; S&C; Society of Corporate Secretaries. In response to these comments, we have increased some of our burden estimates. *See* footnotes 815 and 817 below.

[791] *See* letters from BRT; Society of Corporate Secretaries.

[792] *See* letter from S&C.

[793] *Id.*

[794] *See* letter from BRT.

[795] *See* letter from Altman. The survey had 47 participants that were primarily issuers. The median forecast of this survey was 10%. The survey was based on the eligibility criteria contained in the Proposing Release.

[796] *See* Item 5(e) of Schedule 14N.

[797] For convenience, the estimated PRA hour burdens have been rounded to the nearest whole number. We estimate an hourly cost of $400 for the service of outside professionals based on our consultations with several registrants and law firms and other persons who regularly assist registrants in preparing and filing proxy statements and related disclosures with the Commission.

total annual incremental paperwork burden to nominating shareholders and groups from Schedule 14N to be approximately 7,870 hours of shareholder personnel time, and $1,049,300 for services of outside professionals. As discussed further below, these total costs include all additional disclosure burdens associated with the final rules, including burdens related to the notice and disclosure requirements. The total costs described above also include the burden hours resulting from the new exemptions for solicitations by nominating shareholders or groups in connection with a nomination pursuant to Rule 14a–11.[798] As noted above, smaller reporting companies will not be subject to Rule 14a–11 until three years after the effective date of the rule. For purposes of the PRA, we have calculated the burden estimates as if the rule has been fully phased in for all companies.

As amended, Rule 14a–8(i)(8) will no longer permit companies to exclude, under that basis, shareholder proposals that seek to establish a procedure under a company's governing documents for the inclusion of one or more shareholder director nominees in the company's proxy materials. For purposes of the PRA, we estimate the total annual incremental paperwork burden resulting from the amendment to Rule 14a–8(i)(8) and the related rule changes for reporting companies (other than registered investment companies), registered investment companies, and shareholders to be approximately 17,994 hours of internal company or shareholder time and a cost of approximately $2,399,200 for the services of outside professionals.[799]

1. Rule 14a–11

New Rule 14a–11 will require any company subject to the rule to include disclosure about a nominating shareholder's or group's nominee or nominees for election as director in the company's proxy statement, and the name of the nominee or nominees on the company's proxy card, when the conditions of the rule are met. The rule will not apply if the company is subject to the proxy rules solely as a result of having a class of debt registered under Section 12 of the Exchange Act or if State law, foreign law or a company's governing documents prohibit shareholders from nominating a candidate or candidates for election as director. A nominating shareholder or group will be required to file Schedule 14N to disclose information about the nominating shareholder or group and the nominee or nominees, and the company will be required to include certain information regarding the nominating shareholder or group and nominee or nominees in the company's proxy statement unless the company determines that it is not required to include the nominee or nominees in its proxy materials.[800] A nominating shareholder or group also will be afforded the opportunity to include in the company's proxy statement a statement of support for its nominee or nominees not to exceed 500 words per nominee. The nominee or nominees also will be included on the company's form of proxy in accordance with Exchange Act Rule 14a–4.

Under the final rule, shareholders or groups owning at least 3% of the voting power of a company's securities entitled to be voted on the election of directors for at least three years as of the date of filing their notice on Schedule 14N with the Commission, and transmitting the notice to the company, will be eligible to submit a nominee for election as director to be included in the company's proxy materials,[801] provided certain other eligibility requirements are met[802] and subject to certain limitations on the overall number of shareholder nominees for director.

In the Proposing Release, we estimated that 208 companies with eligible shareholders would receive nominations pursuant to Rule 14a–11. That number was based in part on data, which we used to estimate that approximately 4,163 reporting companies (other than registered investment companies) would have at least one shareholder who met the eligibility criteria set forth in the Proposing Release. We then estimated that 5% of those companies would receive a nomination from an eligible shareholder or group of shareholders, resulting in 208 companies receiving nominations pursuant to Rule 14a–11 annually.[803] In the Proposing Release, we also estimated that 61, or 5%, of 1,225 registered investment companies responding to Rule 20a–1 each year would receive shareholder nominations for inclusion in their proxy materials. After further consideration, we believe that a better indicator of how many shareholders might submit a nomination is the number of contested elections and board-related shareholder proposals that have been submitted to companies.[804] We believe starting with this number is better because it indicates shareholders or groups of shareholders who have shown an interest in using currently available means under our rules to influence governance matters. The number of contested elections and board-related shareholder proposals, however, does not reflect the additional eligibility requirements that are being adopted in new Rule 14a–11. For example, Rule 14a–11 requires that a shareholder or group of shareholders satisfy an ownership threshold of at least 3% of the company's voting power; that amount of securities must have been held continuously for at least three years as of the date the nominating shareholder or group submits notice of its intent to use Rule 14a–11; and the nominating shareholder or group must execute a certification that it is not holding the securities with the purpose, or with the effect, of changing control of the company or to gain a number of board seats that exceeds the maximum number of nominees that the company could be required to include under Rule 14a–11. As a result of the additional eligibility requirements and certifications required by Rule 14a–11, we believe it is reasonable to

[798] *See* new Rules 14a–2(b)(7) and 14a–2(b)(8).

[799] This corresponds to 6,510 hours of shareholder time and $868,000 for the shareholders' use of outside professionals and 11,484 hours of company time and $1,531,200 for the company's use of outside professionals.

[800] The burdens associated with Schedule 14N are discussed below.

[801] *See* Section II.B.4.b. above for a discussion of how voting power is determined.

[802] The eligibility requirements are provided in Rule 14a–11(b). As discussed in more detail in Section II.B.4., a nominating shareholder or group must not be holding the securities used to meet the ownership threshold with the purpose, or with the effect, of changing the control of the company or to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the company could be required to include under Rule 14a–11. A nominating shareholder or group also must provide certain statements and disclosure regarding its ownership and the nominee or nominees must meet the applicable eligibility requirements.

[803] If we used the same data for estimating the number of nominees that would be submitted pursuant to the final rules as adopted, there would be approximately 2,117 companies with at least one shareholder eligible to submit a nomination. If we were to assume that 5% of those companies with at least one shareholder eligible to submit a nomination would receive a nomination, then we would estimate that 106 companies would receive a nomination each year.

[804] In this regard, we note that it is estimated that there were 57 contested solicitations in 2009. *See* Georgeson, 2009 Annual Corporate Governance Review Executive Summary (*available at http://www.georgeson.com/usa/acgr09.php*) and footnote 828 below. In addition, approximately 118 Rule 14a–8 shareholder proposals related to board issues were submitted to shareholders for a vote in the 2008–2009 proxy season. Board related proposals include proposals to have an independent chairman of the board, proposals to allow for cumulative voting and proposals to require a majority vote to elect directors. *See* RiskMetrics 2009 Proxy Season Scorecard, May 15, 2009. We believe these actions related to contested solicitations or board issues, 175 in total, provide useful information about the degree of interest in using Rule 14a–11.

significantly reduce the number of contested elections and board-related shareholder proposals for purposes of estimating the number of shareholders or groups of shareholders who may submit a nomination pursuant to Rule 14a–11. For purposes of this analysis, we estimate that 45 companies other than registered investment companies will receive nominees from shareholders [805] for inclusion in their proxy materials.[806] We further estimate that six registered investment companies will receive nominees from shareholders pursuant to Rule 14a–11 annually.[807]

We estimate for PRA purposes that each company that receives nominees pursuant to Rule 14a–11 will receive two nominees from one shareholder or group. The median board size based on a 2007 sample of public companies was nine.[808] Approximately 60% of the boards sampled had between nine and 19 directors. In the case of registered investment companies, we estimate that the median board size is eight.[809] Thus, although some shareholders or groups could seek to include fewer than two nominees and others would be permitted to include more than two nominees, depending on the size of the board, we assume for purposes of the PRA that each shareholder or group would submit two nominees. As a result, for reporting companies, we estimate up to 211 total company burden hours per company (which is the sum of the bullets below doubled where appropriate to reflect two nominees) which corresponds to 158 hours (211 × 0.75) of company time, and a cost of approximately $21,100 (211 × 0.25 × $400) for the services of outside professionals. In each case, this estimate includes:

- If the company determines that it will include a shareholder nominee, the company's preparation of a written notice to the nominating shareholder or group (five burden hours per notice);
- The company's inclusion in its proxy statement and form of proxy of the name of, and other related disclosures concerning, a person or persons nominated by a shareholder or shareholder group (five burden hours per nominee); [810]
- The company's preparation of its own statement regarding the shareholder nominee or nominees (40 burden hours per nominee); and
- If a company determines that it may exclude a shareholder nominee submitted pursuant to the new rule, the company's preparation of a written notice to the nominating shareholder or group followed by written notice of the basis for its determination to exclude the nominee to the Commission staff (116 burden hours per notice).[811]

For purposes of this PRA analysis, we assume that approximately 41 (or 90% of 45) reporting companies (other than registered investment companies) and 5 (or 90% of 6) registered investment companies that receive a shareholder nominee for director will be required to include the nominee in their proxy materials. In the other 10% of cases, we assume that the company will be able to exclude the shareholder nominee (after providing notice of its reasons to the Commission). If a company determines to include a shareholder nominee, it must provide written notice to the nominating shareholder or group. We estimate the burden associated with preparing this notice to be five hours. For reporting companies (other than registered investment companies), this will result in 205 aggregate burden hours (41 companies × 5 hours/company), which corresponds to 154 burden hours of company time (41 companies × 5 hours/company × 0.75) and $20,500 in services of outside professionals (41 companies × 5 hours/company × 0.25 × $400). For registered investment companies, this will result in 25 aggregate burden hours (5 companies × 5 hours/company), which corresponds to 19 burden hours of company time (5 companies × 5 hours/company × 0.75), and $2,500 for services of outside professionals (5 companies × 5 hours/company × 0.25 × $400).

We estimate the annual disclosure burden for companies to include nominees and related disclosure in their proxy statements and on their form of proxy to be 5 burden hours per nominee, for a total of 410 aggregate burden hours (41 responses × 5 hours/response times; 2 nominees) for reporting companies (other than registered investment companies), and 50 aggregate burden hours (5 responses × 5 hours/response × 2 nominees) for registered investment companies. For reporting companies (other than registered investment companies), this corresponds to 308 burden hours of company time, and $41,000 for services of outside professionals.[812] For registered investment companies, this corresponds to 38 hours of company time, and $5,000 for services of outside professionals.[813]

We estimate that 41 reporting companies (other than registered investment companies) and 5 registered investment companies will include a statement with regard to the shareholder nominees.[814] We anticipate that the

[805] We further estimate that 75% of the 45 submissions, or 34, will be made by groups of shareholders, and the remaining 11 will be made by individuals. *See* the discussion below regarding the estimated increase in Schedule 13G filings.

[806] For the reasons noted above, we discounted the 175 contested elections and board-related shareholder proposals by approximately 75% to reflect the much more stringent eligibility requirements under new Rule 14a–11 as compared to Rule 14a–8. The 45 filings that we estimate for purposes of the PRA are equal to 2.1% of the 2,117 companies we estimate to have at least one eligible shareholder meeting the ownership requirements of the rule.

[807] In this regard, we estimate that there were 11 contested elections in 2009, based on the number of EDGAR filings on form-type PREC14A with respect to unique investment companies in 2009. In addition, the average number of no-action letters issued by the staff regarding proposals seeking to amend a registered investment company's bylaws to provide for shareholder director nominations received in calendar years 2007, 2008 and 2009, rounded to the nearest whole number greater than zero, is one. We estimate that investment companies currently receive as many proposals regarding nomination procedures or disclosures as there are contested elections and no-action letters issued by the staff, resulting in a total of 24 contested elections and board-related shareholder proposals per year. For reasons similar to those articulated above for non-investment companies, we believe these actions related to contested solicitation or board issues, 24 in total, provide useful information about the degree of interest in using Rule 14a–11. However, as discussed above, Rule 14a–11 contains different eligibility requirements than our current rules that will likely result in fewer companies receiving nominations submitted pursuant to the rule. Similar to non-investment companies, we believe it is reasonable to discount the 24 contested elections and board-related shareholder proposals by approximately 75%, resulting in six investment companies receiving nominations pursuant to Rule 14a–11. We further estimate that 75% of the submissions, or five, will be made by groups of shareholders and the remaining one will be made by an individual. *See* the discussion below regarding the estimated increase in Schedule 13G filings.

[808] According to information from RiskMetrics, based on a sample of 1,431 public companies the median board size in 2007 was 9, with boards ranging in size from 4 to 23 members. Approximately 40% of the boards in the sample had 8 or fewer directors, approximately 60% had between 9 and 19 directors, and less than 1% had 20 or more directors.

[809] *See* Investment Company Institute and Independent Directors Council, *Overview of Fund Governance Practices 1994–2006,* at 6–7 (November 2007), *available at http://www.ici.org/pdf/rpt_07_fund_gov_practices.pdf* (noting that the median number of independent directors per fund complex in 2006 was six and that independent directors held 75% or more of board seats in 88% of fund complexes).

[810] The requirement is in amended Rule 14a–4.

[811] As discussed below, for companies that exclude a nominee but do not request no-action relief, we estimate this burden to be 100 hours.

[812] The calculations for these numbers are: 410 burden hours × 0.75 = 308 burden hours of company time and 410 burden hours × 0.25 × $400 = $41,000 for services of outside professionals.

[813] The calculations for these numbers are: 50 burden hours × 0.75 = 38 hours of company time and 50 burden hours × 0.25 × $400 = $5,000 for services of outside professionals.

[814] We assume that each company that includes a shareholder nominee in its proxy materials would include such a statement.

burden to include a statement will include time spent to research the nominee's background, determinations about the nominee's eligibility, investigation and verification of information provided by the nominee, analysis of the relative merits of the shareholder nominee as compared to management's own nominees, multiple meetings of the relevant board committees, analysis of whether a nomination will conflict with any Federal law, State law or director qualification standards, preparation of the statement, and company time for review of the statement by, among others, the nominating committee and legal counsel. In the Proposing Release we estimated that this burden will be approximately 20 hours per nominee. Based on comments received, however, we believe it is appropriate to increase this estimate to 40 hours per nominee.[815] For reporting companies (other than registered investment companies), this will result in 3,280 aggregate burden hours (41 statements × 40 hours/statement × 2 nominees). This corresponds to 2,460 hours of company time (41 statements × 40 hours/statement × 2 nominees × 0.75) and $328,000 for services of outside professionals (41 statements × 40 hours/statement × 2 nominees × 0.25 × $400) for reporting companies (other than registered investment companies). For registered investment companies, this will result in 400 aggregate burden hours (5 statements × 40 hours/statement × 2 nominees). This corresponds to 300 hours of company time (5 statements × 40 hours/statement × 2 nominees × 0.75) and $40,000 for services of outside professionals (5 statements × 40 hours/statement × 2 nominees × 0.25 × $400).

Further, for purposes of this analysis, we assume that approximately 9 (or 20% of 45) reporting companies (other than registered investment companies) and 1 (or 20% of 6) registered investment companies that receive a shareholder nominee for director for inclusion in their proxy materials will make a determination that they are not required to include a nominee in their proxy materials because the requirements of Rule 14a–11 are not met and will file a notice of intent to exclude that nominee.[816] We further estimate that 3 (or 33% of 9) of those reporting companies (other than registered investment companies) will not seek no-action relief from the Commission and will only provide the required notice to the nominating shareholder or group and the Commission. We estimate that the remaining 6 reporting companies other than registered investment companies and the one registered investment company that makes a determination that it is not required to include a nominee in its proxy materials will seek no-action relief in order to exclude the nomination. We estimate that the burden hours associated with preparing and submitting the company's notice to the nominating shareholder or group and the Commission regarding its intent to exclude a shareholder nominee that includes a request for no-action relief would be 116 hours per notice.[817] We estimate that the burden hours associated with preparing and submitting the company's notice to the nominating shareholder or group and the Commission regarding its intent to exclude a shareholder nominee and its reasons for doing so would be 100 hours.[818] One commenter questioned our assumption that submitting a request to the staff to exclude a shareholder nominee will be comparable to preparing a no-action request to exclude a proposal under Rule 14a–8.[819] This commenter argued that due to the fundamental issues at stake, boards are likely to expend significant resources to challenge shareholder nominees and elect their own nominees. We recognize the possibility that companies might expend greater resources in opposing a shareholder nominee than a shareholder proposal. We believe, however, that some of the resources to oppose a shareholder nominee will be allocated to the use of other means outside of the required disclosure in the proxy statement (*e.g.,* "fight letters") so we have not factored that into our collection of information estimate. We believe that a portion of the burden associated with this will be reflected in the company's preparation of its own statement regarding the shareholder nominee, rather than in the preparation of a no-action request, and accordingly, as discussed above, we have increased our estimate of the associated burden from 20 to 40 hours. Although we have increased the burden to the company associated with preparing its own statement, we are not persuaded that also increasing the burden associated with preparing a request to exclude the nominee will be an accurate estimate. We are, however, as discussed above, increasing to 116 hours our estimate for preparing a notice of intent to exclude

[815] In its comment letter and based on its survey of its members, BRT estimated that the preparation of a notice to the nominating shareholder, inclusion of related disclosure in the company's proxy materials, and preparation of its own statement regarding the shareholder nominee will require an average of 99 hours of personnel time. In the Proposing Release, we estimated the burden for these three actions to be 30 hours. We note that the survey conducted by the BRT provides useful information regarding the amount of personnel time that a company will spend responding to a Rule 14a–11 nomination; however, the survey represents a limited number of companies. While we are persuaded that the burden to companies of preparing a statement with regard to the shareholder nominee may require more than the 20 hours we estimated in the Proposing Release, we believe that 99 hours may represent the high end of the range. In light of this information, we believe it is appropriate to increase our estimate and we believe it is adequate to double our estimate of this component from 20 to 40 hours to reflect the average burden across all companies. Thus, we estimate that the internal burden associated with these three actions would be 50 hours.

[816] With respect to companies other than registered investment companies, we assume that 6 of these submissions ultimately would be excludable under the rule.

[817] This estimate is based on data provided by the BRT in its comment letter dated August 17, 2009. In its letter, the BRT provided data from a survey of its own members indicating that the average burden associated with preparing and submitting a single no-action request to the Commission staff in connection with a shareholder proposal is approximately 47 hours and associated costs of $47,784. Although the letter did not specify as much, assuming these costs correspond to legal fees, which we estimate at an hourly cost of $400, we estimate that this cost is equivalent to approximately 120 hours ($47,784/$400). We note that this estimate is higher than the 65 hours we estimated in the Proposing Release, where we relied on 2003 data provided by the American Society of Corporate Secretaries indicating 30 hours and associated costs of $13,896, or 35 hours ($13,896/$400). The BRT survey also indicated that if a company opposes a shareholder nominee, it would incur an additional average of 302 hours of company time. This would be in addition to its estimate of 99 hours for the actions described above. As noted above, the survey conducted by the BRT provides useful estimates for us to consider, but the survey represents a limited number of companies. In addition, it is unclear whether the 302 hours is inclusive of the no-action process. We believe this estimate is high and believe the revised number discussed below is a better estimate because it attempts to reflect the burden across all companies. For purposes of the PRA, we assume that submitting the notice and reasons for excluding a shareholder nominee to the staff will be comparable to preparing a no-action request to exclude a proposal under Rule 14a–8. While it appears, based on commenters' estimates, that associated costs may have increased since 2003, based on estimates provided by other commenters on the costs of preparing and submitting a no-action request (*see, e.g.,* letter from S&C), we believe an average of the two estimates provides a more representative estimate of the spectrum of reporting companies, as opposed to those who participated in the BRT survey. Thus, we estimate that the burden to submit the notice and reasons for excluding a shareholder nominee and request no-action relief, would be approximately 116 hours ([167 hrs + 65 hrs]/2).

[818] We believe that even if a company is not seeking no-action relief the company will still spend significant time preparing its notice to exclude the nominee. Because the notice will be required to include the reasons that the nominee is being excluded, we believe that the burden will be similar to, though not quite as extensive as, preparing a request for no-action relief.

[819] *See* letter from BRT.

the nominee and request no-action relief based on 2009 data received from commenters.[820]

In the case of reporting companies (other than registered investment companies) that have determined they may exclude a nominee and seek no-action relief from the staff, we estimate that this will result in an aggregate burden of 696 hours (6 notices × 116 hours/notice), corresponding to 522 hours of company time (6 notices × 116 hours/notice × 0.75) and $69,600 for the services of outside professionals (6 notices × 116 hours/notice × 0.25 × $400). In the case of registered investment companies that have determined they may exclude a nominee and seeking no-action relief from the staff, we estimate that this will result in 116 aggregate burden hours (1 notice × 116 hours/notice), which will correspond to 87 hours of company time (1 notice × 116 hours/notice × 0.75) and $11,600 for the services of outside professionals (1 notice × 116 hours/notice × 0.25 × $400). For companies (other than registered investment companies) that have determined they may exclude a nomination but not to seek no-action relief from the staff, we estimate that this will result in an aggregate burden of 300 hours (3 notices × 100 hours/notice), corresponding to 225 hours of company time (3 notices × 100 hours/notice × 0.75) and $30,000 for the services of outside professionals (3 notices × 100 hours/notice × 0.25 × $400).[821] These burdens would be added to the PRA burdens of Schedules 14A and 14C or, in the case of registered investment companies, Rule 20a–1.

We also estimate that the annual burden for the nominating shareholder's or group's participation in the no-action process[822] available pursuant to Rule 14a–11 would average 60 hours per nomination.[823] For nominating shareholders or groups of reporting companies (other than registered investment companies), this will result in 360 total burden hours (6 responses × 60 hours/response). This will correspond to 270 hours of shareholder time (6 responses × 60 hours/response × 0.75) and $36,000 for services of outside professionals (6 responses x 60 hours/response × 0.25 × $400). For nominating shareholders or groups of registered investment companies, this will result in 60 total burden hours (1 response × 60 hours/response). This will correspond to 45 hours of shareholder time (1 response × 60 hours/response × 0.75) and $6,000 for services of outside professionals (1 response × 60 hours/response × 0.25 × $400). This burden would be added to the PRA burden of Schedule 14N.

We also are adopting two new exemptions from the proxy rules for solicitations by shareholders or groups in connection with a nomination pursuant to Rule 14a–11. The first exemption addresses written and oral solicitations by shareholders that are seeking to form a nominating shareholder group, provided that certain requirements are met.[824] Solicitations made in reliance on this exemption would be required to be filed under cover of Schedule 14N with the appropriate box marked on the cover page. As discussed above, we estimate that 34 of the submissions made to companies (other than registered investment companies) pursuant to Rule 14a–11 will be by groups of shareholders formed for purposes of satisfying the eligibility requirements of the rule. We estimate that 31 (90% of 34) of these groups will avail themselves of Rule 14a–2(b)(7). In the case of reporting companies (other than registered investment companies), this will result in an aggregate burden of 31 hours (31 solicitations × 1 hour/solicitation), which corresponds to 23 hours of shareholder time (31 solicitations × 1 hour/solicitation × 0.75) and $3,100 for the services of outside professionals (31 solicitations × 1 hour/solicitation × 0.25 × $400). In the case of registered investment companies, we estimate that five of the submissions made pursuant to Rule 14a–11 will be by groups of shareholders formed for purposes of satisfying the eligibility requirements of the rule. We estimate that all of these groups will avail themselves of Rule 14a–2(b)(7) (90% of 5 rounds up to 5). This will result in an aggregate burden of 5 hours (5 solicitations × 1 hour/solicitation), which corresponds to 4 hours of shareholder time (5 solicitations × 1 hour/solicitation × 0.75) and $500 for the services of outside professionals (5 solicitations × 1 hour/solicitation × 0.25 × $400). These burden hours would be added to the PRA burden of Schedule 14N.

The second new exemption will apply to written and oral solicitations by or on behalf of a nominating shareholder or group that has met the requirements of Rule 14a–11 in favor of shareholder nominees or for or against company nominees.[825] Although nominating shareholders or groups will not be required to engage in written solicitations, if the nominating shareholder or group does so, the exemption will require inclusion in any written soliciting materials filed under cover of Schedule 14N of a legend advising shareholders to look at the company's proxy statement when available and advising shareholders how to find the company's proxy statement. For purposes of this analysis, we assume that 50% of nominating shareholders or groups ultimately included in a company's proxy statement will solicit in favor of their nominee or nominees outside the company's proxy statement. In the case of reporting companies (other than registered investment companies), this will result in an aggregate burden of 20 hours (20 solicitations × 1 hour/solicitation), which corresponds to 15 hours of shareholder time (20 solicitations × 1 hour/solicitation × 0.75) and $2,000 for services of outside professionals (20 solicitations × 1 hour/solicitation × 0.25 × $400). These burden hours would be added to the PRA burden of Schedule 14N. In the case of registered investment companies, this will result in an aggregate burden of 3 hours (3 solicitations × 1 hour/solicitation), which corresponds to 2 hours of shareholder time (3 solicitations × 1 hour/solicitation × 0.75) and $300 for services of outside professionals (3 solicitations × 1 hour/solicitation × 0.25 × $400). These burden hours would be added to the PRA burden of Schedule 14N.

2. Amendment to Rule 14a–8(i)(8)

Under our amendment to Rule 14a–8(i)(8), the election exclusion, a company will no longer be able to rely on this basis to exclude a shareholder proposal that seeks to establish a procedure under a company's governing

[820] Our prior estimate of 65 hours in the Proposing Release was based on 2003 data.

[821] As discussed above, we estimate that only one registered investment company will make a determination that it is not required to include a nominee in its proxy material and that this company will seek no-action relief.

[822] There is no corresponding burden for shareholders or groups whose nomination is excluded by the company, and the company does not seek no-action relief. If the shareholder objects to the exclusion, there is no requirement that the shareholder seek redress from the staff or the Commission. As a result, we have not provided an estimated burden.

[823] As noted in footnote 817, we estimate that the average burden to a company associated with preparing and submitting a no-action request to the staff is approximately 116 burden hours. We believe that the average burden for a shareholder proponent to respond to a company's no-action request is likely to be less than a company's burden to prepare the request; therefore, we estimate it will take approximately half the time (or 60 burden hours) for a nominating shareholder or group to respond to a company's notice to the Commission of its intent to exclude.

[824] *See* new Rule 14a–2(b)(7).

[825] *See* new Rule 14a–2(b)(8).

documents for the inclusion of one or more shareholder director nominees in the company's proxy materials. The shareholder proposal will have to meet the procedural requirements of Rule 14a–8 and not be subject to one of the substantive exclusions other than the election exclusion (*e.g.,* the proposal could be excluded if the shareholder proponent did not meet the ownership threshold under Rule 14a–8).

Historically, shareholders have made relatively few proposals relating to shareholder access to a company's proxy materials. The staff received 368 no-action requests from companies seeking to exclude shareholder proposals during the 2006–2007 fiscal year. Of these requests, only three (or approximately one percent) related to proposals for bylaw amendments providing for shareholder nominees to appear in the company's proxy materials. During the 2007–2008 fiscal year, the staff received 423 no-action requests to exclude shareholder proposals pursuant to Rule 14a–8. Of these no-action requests, six (or approximately two percent) related to proposals for bylaw amendments providing for shareholder nominees to appear in the company's proxy materials. During the 2008–2009 fiscal year, the staff received 365 no-action requests to exclude shareholder proposals pursuant to Rule 14a–8. Of these requests, seven related to shareholders' ability to have their nominee included in a company's proxy materials. One such request sought to exclude a proposal to directly amend a company's governing documents to permit shareholder director nominations; the remaining six no-action requests related to proposals requesting that the company reincorporate in North Dakota where the relevant state corporate law gives qualified shareholders the right to submit director nominees for inclusion in the company's proxy materials.[826] Although these reincorporation proposals did not seek to amend the companies' bylaws, by seeking reincorporation into North Dakota it appears they sought the ability for shareholders to have nominees included in a company's proxy materials. As of July 23, 2010, during the 2009–2010 fiscal year, the staff has received 353 no-action requests to exclude shareholder proposals pursuant to Rule 14a–8, none of which related to shareholders' ability to have their nominee included in a company's proxy materials. While we believe that these proposals are helpful in gauging the level of shareholder interest in nominating directors, because our amendment to Rule 14a–8(i)(8) narrows the scope of the exclusion and no longer permits companies to exclude certain proposals that are excludable under current Rule 14a–8(i)(8), and Rule 14a–11 as adopted includes meaningful eligibility standards, we believe there may be an increase in the number of shareholder proposals seeking to establish procedures under a company's governing documents for the inclusion of one or more shareholder nominees in a company's proxy materials to allow, for example, lower ownership thresholds or higher numbers of shareholder director nominees.

While the number of no-action requests the staff has received in the past is a useful starting point for the PRA analysis, other data also is helpful to gauge shareholder interest in nominating directors and to predict the anticipated impact on the number of proposals submitted pursuant to Rule 14a–8 that seek to establish procedures under a company's governing documents for the inclusion of one or more shareholder nominees in a company's proxy materials that otherwise would be excludable under current Rule 14a–8(i)(8). For example, based on publicly available information, from 2001 to 2005, there were, on average, 14 contested elections per year.[827] It is estimated that in 2009 there were at least 57 contested elections,[828] and in 2008 it is estimated that there were at least 50 contested elections.[829] For purposes of the PRA, we believe that as a result of the amendment to Rule 14a–8(i)(8), shareholders may submit at least as many shareholder proposals to establish procedures under a company's governing documents for the inclusion of shareholder nominees for director in company proxy materials as there are contested elections. We believe that if shareholders are willing under the current proxy rules to put forth the expense and effort to wage a contest to put forth their own nominees in 57 instances, there may be a similar number of proposals submitted to companies pursuant to Rule 14a–8, as amended, because companies will no longer be permitted to exclude some proposals that currently are excludable under Rule 14a–8(i)(8). We also believe that some shareholders that have submitted proposals in the past with regard to other board issues will submit proposals seeking to establish procedures under a company's governing documents for the inclusion of shareholder nominees for director in company proxy materials. As noted in the Proposing Release, according to information from RiskMetrics, approximately 118 Rule 14a–8 shareholder proposals regarding board issues were submitted to shareholders for a vote in the 2008–2009 proxy season.[830] For purposes of the PRA, we estimate that approximately half of these shareholders may submit a proposal regarding procedures for the inclusion of shareholder nominees for director in company proxy materials, resulting in up to 59 proposals in lieu of proposals related to other board issues.[831]

In the case of reporting companies (other than registered investment companies), we believe that the amendment to Rule 14a–8(i)(8) may result in an increase of up to 64 (57 + 7 2009 shareholder proposals) proposals annually from 2009, and a total of 123 proposals (59 proposals + 57 + 7) to companies per year regarding procedures for the inclusion of shareholder nominees for director in company proxy materials.[832] We

[826] *See* North Dakota Publicly Traded Corporations Act, N.D. Cent. Code § 10–35–08 (2009).

[827] *See* Lucian A. Bebchuk, *The Myth of the Shareholder Franchise,* 93 *Va. L. Rev.* 675, 683 (2007) ("Bebchuk (2007)") (citing data from proxy solicitation firm Georgeson Shareholder). *See* footnote 314 in the Proposing Release.

[828] *See* Georgeson, 2009 Annual Corporate Governance Review (stating that as of the end of September 2009 it had tracked 57 formal proxy contests); *see also* RiskMetrics Group, 2009 Postseason Report Summary, A New Voice in Governance: Global Policymakers Shape the Road to Reform, October 2009, *available at http://www.riskmetrics.com/docs/2009-postseason-report* (noting that during the 2009 proxy season there were at least 39 proxy contests, and 36 negotiated settlements prior to a shareholder vote).

[829] *See* letter from BRT (citing data from Georgeson, "2008 Annual Corporate Governance Review"). *See also* RiskMetrics Group, 2008 Postseason Report Summary, Weathering the Storm: Investors Respond to the Global Credit Crisis, October 2008, *available at http://www.riskmetrics.com/docs/2008postseason_review_summary.*

[830] *See* footnote 804 above.

[831] We note that we used this estimate in the Proposing Release and did not receive comment on it. *See* Section IV.C.2. of the Proposing Release. We acknowledge the possibility that the number of Rule 14a–8 proposals relating to director nomination procedures may decrease with shareholders' ability to submit a nominee for inclusion in company proxy materials pursuant to Rule 14a–11, but we believe that any decrease may be countered by an increase in shareholder proposals to establish company-specific requirements that are different than Rule 14a–11.

[832] The increase is calculated by adding the number of proxy contests in 2009 (57) plus the number of no-action requests received in 2009 regarding proposals seeking to amend a company's bylaws to provide for shareholder director nominations (seven). We have not included an estimated 59 proposals in this increase because we believe they will be submitted in lieu of other types

Continued

estimate the annual incremental burden for the shareholder to prepare the proposal to be 10 burden hours per proposal, for a total of 640 burden hours (64 proposals × 10 hours/proposal). This will correspond to 480 hours of shareholder time (64 proposals × 10 hours/proposal × 0.75) and $64,000 for the services of outside professionals (64 proposals × 10 hours/proposal × 0.25 × $400).[833]

We recognize that a company that receives a shareholder proposal has no obligation to submit a no-action request to the staff under Rule 14a–8. We anticipate that because the proposals that would be submitted pursuant to amended Rule 14a–8 could affect the composition of the company's board of directors, nearly all companies receiving such proposals would submit a written statement of its reasons for excluding the proposal to the staff. We estimate that there will be a total of 123 proposals per year regarding procedures for the inclusion of shareholder nominees in the company's proxy statement. This number includes the 64 (57 + 7) new proposals plus the 59 proposals submitted in lieu of other proposals. Thus, we estimate that 90% of the estimated 123 companies receiving proposals seeking to establish procedures under a company's governing documents for the inclusion of one or more shareholder nominees in a company's proxy materials will submit a written statement of their reasons for excluding the proposal to the staff and would seek no-action relief.

We estimate that companies would determine that they could exclude, and would seek staff concurrence through the no-action letter process for, 110 proposals (123 proposals × 90%) per proxy season. We estimate that the annual burden for the company's submission of a notice of its intent to exclude the proposal and its reasons for doing so would average 116 hours per proposal, for a total of 12,760 burden hours (110 proposals × 116 hours/proposal) for reporting companies (other than registered investment companies). This will correspond to 9,570 hours of company time (110 proposals × 116 hours/proposal × 0.75) and $1,276,000 for the services of outside professionals (110 proposals × 116 hours/proposal × 0.25 × $400).

We also estimate that the annual burden for the proponent's participation in the Rule 14a–8 no-action process would average 60 hours per proposal, for a total of 6,600 burden hours (110 proposals × 60 hours/proposal).[834] This will correspond to 4,950 hours of shareholder time (110 proposals × 60 hours/proposal × 0.75) and $660,000 for services of outside professionals (110 proposals × 60 hours/proposal × 0.25 × $400). These burdens would be added to the PRA burden of Schedules 14A and 14C.

In the case of registered investment companies, we anticipate that the amendment to Rule 14a–8(i)(8) will result in an increase of 12 proposals annually, and a total of 24 proposals regarding procedures for the inclusion of shareholder nominees for director in company proxy materials to companies per year.[835] We estimate the annual incremental burden for the shareholder proponent to prepare the proposal to be 10 hours per proposal, for a total of 120 burden hours (12 proposals × 10 hours/proposal). This would correspond to 90 hours of shareholder time (12 proposals × 10 hours/proposal × 0.75) and $12,000 for the services of outside professionals (12 proposals × 10 hours/proposal × 0.25 × $400).

Similar to reporting companies other than investment companies, we assume that 90% of registered investment companies that receive a shareholder proposal seeking to establish procedures under a company's governing documents for the inclusion of one or more shareholder nominees in a company's proxy materials will determine that they may exclude the proposal from their proxy materials and request concurrence through the no-action letter process (so registered investment companies will seek to exclude 22 such proposals per proxy season). Also similar to reporting companies other than registered investment companies, we assume that the annual burden for the company's submission of a notice of its intent to exclude the proposal and its reasons for doing so would average 116 hours per proposal, for a total of 2,552 burden hours for registered investment companies (22 proposals × 116 hours/proposal). This corresponds to 1,914 hours of company time (22 proposals × 116 hours/proposal × 0.75) and $255,200 for the services of outside professionals (22 proposals × 116 hours/proposal × 0.25 × $400). We also estimate that the annual burden for the proponent's participation in the Rule 14a–8 no-action process would average 60 hours per proposal, for a total of 1,320 burden hours (22 proposals × 60 hours/proposal). This corresponds to 990 hours of shareholder time (22 proposals × 60 hours/proposal × 0.75) and $132,000 for the services of outside professionals (22 proposals × 60 hours/proposal × 0.25 × $400). These burdens would be added to the PRA burden of Rule 20a–1.

3. Schedule 14N and Exchange Act Rule 14a–18

Rule 14n–1 establishes a new filing requirement for the nominating shareholder or group, under which the nominating shareholder or group will be required to file notice of its intent to include a shareholder nominee or nominees for director pursuant to Rule 14a–11, applicable State law provisions, or a company's governing documents, as well as disclosure about the nominating shareholder or group and nominee or nominees on new Schedule 14N. New Schedule 14N was modeled after Schedule 13G, but with more extensive disclosure requirements than Schedule 13G. Schedule 14N will require, among other items, disclosure about the amount and percentage of securities owned by the nominating shareholder or group, the length of ownership of such amount, and a written statement that the nominating shareholder or group will continue to hold the securities through the date of the meeting.

of proposals (a shareholder is limited to submitting one shareholder proposal to each company).

[833] We note that this calculation is for incremental, not total, costs. One commenter estimated that the average approximate total cost for shareholders to include a Rule 14a–8 proposal was $30,000. *See* letter from CalPERS. Assuming these costs correspond to legal fees, which we estimate at an hourly cost of $400, we estimate that this cost will be equivalent to approximately 75 hours.

[834] As noted in footnote 817 above, we estimate that the average burden to a company associated with preparing and submitting a no-action request to the staff was approximately 116 burden hours. As noted above in footnote 823, we estimate 60 burden hours for a shareholder proponent to respond to a company's notice of intent to exclude and request for no-action relief to the Commission. In this regard, we also estimate that the average incremental burden for a shareholder proponent to submit a shareholder proposal would be 10 hours. We note that one commenter estimated that the average approximate cost to shareholders of submitting a proposal is $30,000. *See* letter from CalPERS. We note that this commenter's estimate corresponds to the burden to shareholders of submitting a proposal, whereas our estimate of 60 burden hours corresponds to the burden to shareholders in responding to a company's no-action request.

[835] The increase is estimated based on the number of registered investment company proxy contests in calendar year 2009 (11) plus the average number of no-action letters issued by the staff regarding proposals seeking to amend a registered investment company's bylaws to provide for shareholder director nominations received in calendar years 2007, 2008, and 2009 rounded to the nearest whole number greater than zero (1). In addition, we estimate that investment companies currently receive as many proposals regarding nomination procedures or disclosures as there are contested elections and no-action letters issued by the staff, resulting in a total of an estimated 24 proposals regarding nomination procedures or disclosures related to director nominations to companies per year.

In addition, Schedule 14N will contain the disclosure required to be included in the nominating shareholder's or group's notice to the company of its intent to require that the company include the shareholder's or group's nominee in the company's proxy materials pursuant to Rule 14a–11 or pursuant to applicable state or foreign law provisions or a company's governing documents. With regard to the latter, we are seeking to assure that nominating shareholders or groups that submit a shareholder nomination for inclusion in a company's proxy materials pursuant to applicable state or foreign law provisions or the company's governing documents also provide disclosure similar to the disclosure required in a contested election to give shareholders the information needed to make an informed voting decision.

Schedule 14N will require disclosures regarding the nature and extent of the relationships between the nominating shareholder or group, the nominee and the company or any affiliate of the company. Pursuant to Items 7(e)–(f) of Schedule 14A and, in the case of an investment company, Items 22(b)(18)–(19) of Schedule 14A, the company will be required to include certain information set forth in the shareholder's notice on Schedule 14N in its proxy materials. A nominating shareholder or group filing a Schedule 14N to provide disclosure when submitting a nominee for inclusion in a company's proxy materials pursuant to applicable state or foreign law provisions or the company's governing documents will not be required to provide certain statements and certifications required for nominating shareholders or groups using Rule 14a–11.

We estimate that compliance with the Schedule 14N requirements will result in a burden greater than Schedule 13G [836] but less than a Schedule 14A.[837] Therefore, we estimate that compliance with Schedule 14N will result in 47 hours per response per nominee submitted pursuant to Rule 14a–11.[838] We also note that the burden associated with filing a Schedule 14N in connection with a nomination made pursuant to an applicable state or foreign law provision or the company's governing documents may be slightly less than a nomination made pursuant to Rule 14a–11 because certain disclosures, statements, and certifications will not be required (including a statement that the nominating shareholder will continue to own the amount of securities through the date of the meeting, disclosure about the nominating shareholder's or group's intent with respect to continued ownership of the securities after the election, the certifications that will be required to use Rule 14a–11 (such as the certification concerning lack of intent to change control or to gain a number of seats on the board that exceeds the maximum number of nominees that the company could be required to include under Rule 14a–11, or the certifications that the nominating shareholder or group and the nominee satisfy the requirements of Rule 14a–11), and a supporting statement from the nominating shareholder or group. Therefore, we estimate that compliance with Schedule 14N when a shareholder or group submits a nominee or nominees to a company pursuant to an applicable state or foreign law provision or the company's governing documents will result in 40 hours per response per nominee.

For purposes of the PRA, we estimate the total annual incremental burden for nominating shareholders or groups to prepare the disclosure that will be required under this portion of the final rules to be approximately 7,870 hours of shareholder time, and $1,049,300 for the services of outside professionals.[839] This estimate includes the nominating shareholder's or group's preparation and filing of the notice and required disclosure and, as applicable, certifications on Schedule 14N and filings related to new Rules 14a–2(b)(7) and 14a–2(b)(8).

We do not expect that every shareholder that meets the eligibility threshold to submit a nominee for inclusion in a company's proxy materials pursuant to Rule 14a–11, an applicable state or foreign law provision, or a company's governing documents will do so. As discussed above, we estimate that 45 reporting companies (other than registered investment companies) and 6 registered investment companies will receive notices of intent to submit nominees pursuant to Rule 14a–11. We anticipate that some companies will receive nominees from more than one shareholder or group, though, as discussed above, for purposes of PRA estimates, we assume companies with an eligible shareholder would receive two nominees from only one shareholder or group.

We estimate that compliance with the requirements of Schedule 14N submitted pursuant to Rule 14a–11 will require 4,230 burden hours (45 notices × 47 hours/notice × 2 nominees/shareholder) in aggregate each year for nominating shareholders or groups of reporting companies (other than registered investment companies), which corresponds to 3,173 hours of shareholder time (45 notices × 47 hours/notice × 2 nominees/shareholder × 0.75) and costs of $423,000 (45 notices × 47 hours/notice × 2 nominees/shareholder × 0.25 × $400) for the services of outside professionals. In the case of registered investment companies, we estimate that a nominating shareholder's or group's compliance with the requirements of Schedule 14N will require 564 burden hours (6 responses × 47 hours/response × 2 nominees) in aggregate each year, which corresponds to 423 hours of shareholder time (6 responses × 47 hours/response × 2 nominees × 0.75) and costs of $56,400 for the services of outside professionals (6 responses × 47 hours/response × 2 nominees × 0.25 × $400). Therefore, we estimate a total of 4,794 burden hours for all reporting companies, including investment companies, broken down into 3,596 hours of shareholder time and $479,400 for services of outside professionals.

We assume that all nominating shareholders or groups will prepare a statement of support for the nominee or nominees, and we estimate the disclosure burden for the nominating shareholder or group to prepare a statement of support for its nominee or nominees to be approximately 10 burden hours per nominee. In the case of companies other than registered investment companies, this results in an aggregate burden of 900 (45 statements × 10 hours/statement × 2 nominees/shareholder), which corresponds to 675 hours of shareholder time (45 statements × 10 hours/statement × 2 nominees/shareholder × 0.75) and $90,000 for services of outside professionals (45 statements × 10 hours/

[836] We currently estimate the burden per response for preparing a Schedule 13G filing to be 12.4 hours.

[837] We currently estimate the burden per response for preparing a Schedule 14A filing to be 101.5 hours and a Schedule 14C to be 102.62 hours.

[838] We estimate that the burden of preparing the information in Schedule 14N for a nominating shareholder or group would be ⅓ of the disclosures typically required by a Schedule 14A filing, which results in approximately 34 burden hours. For purposes of this analysis, we estimate that the 34 burden hours will be added to the 12.4 hours associated with filing a Schedule 13G, resulting in a total of approximately 47 burden hours. We estimate that 75% of the burden of preparation of Schedule 14N will be borne internally by the nominating shareholder or group, and that 25% will be carried by outside professionals. We believe the nominating shareholder or group will work with their nominee to prepare the disclosure and then have it reviewed by outside professionals.

[839] This figure represents the aggregate burden hours attributed to Schedule 14N and is the sum of the burden associated with Schedules 14N submitted pursuant to Rule 14a–11, applicable state or foreign law provisions, and a company's governing documents.

statement × 2 nominees/shareholder × 0.25 × $400) for shareholders of reporting companies (other than registered investment companies). For registered investment companies, this will result in an aggregate burden of 120 (6 statements × 10 hours/statement × 2 nominees/shareholder), which corresponds to 90 hours of shareholder time (6 statements × 10 hours/statement × 2 nominees/shareholder × 0.75) and $12,000 for services of outside professionals (6 statements × 10 hours/statement × 2 nominees/shareholder × 0.25 × $400). Therefore, we estimate a total of 1,020 burden hours for all reporting companies, including investment companies, broken down into 765 hours of shareholder time and $102,000 for services of outside professionals.

When a nominating shareholder or group submits a nominee or nominees to a company pursuant to an applicable state or foreign law provision or the company's governing documents, the nominating shareholder or group will be required to file a Schedule 14N to provide disclosure about the nominating shareholder or group and the nominee or nominees. As discussed, a company will be required to include certain disclosures about the nominating shareholder or group and the nominee or nominees in its proxy statement. As noted above, we estimate that the burden associated with filing a Schedule 14N in connection with a nomination made pursuant to an applicable state or foreign law provision or a company's governing documents is 40 hours per nominee. We also estimate that approximately 30 nominating shareholders or groups of reporting companies (other than registered investment companies) will submit a nomination pursuant to an applicable state or foreign law provision or a company's governing documents.[840] Thus, we estimate compliance with the requirements of Schedule 14N for nominating shareholders or groups submitting nominations pursuant to an applicable state or foreign law provision or the company's governing documents would result in 2,400 aggregate burden hours (30 notices × 40 hours/notice × 2 nominees/shareholder) each year for nominating shareholders or groups of reporting companies (other than registered investment companies), broken down into 1,800 hours of shareholder time (30 notices × 40 hours/notice × 2 nominees/shareholder × 0.75) and costs of $240,000 for the services of outside professionals (30 notices × 40 hours/notice × 2 nominees/shareholder × 0.25 × $400). In the case of registered investment companies, we estimate that approximately 12 nominating shareholders or groups will submit a nomination pursuant to an applicable state or foreign law provision or a company's governing documents.[841] We estimate that a nominating shareholder's or group's compliance with the requirements of Schedule 14N would result in 960 aggregate burden hours (12 notices × 40 hours/notice × 2 nominees/shareholder) each year, which corresponds to 720 hours of shareholder time (12 notices × 40 hours/notice × 2 nominees/shareholder × 0.75) and costs of $96,000 for the services of outside professionals (12 notices × 40 hours/notice × 2 nominees/shareholder × 0.25 × $400). Therefore, we estimate that the total burden hours would be 3,360 for all reporting companies, including investment companies, broken down into 2,520 hours of shareholder time and $336,000 for services of outside professionals.

We assume that all nominating shareholders or groups that submit a nominee or nominees pursuant to an applicable state or foreign law provision or a company's governing documents will prepare a statement of support for the nominee or nominees,[842] and we estimate the disclosure burden for the nominating shareholder or group to prepare a statement of support for its nominee or nominees to be approximately 10 burden hours per nominee. This results in an aggregate burden of 600 hours (30 statements × 10 hours/statement × 2 nominees/shareholder) for shareholders of reporting companies (other than registered investment companies), which corresponds to 450 hours of shareholder time (30 statements × 10 hours/statement × 2 nominees/shareholder × 0.75) and $60,000 for services of outside professionals (30 statements × 10 hours/statement × 2 nominees/shareholder × 0.25 × $400). For registered investment companies, this results in an aggregate burden of 240 hours (12 statements × 10 hours/statement × 2 nominees/shareholder), which corresponds to 180 hours of shareholder time (12 statements × 10 hours/statement × 2 nominees/shareholder × 0.75) and $24,000 for services of outside professionals (12 statements × 10 hours/statement × 2 nominees/shareholder × 0.25 × $400). This results in a total of 840 burden hours, broken down into 630 hours of shareholder time and $84,000 for the services of outside professionals.

4. Amendments to Exchange Act Form 8–K

Under Rule 14a–11, a nominating shareholder or group will be required to file with the Commission, and transmit to the company, a notice on Schedule 14N of its intent to require the company to include the nominating shareholder's or group's nominee in the company's proxy materials. The nominating shareholder or group must file and transmit the notice on Schedule 14N no earlier than 150, and no later than 120, calendar days before the anniversary of the date that the company mailed its proxy materials for the prior year's annual meeting. If the company did not hold an annual meeting during the prior year, or if the date of the meeting has changed more than 30 days from the prior year, then the nominating shareholder or group will be required to provide notice a reasonable time before the company mails its proxy materials, as specified by the company in a Form 8–K filed pursuant to new Item 5.08 of Form 8–K. The final rules also require a registered investment company that is a series company to file a Form 8–K disclosing the total number of the company's shares that are entitled to vote for the election of directors at the annual meeting of shareholders (or, in lieu of such an annual meeting, a special meeting of shareholders) as of

[840] As discussed above, according to information from RiskMetrics, approximately 118 Rule 14a–8 shareholder proposals regarding board issues were submitted to shareholders for a vote in the 2008–2009 proxy season. *See* footnote 804. We believe this data is a useful starting point for estimating the number of shareholders who may avail themselves of our new rules, including the use of Schedule 14N. Also as discussed above, we estimate that approximately half of these shareholders may submit a proposal pursuant to Rule 14a–8 regarding procedures for the inclusion of shareholder nominees for director in company proxy materials, resulting in 59 proposals. We believe the number of shareholders submitting nominees pursuant to a state or foreign law provision will be lower than the number of shareholders submitting proposals pursuant to Rule 14a–8. As a result, we estimate that approximately 30 shareholder proponents will submit nominations pursuant to applicable state or foreign law provisions or a company's governing documents.

[841] We estimate that approximately half of the 24 shareholders submitting proposals to registered investment companies regarding the inclusion of one or more shareholder nominees for director in company proxy materials will make submissions pursuant to applicable state or foreign law provisions or a company's governing documents. As a result, we estimate that approximately 12 shareholder proponents will submit to registered investment companies nominations pursuant to applicable state or foreign law provisions or a company's governing documents.

[842] We are assuming for PRA purposes that any applicable state or foreign law provision or company's governing documents will allow for inclusion of such a statement by the nominating shareholder or group.

the end of the most recent calendar quarter.[843]

For purposes of the PRA, we estimate that approximately 4% of reporting companies (other than registered investment companies) will be required to file a Form 8–K because the company did not hold an annual meeting during the prior year, or the date of the meeting has changed by more than 30 days from the prior year.[844] Based on our estimate that there are approximately 11,000 reporting companies (other than registered investment companies), this corresponds to 440 companies that will be required to file a Form 8–K. In accordance with our current estimate of the burden of preparing a Form 8–K, we estimate 5 burden hours to prepare, review and file the Form 8–K, for a total burden of 2,200 hours (440 filings × 5 hours/filing). This total burden corresponds to 1,650 hours of company time (440 filings × 5 hours/filing × 0.75) and $220,000 for services of outside professionals (440 filings × 5 hours/filing × 0.25 × $400).

In the case of registered investment companies, we estimate that, similar to reporting companies other than registered investment companies, 4% of registered closed-end management investment companies subject to Rule 14a–11 that are traded on an exchange would be required to file a Form 8–K because the company did not hold an annual meeting during the prior year or the date of the meeting has changed by more than 30 days from the prior year.[845] We estimate that approximately 625 of the 1,225 registered investment companies responding to Investment Company Act Rule 20a–1 are closed-end funds that are traded on an exchange, resulting in 25 closed-end funds that will be required to file Form 8–K for these purposes (625 registered closed-end management investment companies × 0.04).[846] However, we estimate that few, if any, registered open-end management investment companies regularly hold annual meetings. Therefore, we estimate that 600 registered investment companies are not closed-end investment companies and will be required to file Form 8–K. This results in a total of 625 registered investment companies required to file Form 8–K (25 closed-end management investment companies + 600 other registered investment companies) and 3,125 burden hours (625 filings × 5 hours/filing). This total burden corresponds to 2,344 hours of company time (625 filings × 5 hours/filing × 0.75) and $312,500 for services of outside professionals (625 filings × 5 hours/filing × 0.25 × $400).[847] Adding the totals for reporting companies (other than registered investment companies) and registered investment companies results in a total burden of 5,325, which corresponds to 3,994 hours of company time and $532,500 for services of outside professionals. This includes the requirement for a registered investment company that is a series company to file a Form 8–K disclosing the total number of the company's shares that are entitled to vote for the election of directors at the annual meeting of shareholders (or, in lieu of such an annual meeting, a special meeting of shareholders) as of the end of the most recent calendar quarter.

5. Schedule 13G Filings

Shareholders will be permitted to aggregate holdings for purposes of meeting the eligibility threshold in Rule 14a–11 and therefore we anticipate that some groups of shareholders may beneficially own in the aggregate more than 5% of a voting class of an equity security registered pursuant to Section 12. In these circumstances, nominating shareholders will need to consider whether they have formed a group under Exchange Act Section 13(d)(3) and Rule 13d–5(b)(1) that is required to file beneficial ownership reports.[848] To the extent nominating shareholder groups exceed the 5% threshold and file a Schedule 13G, this will result in an increased number of Schedule 13G filings. With respect to reporting companies other than registered investment companies, we estimate that 25% (11) of the nominees submitted pursuant to Rule 14a–11 will be from shareholders who individually meet the eligibility thresholds (25% of 45), and 75% (34) will be from shareholder groups (75% of 45). We estimate that 75% of the 34 groups formed will exceed the 5% threshold and will file a Schedule 13G. As a result, we estimate that an additional 26 Schedule 13G filings will be made annually. The total burden associated with this increase in the number of filings is 322 burden hours (26 additional Schedule 13Gs × 12.4 hours/schedule). This burden corresponds to 81 hours of shareholder time (26 additional Schedule 13Gs × 12.4 hours/Schedule × 0.25) and $96,720 for services of outside professionals (26 additional Schedule 13Gs × 12.4 hours/Schedule × 0.75 × $400).

With respect to registered investment companies, we estimate that approximately 3 (50% of 6) of the shareholder nominees will be submitted by shareholders of closed-end funds whose shareholders are required to file beneficial ownership reports under the Exchange Act.[849] We estimate that 25% (1) of the nominees for director of closed-end funds submitted pursuant to Rule 14a–11 will be from shareholders who individually meet the eligibility thresholds (25% of 3), and 75% (2) will be from shareholder groups (75% of 3). We estimate that 75% of the two groups formed to nominate directors of closed-end funds will exceed the 5% threshold and file a Schedule 13G. As a result, we estimate that an additional 2 Schedule 13G filings will be made annually (75% of two groups rounds up to two). The total burden associated with this increase in the number of filings is approximately 25 burden hours (2 additional Schedule 13Gs × 12.4 hours/schedule). This burden corresponds to 6 hours of shareholder time (2 additional Schedule 13Gs × 12.4 hours/schedule × 0.25) and $7,440 for services of outside

[843] The amendment to Rule 14a–8(i)(8) is not expected to impact Form 8–K, so the burden estimates solely reflect the burden changes resulting from new Item 5.08, including when a nomination is submitted pursuant to a company's governing documents or pursuant to applicable State law.

[844] Based on information obtained in 2003 from the Investor Responsibility Research Center, 3.75% of companies (other than registered investment companies) did not hold an annual meeting during the prior year or the date of the meeting changed by more than 30 days from the prior year. *See also* footnote 195 in the 2003 Proposal.

[845] We believe that the percentage for registered closed-end investment companies will be similar to other reporting companies because such investment companies are traded on an exchange and are required to hold annual meetings of shareholders.

[846] We estimate that 1,225 registered investment companies hold annual meetings each year based on the number of responses to Rule 20a–1. Based on data provided by Lipper, the Commission estimates that approximately 625 registered closed-end management investment companies are traded on an exchange.

[847] Consistent with the current estimates for Form 8–K, we estimate that that 75% of the burden of preparation of Form 8–K is carried by the company and that 25% of the burden of preparation of Form 8–K is carried by outside professionals at an average cost of $400 per hour. The burden includes disclosure of the date by which a nominating shareholder or group must submit the notice required by Rule 14a–11(c) as well as disclosure of net assets, outstanding shares, and voting.

[848] We recognize that each shareholder group will need to analyze its own facts and circumstances in order to determine whether it is required to file a Schedule 13G; however, we expect that most groups will file a Schedule 13G.

[849] Under Section 13(d) of the Exchange Act, only holders of equity securities of closed-end funds are required to file beneficial ownership reports with the Commission. Holders of open-end funds are not subject to this requirement. Previously, we estimated that approximately 625 (or slightly over 50%) of the 1,225 registered investment companies responding to Investment Company Act Rule 20a–1 are closed-end funds that are traded on an exchange. We estimate that the percentage of the shareholder nominees that will be submitted by shareholders of closed-end funds will be approximately equal to the percentage of closed-end funds that are traded on an exchange.

professionals (2 additional Schedule 13Gs × 12.4 hours/schedule × 0.75 × $400).

Adding the totals for reporting companies (other than registered investment companies) and registered investment companies results in a total burden of 347 hours, which corresponds to 87 hours of shareholder time and $104,160 for services of outside professionals.

6. Form ID Filings

Under Rule 14n–1 and Rule 14a–11, a shareholder who submits a nominee or nominees for inclusion in the company's proxy statement must provide notice on Schedule 14N to the company of its intent to require that the company include the nominee or nominees in the company's proxy materials. The notice on Schedule 14N must be filed with the Commission on the date the notice is transmitted to the company. We anticipate that some shareholders who submit a nominee or nominees for inclusion in a company's proxy materials will not previously have filed an electronic submission with the Commission and will file a Form ID. Form ID is the application form for access codes to permit filing on EDGAR. The final rules are not changing the form itself, but we anticipate that the number of Form ID filings may increase due to shareholders filing Schedule 14N when submitting a nominee or nominees to a company for inclusion in its proxy materials pursuant to Rule 14a–11, applicable state or foreign law provisions, or a company's governing documents. We estimate that 90% of the shareholders who submit a nominee or nominees for inclusion in a company's proxy materials will not have filed previously an electronic submission with the Commission and will be required to file a Form ID. As noted above, we estimate that approximately 45 reporting companies (other than registered investment companies) and 6 registered investment companies will receive shareholder nominations submitted pursuant to Rule 14a–11. This corresponds to 46 additional Form ID filings (90% of 51). In addition, as noted above, we estimate that approximately 30 reporting companies (other than registered investment companies) and 12 registered investment companies will receive shareholder nominations submitted pursuant to an applicable state or foreign law provision or a company's governing documents. This corresponds to an additional 38 Form ID filings (90% of 42). As a result, the additional annual burden would be 13 hours (84 filings × 0.15 hours/filing).[850] For purposes of the PRA, we estimate that the additional burden cost resulting from the new rules will be zero because we estimate that 100% of the burden will be borne internally by the nominating shareholder or group.

E. Revisions to PRA Reporting and Cost Burden Estimates

Table 1 below illustrates the incremental annual compliance burden of the collection of information in hours and in cost for securities ownership reports filed by investors, proxy and information statements, and current reports under the Exchange Act. The burden was calculated by multiplying the estimated number of responses by the estimated average number of hours each entity spends completing the form. We estimate that 75% of the burden of preparation of the proxy and information statement and current reports is carried by the company internally, while 25% of the burden of preparation is carried by outside professionals at an average cost of $400 per hour. We estimate that 75% of the burden of preparation of Schedule 14N, any soliciting materials with regard to formation of a nominating shareholder group, and any soliciting materials regarding the nomination will be carried by the nominating shareholder or group internally and that 25% of the burden of preparation will be carried by outside professionals retained by the nominating shareholder or group. We estimate that 25% of the burden of preparation of Schedule 13G (for nominating shareholder groups that beneficially own more than 5% of a voting class of any equity security registered pursuant to Section 12) will be carried by the nominating shareholder or group internally and that 75% of the burden of preparation will be carried by outside professionals retained by the nominating shareholder or group. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried internally by the company and nominating shareholder or group is reflected in hours.

[850] We currently estimate the burden associated with Form ID is 0.15 hours per response.

TABLE 1—CALCULATION OF INCREMENTAL PRA BURDEN ESTIMATES*

	Current annual responses (A)	Proposed annual responses (B)	Current burden hours (C)	Increase in burden hours (D)	Proposed burden hours (E) = C + D	Current professional costs (F)	Increase in professional costs (G)	Proposed professional costs = F + G
Sch 14A	7,300	7,300	671,970	16,370	688,340	79,214,887	2,182,590	81,397,477
Sch 14C	680	680	631,152	1,819	632,971	7,393,639	242,510	7,636,149
Sch 14N	0	162	0	7,870	7,870	0	1,049,300	1,049,300
Form 8–K	115,795	116,860	493,436	3,994	497,430	65,791,500	532,500	66,324,000
Form ID	65,700	65,784	9,855	13	9,868	0	0	0
Sch 13G	12,500	12,528	35,577	87	35,664	42,694,200	104,160	42,798,360
Rule 20a–1	1,225	1,225	142,958	3,438	146,396	20,090,000	458,300	20,548,300
Total				33,591			4,569,360	

*The incremental burden estimate for Rule 20a–1 includes the disclosure that would be required on Schedule 14A and 14C, discussed above, with respect to funds.

IV. Cost-Benefit Analysis

A. Background

The Commission is adopting new rules that, under certain circumstances, will require companies to include in their proxy materials shareholder nominees for director, as well as other disclosure regarding those nominees and the nominating shareholder or group. In addition, the new rules will require companies, under certain circumstances, to include in their proxy materials a shareholder proposal that seeks to establish a procedure in the company's governing documents for the inclusion of shareholder director nominees in the company's proxy materials. As a result, a company's proxy materials may be required, under certain circumstances, to provide shareholders with information about, and the ability to vote for, a shareholder nominee for director. The new rules will therefore facilitate shareholders' ability to exercise their traditional State law rights to nominate and elect directors by improving the disclosure provided in connection with corporate proxy solicitations and communication between shareholders in the proxy process.

We requested comment on all aspects of the cost-benefit analysis contained in the Proposing Release, including identification of any additional costs and benefits. We have considered these comments carefully and made responsive changes to the rules in order to minimize the potential costs. Below we consider the benefits and costs of the economic effects of the new rules and discuss the comments we received, as applicable.

B. Summary of Rules

Rule 14a–11 will require companies to include shareholder nominations for director and disclosure about the nominating shareholder or group and the nominee in a company's proxy materials if, among other things, the nominating shareholder or group held, as of the date of the shareholder notice on Schedule 14N, either individually or in the aggregate, at least 3% of the voting power of the company's securities that are entitled to be voted on the election of directors at the annual meeting of shareholders (or, in lieu of such an annual meeting, a special meeting of shareholders) or on a written consent in lieu of such meeting and has held the qualifying amount of securities used to satisfy the ownership threshold continuously for at least three years as of the date of the shareholder notice on Schedule 14N (in the case of a shareholder group, each member of the group must have held the amount of securities that are used to satisfy the ownership threshold for at least three years as of the date of the shareholder notice on Schedule 14N). The nominating shareholder or group also will be required to hold the shares through the date of the meeting. A nominating shareholder or group that includes a nominee or nominees in a company's proxy materials pursuant to Rule 14a–11 will be required to provide in its notice on Schedule 14N filed with the Commission and transmitted to the company disclosures similar to the disclosures required in a traditional contested election. Pursuant to Item 7(e) of Schedule 14A (and, in the case of registered investment companies and business development companies, Item 22(b)(18) of Schedule 14A), the company will be required to include in its proxy materials certain disclosure provided by the nominating shareholder or group in its notice on Schedule 14N. In addition, the new rules will enable shareholders to engage in limited solicitations to form nominating shareholder groups and engage in solicitations in support of their nominee or nominees without disseminating a proxy statement.[851]

The Commission also is adopting an amendment to Rule 14a–8 to narrow the exclusion in paragraph (i)(8) of the rule, which addresses director elections. Under the amendment, a company will not be permitted to rely on Rule 14a–8(i)(8) to omit from its proxy materials a shareholder proposal that seeks to establish a procedure in the company's governing documents for the inclusion of shareholder nominees for director in the company's proxy materials. The current procedural requirements for submitting a shareholder proposal pursuant to Rule 14a–8 will remain the same. No additional disclosures will be required from any shareholder that submits such a proposal; however, a nominating shareholder or group that includes a nominee or nominees in a company's proxy materials pursuant to an applicable state or foreign law provision or the company's governing documents will be required to file with the Commission and transmit to the company, in its notice on Schedule 14N, disclosures similar to the disclosures required in a traditional contested election. Pursuant to Item 7(f) of Schedule 14A (and, in the case of registered investment companies and business development companies, Item 22(b)(19) of Schedule 14A), the company will be required to include in its proxy materials certain disclosures provided by the nominating shareholder or group in its notice on Schedule 14N.

C. Factors Affecting Scope of the New Rules

Our discussion of the economic effects of the new rules takes into account various factors, such as the

[851] *See* Rules 14a–2(b)(7) and 14a–2(b)(8).

incentives and actions of certain parties, that will affect the rules' scope and influence.

Any future actions of the states and their legislatures could affect the applicability of the new rules. Rule 14a–11, for instance, will not apply to companies incorporated in states or other jurisdictions that prohibit nominations of directors by shareholders or permit companies to prohibit such nominations and where the company's governing documents do so.[852] Under Rule 14a–8, shareholder proposals must be proper subjects for action by shareholders under the laws of the jurisdiction of the company's organization. To the extent that states or other jurisdictions change their laws, for example, to prohibit the nomination of directors by shareholders, Rule 14a–11 and Rule 14a–8 would apply less broadly.

Future actions of boards may affect the applicability of the new rules. In the case of Rule 14a–11, we believe that the applicability of the rule is not likely to be affected by future actions of a board because companies generally may not prohibit shareholders from nominating directors under existing State law.[853] In addition, a company will not be permitted to exclude pursuant to amended Rule 14a–8(i)(8) a shareholder proposal that would establish a procedure under a company's governing documents for the inclusion of one or more shareholder nominees for director in the company's proxy materials. It is reasonable to expect that some shareholders will submit this type of proposal, particularly shareholders who perceive that the current board does not represent, or possibly may come to not represent, their interests and are not otherwise able to use Rule 14a–11 (such as if the shareholder does not qualify to submit a nominee or if larger shareholders have exhausted the nomination slots available pursuant to Rule 14a–11). Finally, boards seeking to limit the effect of shareholder-nominated candidates submitted pursuant to Rule 14a–11 and elected as directors may, in some instances, choose to expand the board size to dilute, to an extent, the influence of those directors.[854]

The actions and intentions of shareholders also may affect the applicability of the new rules. To rely on Rule 14a–11, the nominating shareholder (or where there is a nominating shareholder group, each member of the nominating shareholder group) must not be holding any of the company's securities with the purpose, or with the effect, of changing control of the company[855] or to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the company could be required to include under Rule 14a–11 and must provide a certification to this effect in its filed Schedule 14N.[856] The effect of the rule also is affected by the limitation on the number of shareholder director nominees that a company is required to include in its proxy materials. Under Rule 14a–11, a company will not be required to include shareholder nominations for more than a maximum of one director or 25% of the existing board, whichever is greater. If one shareholder or group that is eligible to use Rule 14a–11 nominates the maximum allowable number of candidates, a company will be permitted to exclude any other shareholder's or group's nominees from the company's proxy materials.[857] Further, if the maximum allowable number of existing shareholder director nominees is currently in place on the board, additional shareholder director nominees are not required to be disclosed in the proxy materials pursuant to the rule.[858]

Shareholders seeking to establish a procedure in a company's governing documents and submit nominees for director using such a provision will need to initiate a two-step process to have their nominees included in a company's proxy materials.[859] Unlike the use of Rule 14a–11, this two-step process depends on both the likelihood that a shareholder will initiate such a process and on its success at each step of the process (*e.g.,* the successful inclusion of the shareholder proposal in the company's proxy materials and adoption of the proposal by the appropriate shareholder vote). The likelihood that a shareholder will initiate the two-step process could be limited by the costs arising from the time needed to complete the process (*e.g.,* including opportunity costs of holding securities where the shareholder may consider the company's board composition to be sub-optimal) and the added risk of failure due to the need to complete two separate steps to include its director nominees in the proxy materials. The likelihood that a shareholder will initiate this process is also affected by the existence of Rule 14a–11, which some eligible shareholders may seek to use instead.

Lastly, the scope of the effects of Rule 14a–11, including the expected benefits and costs described below, is affected by the size of the eligible population of shareholder groups and companies. Consequently, the scope of the direct effects of Rule 14a–11 will narrow to the extent that the rule's eligibility criteria reduce the number of shareholders eligible to take advantage of the rule. According to the data from Form 13F filings, 33% of the 6,416 public issuers included in the sample would have one or more shareholders that, on its own, satisfies the 3% ownership threshold and three-year holding period

[852] As noted above, we are not aware of any states that currently prohibit shareholder nominations for director.

[853] Several commenters also stated that they were unaware of any law in any state or in the District of Columbia that prohibits shareholders from nominating directors. *See* letters from ABA; BRT; CII; Eaton.

[854] As an example, a board of eight directors, with two new shareholder-nominated directors, may expand to up to 11 directors. Such an expansion would dilute the influence of the shareholder-nominated directors without increasing the number of director slots for shareholder nominees for director in the proxy materials because Rule 14a–11 includes a provision allowing companies to round down the number of nominees that must be included when calculating the 25% maximum.

[855] Although Rule 14a–11 does not contain a requirement that the shareholder nominee or nominees do not have an intent to change the control of the company, a nominating shareholder's or group's ability to meet the requirement and certify that it does not have such an intent will be impacted by the intentions and actions of its nominee or nominees. For example, a nominating shareholder will not be able to certify that it does not hold the company's securities for the purpose, or with the effect, of changing the control of the company if its nominee launches its own proxy contest or tender offer. For further discussion, *see* Section II.B.4.d. above.

[856] *See* certifications in Item 8 of new Schedule 14N.

[857] Prior to the time a company has commenced printing its proxy statement and a form of proxy, if a nominating shareholder or group withdraws its shareholder director nominee or the nominee becomes disqualified, the company will be required to include in its proxy materials the director nominee or nominees of the nominating shareholder or group with the next highest voting power percentage that is otherwise eligible to use the rule and that filed a timely notice in accordance with the rule, if any. This process will continue until the company includes the maximum number of nominees that it is required to include in its proxy materials or the company exhausts the list of eligible nominees. For further discussion, *see* Section II.B.7.b above.

[858] This could be the case when shareholder-nominated candidates for director are elected at a company with a classified board or when a company decides to nominate previously-elected shareholder-nominated directors after their first term in office.

[859] The first step of this two-step process would be the submission of a shareholder proposal pursuant to Rule 14a–8 seeking to establish a procedure in a company's governing documents for the inclusion of shareholder nominees for director in the company's proxy materials and shareholder approval of the proposal. The second step would be the submission and inclusion of shareholder director nominees in the company's proxy materials pursuant to the nomination procedures adopted by shareholders.

requirement of Rule 14a–11.[860] Our extension of the holding period from a one-year period, as proposed, to the three-year period in the final rule, as well as the increase in the ownership threshold from that proposed for large accelerated filers, limit the number of shareholders eligible to use the rule and the number of companies directly affected by the rule. For non-accelerated filers, the uniform 3% ownership threshold is lower than the 5% ownership threshold that we proposed for that class of filers. This may result in an increase in the number of shareholders eligible to use Rule 14a–11 and the number of companies directly affected by the rule as compared to those shareholders and companies affected under the proposed one year and 5% minimum standards; however, we believe that the extension of the holding period from one to three years may limit any increase in the number of shareholders eligible to use the rule at smaller reporting companies. The comments we received on the Proposal did not substantiate the concern that the rule would have a disproportionate impact on small issuers, and comments from companies overwhelmingly supported uniform ownership thresholds for all public companies.

D. Benefits

We believe that Rule 14a–11 and the amendment to Rule 14a–8(i)(8), where applicable, will (1) facilitate shareholders' ability to exercise their traditional State law rights to nominate and elect directors; (2) establish a minimum uniform procedure pursuant to which shareholders will be able to include their director nominees in a company's proxy materials and enhance shareholders' ability to propose alternative procedures that further shareholders' rights to nominate and elect directors; (3) potentially improve overall board and company performance; and (4) result in more informed voting decisions in director elections due to improved disclosure of shareholder director nominations and enhanced communications between shareholders regarding director nominations.

1. Facilitating Shareholders' Ability to Exercise Their State Law Rights to Nominate and Elect Directors

Facilitating shareholders' ability to exercise their traditional State law rights to nominate and elect directors is a direct benefit of the new rules for shareholders. The new rules do so by requiring the company proxy materials to include shareholder nominees under certain conditions and, as a result, providing alternative means for shareholders to nominate and elect director candidates other than through a traditional proxy contest. Some eligible shareholders may view the new rules as more advantageous than traditional proxy contests and, hence, the new rules may influence their behavior. In addition, eligible shareholders who would have considered launching a proxy contest for purposes other than to change control of the company may prefer to use the new rules instead. The availability of the new rules also may encourage shareholders who would not have previously considered conducting a proxy contest to take a greater role in the governance of their company by using the new rules to have their nominees for director included in a company's proxy materials.

The precise level of the direct benefits to shareholders will depend on a number of other factors. The benefits may be enhanced to the extent that companies' governing documents are modified to require inclusion of shareholder nominees for director in the company's proxy materials from a broader spectrum of shareholders (for example, by lowering the ownership threshold required to have a nominee included in the company's proxy materials or shortening the holding period).[861] The instances of such changes to provisions in governing documents may increase as a result of the amendment to Rule 14a–8(i)(8).[862] We also recognize the possibility that certain quantifiable benefits for shareholders, such as a nominating shareholder's or group's savings in the direct costs of printing and mailing proxy materials, may be less than the quantifiable costs for a company subject to the new rules. We note, however, that the benefits of the new rules are not limited to those that are quantifiable (such as the direct savings in printing and mailing costs) and instead include benefits that are not as easily quantifiable (such as the possibility of greater shareholder participation and communication in the director nomination process), as discussed below. We believe that these benefits, collectively, justify the costs of the new rules.

We discuss below the ways in which the new rules will facilitate shareholders' exercise of their traditional State law rights and the benefits for shareholders (particularly as compared to a traditional proxy contest). We discuss specific monetary cost savings, both direct and indirect, as well as other changes and the resulting benefits for shareholders.

Shareholders generally have the right under State law to nominate and elect their own director candidates—a right that many shareholders believe they should be able to exercise.[863] Currently, however, a shareholder or group that wishes to present its director nominations for a shareholder vote must generally conduct a proxy contest, which is a costly endeavor. The nominating shareholder or group would have to incur costs involved with preparing proxy materials with the required disclosures regarding the director nominations and mailing the proxy materials to each shareholder solicited.[864] Several commenters stated that the costs of traditional proxy contests have made them prohibitively expensive for shareholders wishing to exercise their traditional State law rights to nominate and elect directors.[865]

Further, the concern about the costs of conducting a traditional proxy contest is not limited to the fact that the nominating shareholder or group must incur these costs directly. A collective action problem also exists. The time and effort spent by a shareholder in nominating and advocating for new directors are not shared by other shareholders. This unequal cost sharing may serve to discourage any one

[860] November 2009 Memorandum. *See* Section II.B.4.b. above for a discussion of the data, including its limitations.

[861] As adopted, Rule 14a–11 requires the nominating shareholder individually, or the nominating group in the aggregate, to hold at least 3% of the total voting power of the company's securities that are entitled to be voted on the election of directors at the annual (or a special meeting in lieu of the annual) meeting of shareholders, or on a written consent in lieu of such meeting, on the date the nominating shareholder or nominating group provides notice to the company on Schedule 14N.

[862] As amended, companies will no longer be able to rely on Rule 14a–8(i)(8) to exclude a shareholder proposal that seeks to establish a procedure in the company's governing documents for the inclusion of shareholder nominees for director in the company's proxy materials.

[863] *See* letters from AFSCME; Sodali; Universities Superannuation (citing a June 2009 survey conducted by ShareOwners.org showing that 82% of the respondents believed that shareholders should be able to "nominate and elect directors of their own choosing to the boards of the companies they own," while 16% of the respondents stated that "shareholders should not be able to propose directors to sit on the boards of the companies they own.").

[864] Proxy contests waged in connection with efforts to obtain control may involve costs related to not only preparing proxy materials and engaging in solicitation efforts, but to the purchase or lock-up of a significant amount of the voting securities of the target company. Such costs could be high.

[865] *See* letters from Americans for Financial Reform; CalPERS; CII; Florida State Board of Administration; M. Katz; J. McRitchie; S. Ranzini; Teamsters.

shareholder from assuming the costs of running a traditional proxy contest on its own, even though a successful contest could result in a greater aggregate benefit for all shareholders.[866] As a result, there is the added economic cost of foregone opportunities where a qualified director candidate fails to be nominated because no one shareholder or group wishes to bear alone the costs of an election contest for the benefit of all shareholders.

We believe Rule 14a–11 will further our stated goal of facilitating shareholders' ability to nominate and elect their own director candidates by allowing shareholders to avoid certain direct costs of conducting a traditional proxy contest and reducing the overall costs to shareholders for nominating and electing directors—a belief shared by several commenters.[867] The new rules also will mitigate collective action and free-rider concerns that may have otherwise deterred many shareholders from exercising their rights under State law to nominate directors.

Direct cost savings, particularly as compared to the cost of a traditional proxy contest, come from two sources. First, a nominating shareholder or group may see direct cost savings due to reduced printing and postage costs. Based on the information available,[868] we calculate that a shareholder using Rule 14a–11 to submit a director nominee or nominees to be included in a company's proxy materials will save at least $18,000 on average in printing and postage costs.

Second, and significantly, a nominating shareholder or group may see direct cost savings related to reduced expenditures for advertising and promotion of its candidates as a result of its ability to use the company's proxy materials to directly solicit other shareholders. To the extent that the nominating shareholder or group decides to reduce its public relations and advertising expenditures to promote its candidates, or to engage proxy solicitors, the cost savings will be greater. These reductions in costs may remove a disincentive for shareholders to submit their own director nominations, mitigate the collective action concern, and serve the goal of facilitating shareholders' ability to exercise their traditional State law rights to nominate and elect directors.

We received significant comment questioning the need for the new rules to reduce the costs described above or the degree to which the reduction in costs will actually facilitate shareholder director nominations.[869] One commenter characterized the direct printing and mailing cost savings as the sole benefit of the new rules for shareholders and one that is not justified by the costs and disruption that would result from the rules.[870] The commenter observed that the average of $18,000 in estimated savings identified in the Proposing Release represented less than 5% of the cost of a traditional proxy contest and did not include costs that would be incurred by a shareholder actively seeking the election of its nominee, such as costs related to legal counsel, proxy solicitors, public relations advisers and advertising.

We recognize that the adoption of the new rules may not relieve a nominating shareholder or group of all expenditures that could be incurred for an active campaign that may be more successful to support the election of its candidate to the company's board of directors. The new rules, however, are not intended to serve that purpose. Instead, the new rules' goal is to facilitate shareholders' ability to present their own director nominees for a vote at a shareholder meeting by eliminating or reducing barriers in the proxy solicitation process—one of which is the direct cost of printing and mailing proxy materials—that have contributed to frustrating shareholder director nominations.[871]

We also recognize that the direct printing and mailing cost savings of $18,000, on their own, may not be viewed by some to be significant enough to drive the behavior of large shareholders of public companies. The comments that we received regarding the likely increase in the number of election contests resulting from the new rules, however, seem to undercut this view and suggest instead that shareholders' behavior may indeed be influenced by the rules.[872] The extent to which election contests are predicted to increase as a result of shareholders nominating their own director candidates for inclusion in the company's proxy materials strongly indicates that the benefits of the new rules cannot be fairly characterized as a

[866] *See, e.g.,* letters from Bebchuk, *et al.* ("In evaluating eligibility and procedural requirements, the SEC should also keep in mind that many institutional investors lack incentives to invest actively in seeking governance benefits that would be shared by their fellow shareholders."); Lucian A. Bebchuk and Scott Hirst ("Bebchuk/Hirst") (submitting the article by Lucian A. Bebchuk and Scott Hirst, *Private Ordering and the Proxy Access Debate,* 65 Bus. Law. 329 (2010) ("Bebchuk and Hirst (2010)"), in which the authors state: "Thus, challengers who might be able to improve the management of the company may be discouraged from running because they will bear all of the costs but capture only a fraction of the benefits from any improvement in governance." *See also* Lynn A. Stout, *The Mythical Benefit of Shareholder Control,* 93 Va. L. Rev. 789, 789 (2007) ("Stout (2007)") ("In a public company with widely dispersed share ownership, it is difficult and expensive for shareholders to overcome obstacles to collective action and wage a proxy battle to oust an incumbent board.") (cited in the Proposing Release, Section V.B.1.).

[867] *See* letters from CII; Key Equity Investors; Pershing Square. The benefit of a reduction in the cost of a proxy solicitation exists only to the extent that the nominating shareholder or group views Rule 14a–11 as a substitute for a traditional proxy contest. Even with the adoption of Rule 14a–11, some shareholders may prefer to conduct a traditional proxy contest due to the various restrictions on the use of the rule. For example, the rule restricts the number of shareholder director nominees that a company will be required to include in its proxy materials. The rule also will be available only to shareholders that do not hold the securities in the company with the purpose, or with the effect, of changing control of the company. These elements of Rule 14a–11 impose restrictions that are not present in a traditional proxy contest. Some shareholders also may prefer a traditional proxy contest over Rule 14a–11 for reasons related to their strategy for the conduct of the election contest, such as having greater control over the mailing schedule and contents of their proxy materials. *See, e.g.,* letter from Carl T. Hagberg ("C. Hagberg") (stating that "most truly serious nominators of director candidates will surely produce their own proxy materials, and take control of their own 'electioneering' with materials and proxy cards of their own, if they want to stand a reasonable chance to win."). Therefore, while Rule 14a–11 may encourage some shareholders seeking to nominate and elect their candidates to use the rule instead of conducting a traditional proxy contest, other shareholders may continue to prefer a traditional contest. For such shareholders, the expected reduction in a shareholder's proxy solicitation costs will not materialize.

[868] According to a study of proxy contests conducted during 2003, 2004, and 2005, the average cost of a proxy contest to a soliciting shareholder was $368,000. *See* letter from Automatic Data Processing, Inc. (April 20, 2006) regarding *Internet Availability of Proxy Materials,* Exchange Act Release No. 34–52926 (December 8, 2005) (File No. S7–10–05). The costs included those associated with proxy advisors and solicitors, processing fees, legal fees, public relations, advertising, and printing and mailing of proxy materials. Approximately 95% of the costs were unrelated to printing and postage. The cost of printing and postage averaged approximately $18,000.

[869] *See* letters from 26 Corporate Secretaries; 3M; Ameriprise; Association of Corporate Counsel; BRT; Cummins; DuPont; ExxonMobil; FMC Corp.; Frontier; GE; General Mills; Honeywell; IBM; Keating Muething; Motorola; Schneider; Sidley Austin; Simpson Thacher; Time Warner Cable; Wachtell; Wells Fargo; Xerox.

[870] *See* letter from BRT.

[871] We recognize that other factors may have similarly frustrated the effective exercise of this State law right. We discuss below these factors and how the new rules will reduce or eliminate these factors.

[872] *See, e.g.,* letters from Altman (stating that participants in its survey predicted that, on average, 15% of companies listed on U.S. exchanges could expect to face a shareholder director nomination submitted under Rule 14a–11 in 2011, based on the eligibility criteria of the Proposal); BRT (stating that the new rules "will increase the frequency of contested elections * * *"); Chamber of Commerce/CCMC (noting that if the new rules are adopted, "it is likely that proxy contests (in which the company is required to solicit proxies on behalf of shareholders) will increase greatly and may become customary.").

"mere $18,000 in estimated savings"[873] —a characterization that we believe obfuscates the significance of this benefit of our new rules.

We received comment that while certain shareholders may be relieved of certain costs to run a traditional proxy contest as a result of the new rules, the rules may simply shift those costs onto the company and, indirectly, all shareholders.[874] Therefore, while the rules may reduce the direct costs of solicitation by a particular shareholder for its director nominees, it may result in an increase in the overall cost of a company's proxy solicitation for a director election (*e.g.,* additional printing and mailing costs arising from the disclosure of the shareholder director nominations) and indirectly the cost to all shareholders, particularly if the new rules lead to an increase in the number of shareholder director nominations. We have some reason to believe, however, that the increased costs for the company may not be as much as would otherwise result if that shareholder engaged in a traditional proxy contest.[875] We also note that, to the extent that the new rules help to address the collective action concern, it could remove disincentives that previously deterred shareholders from submitting director nominations that may have ultimately benefited all shareholders.

Other commenters observed that savings in printing and mailing costs could be obtained through our notice and access model for electronic delivery of proxy materials[876] or stated that the notice and access model has already reduced the costs for shareholders to effect changes in the membership of a board.[877] We note that this observation applies only to the direct printing and mailing costs, rather than all of the other monetary cost savings discussed throughout this section. We agree that the notice and access model may decrease significantly the printing and mailing costs associated with a proxy solicitation. To the extent that a shareholder chooses to nominate and elect its director candidates through a traditional proxy contest using the notice and access model, the expected benefit of a reduction in printing and mailing costs will be somewhat lower. The notice and access model, however, may not necessarily provide a soliciting shareholder with the same cost savings possible under Rule 14a–11. Under the model, a soliciting shareholder will still incur the costs of printing and mailing notices of availability of proxy materials to shareholders from whom the person is soliciting proxy authority.[878] Further, as we recognized at the time we created the notice and access model, additional printing and mailing costs will be incurred to the extent that a solicited shareholder requests paper copies of the proxy materials.[879] A soliciting shareholder also may prefer using the new rules over a traditional proxy contest conducted through the notice and access model for reasons related to its strategy for the conduct of the election contest, such as avoiding the need and cost to use Exchange Act Rule 14a–7 to obtain a shareholder list from the company (or have the company send proxy materials on its behalf)[880] as well as the requirement to file preliminary proxy materials at least ten calendar days before definitive materials are first sent to shareholders.[881]

The new rules will do more than reduce the direct monetary costs described above. We recognize that shareholders today are widely dispersed and the corporate proxy is the principal means through which State law voting rights are exercised. The dispersed nature of ownership creates certain intangible disincentives to the effective exercise of shareholders' ability to nominate and elect their own director candidates, as discussed below. As we stated in the Proposing Release, the proxy process provides the only practical means for shareholders to solicit votes from other shareholders in favor of the election of their nominees. The current inability of many shareholders to utilize the proxy process for this purpose means that shareholder director nominees do not have a realistic prospect of being elected because most, if not all, shareholders would have cast their votes well in advance of the shareholder meeting. Shareholders are deprived of not only the ability to exercise a traditional State law right, but the opportunity to assess

[873] *See* letter from BRT.

[874] *See* letter from ABA. We recognized this possibility in the Proposing Release as well, noting that the rule "may result in a decrease in costs to shareholders that would have to conduct proxy contests in the absence of [proposed] Rule 14a–11, but may increase the costs for companies." *See* Proposing Release, Section V.C.3.

[875] One commenter on the 2003 Proposal estimated that a Rule 14a–11 contest would cost a company approximately one-third what a full proxy contest costs. *See* letter from Stephen M. Bainbridge submitted in connection with the 2003 Proposal (File No. S7–19–03)("Bainbridge 2003 Letter"). Based on this assumption and relying on data from a late 1980s survey, this commenter estimated that the costs of such a contest to a public company would be $500,000. This commenter also cited data estimating companies' annual expenditures on Rule 14a–8 shareholder proposals to be $90 million. While this commenter noted the belief that it is unlikely that there will be as many Rule 14a–11 election contests as Rule 14a–8 shareholder proposals, the commenter asserted that incumbent boards are likely to spend considerably more on opposing each Rule 14a–11 contest than on opposing a Rule 14a–8 shareholder proposal. This commenter estimated that $100 million may be an appropriate estimate for the lower boundary of the range within which Rule 14a–11's direct costs will fall. Commenters did not provide any data during the comment period for the Proposal that compared these costs for a company.

[876] *See, e.g.,* letters from 26 Corporate Secretaries; Ameriprise; BRT.

[877] *See* letters from 26 Corporate Secretaries; 3M; Ameriprise; Association of Corporate Counsel; BRT; Cummins; DuPont; ExxonMobil; FMC Corp.; Frontier; GE; General Mills; Honeywell; IBM; Keating Muething; Motorola; Schneider; Sidley Austin; Simpson Thacher; Time Warner Cable; Wachtell; Wells Fargo; Xerox.

[878] Exchange Act Rule 14a–16(*l*)(2). A soliciting person other than the company could limit the cost of a solicitation by soliciting proxies only from a select group of shareholders, such as those with large holdings, without furnishing other shareholders with any information. This flexibility would allow a soliciting person other than the company to reduce even further its printing and mailing costs by soliciting only those persons who have not previously requested paper copies of the proxy materials. Certain practical reasons, however, may deter a soliciting person other than the company from taking full advantage of this flexibility, such as the fact that institutional investors may prefer receiving paper copies of proxy materials. *See* Jeffrey N. Gordon, *Proxy Contests in an Era of Increasing Shareholder Power: Forget Issuer Proxy Access and Focus on E-Proxy,* 61 Vand. L. Rev. 476, 488 (2008) (noting that institutional investors "generally may request paper delivery to minimize their own printing costs.") (cited in the letters from BRT and Simpson Thacher).

[879] *See Internet Availability of Proxy Materials,* Release No. 34–55146 (January 22, 2007) ("Internet Proxy Availability Release") (noting that "to the extent that some shareholders request paper copies of the proxy materials, the benefits of the amendments in terms of savings in printing and mailing costs will be reduced.").

[880] Exchange Act Rule 14a–7 sets forth the obligation of companies either to provide a shareholder list to a requesting shareholder or to send the shareholder's proxy materials on the shareholder's behalf. The rule provides that the company has the option to provide the list or send the shareholder's materials, except when the company is soliciting proxies in connection with a going-private transaction or a roll-up transaction. Under Rule 14a–7(e), the shareholder must reimburse the company for "reasonable expenses" incurred by the company in providing the shareholder list or sending the shareholder's proxy materials.

[881] Exchange Act Rule 14a–6 requires that preliminary copies of the proxy statement and form of proxy be filed with the Commission at least ten calendar days prior to the date that definitive copies of such materials are first sent or given to security holders, except if the solicitation relates to certain matters to be acted upon at the meeting of security holders. Accordingly, the proxy statement and form of proxy for a traditional proxy contest must be filed in preliminary form. By contrast, under the amendments to Rule 14a–6 that we are adopting today, the inclusion of a shareholder director nominee in the company's proxy materials will not require the company to file preliminary proxy materials, provided that the company is otherwise qualified to file directly in definitive form. In this regard, the inclusion of a shareholder director nominee will not be deemed a solicitation in opposition for purposes of the exclusion from filing preliminary proxy materials.

and vote on qualified candidates who could have been presented for a vote if the proxy process functioned as intended. As with the direct monetary costs, reducing the costs arising from the dispersed nature of ownership discussed below will help address any related collective action concerns.

Some commenters observed that a shareholder seeking to nominate and elect its own director candidates through a traditional proxy contest is disadvantaged by the fact that its candidates are presented to shareholders through a separate set of proxy materials.[882] A nominating shareholder or group may encounter difficulties in having its nominees evaluated in the same manner as those of management by shareholders who are used to receiving only the company's proxy materials and who may react differently, and perhaps negatively, to the shareholder's nominees simply because the nominees are presented in a separate, unfamiliar set of proxy materials.

As we stated throughout this release, the Federal proxy rules should not frustrate the exercise of a shareholder's traditional State law right to present its own director candidates for a shareholder vote. To the extent that the exercise of this right is hindered simply because of a nominating shareholder's or group's need to deliver a separate set of proxy materials and potentially negative reaction by shareholders to the appearance of this set of materials, we believe that our new rules will help address that concern. With the new rules, a shareholder will have the ability to include its director nominees in the company's proxy materials, provided that the rules' requirements are met. The fact that a nominating shareholder or group could have its director nominees included in a company's proxy materials—as opposed to being included in its own proxy materials—pursuant to the new rules may be viewed by the shareholder or group as a significant improvement in its ability to have its nominees evaluated by shareholders in the same manner as they evaluate management's nominees. Shareholders who are interested in effecting a change in the company's leadership or direction may be less likely to be deterred by the prospect that their director nominees will not be assessed on their merit. Nominating shareholders also may see less need for additional soliciting efforts, such as the hiring of proxy solicitors, public relations advisors, or advertising, if their director nominees are presented alongside those of management in a set of company proxy materials with which the company's shareholders are familiar.[883]

Shareholders also may be hindered in making their voting decisions in a traditional proxy contest due to the fact that they have to evaluate more than one set of proxy materials—one sent by a company and another sent by an insurgent shareholder—when evaluating whether and how to grant authority to vote their shares by proxy.[884] Presenting the competing director nominees on one proxy card, with the related disclosure contained in one proxy statement, may simplify the shareholder's decision-making process and reduce the potential for any confusion on the part of shareholders.[885] The result may be a greater degree of participation by shareholders through the proxy process in the governance of their companies.

2. Minimum Uniform Procedure for Inclusion of Shareholder Director Nominations and Enhanced Ability for Shareholders To Adopt Director Nomination Procedures

Rule 14a–11, as adopted, will provide shareholders of companies subject to the Federal proxy rules the ability to include their director nominees in the company's proxy materials, provided that the rule's requirements are met.[886] Further, with our adoption of the amendment to Rule 14a–8(i)(8), shareholders will be able to present in the company's proxy materials a proposal that would seek to establish a procedure in the company's governing documents for the inclusion of shareholder nominees for director in the company's proxy materials.[887] Shareholders will have a greater ability to present for a shareholder vote a director nomination procedure with requirements, such as the requisite ownership threshold or holding period, that differ from those of Rule 14a–11.[888]

We received significant comment regarding the uniform applicability of Rule 14a–11 and the amendment to Rule 14a–8(i)(8).[889] While there was widespread support for the amendment to Rule 14a–8(i)(8), commenters were

[882] *See* letters from Bebchuk/Hirst (submitting the Bebchuk and Hirst (2010) study, which noted the ability of shareholders to include their nominees in the company's proxy materials would "avoid intangible disadvantages that may result from being on a separate card."); Pershing Square (stating that "the absence of universal ballots, on which shareholders can vote from among all nominees regardless of who proposed them, is glaring and clearly anti-choice" and that "[o]ur hope is that, outside the control context, selection of the best nominees in a contest will be based more on character, competency, and relevancy of their experience rather than the identity of the person nominating the candidate.").

At the October 7, 2009 "Proxy Access Roundtable" held by the Harvard Law School Program on Corporate Governance (the transcript of which was submitted as part of a comment letter from S. Hirst), Roy Katzovicz, the Chief Legal Officer of Pershing Square Capital Management, L.P. explained:

As a cultural matter, there are two sub-points. First and foremost, having the decision of choosing two people, one next to the other, invites, we think, a more intelligent analysis on the part of shareholders generally. In particular, we think that if the basis for election for a nominee is their merit as an individual, a fund or an investor of any type that can identify the deadweight on the board, and in place of that deadweight find ideal candidates from a skills perspective to round out the board, they're going to have an easier time getting shareholder support for their nominee. Their ability to vote among all the nominees and from all proponents, I think, facilitates that kind of person-by-person analysis, versus slate-by-slate analysis.

[883] As discussed in Section II.B.9.d.ii. above, we have adopted the proposed amendments to Exchange Act Rule 14a–4 out of a similar desire to avoid giving management's director nominees an advantage over those of a nominating shareholder or group and to create an impartial presentation of the nominees for whom a shareholder may vote.

[884] One commenter stated that if enabling shareholders to evaluate a board more efficiently and make more informed voting decisions is the goal of the Proposal, then enhancing proxy disclosure, rather than facilitating proxy contests, will better achieve that goal. *See* letter from Davis Polk. We recognize the importance of enhancing the disclosure provided in connection with proxy solicitations and recently adopted new rules to better enable shareholders to evaluate the leadership of public companies. *See* Proxy Disclosure Enhancements Adopting Release. These rules, however, do not dispense with the need for Rule 14a–11 and the amendment to Rule 14a–8(i)(8). The new rules we are adopting will complement the recently-adopted proxy disclosure enhancement rules by enabling shareholders to submit their own director nominees if, after evaluating a company's public disclosures and performance, they are displeased with that company's current leadership or direction.

[885] As discussed in Section IV.D.4. below, the new disclosure requirements that we are adopting for shareholder director nominations submitted pursuant to Rule 14a–11, a state or foreign law provision, or a provision in the company's governing documents also will facilitate more informed voting decisions by providing shareholders with important disclosures and enhancing their ability to communicate with each other regarding director nominations.

[886] For a discussion of the companies that are subject to Rule 14a–11, *see* Section II.B.3. above. As discussed in that section, foreign private issuers and companies that are subject to the Federal proxy rules solely because they have a class of debt securities registered under Exchange Act Section 12 will not be subject to Rule 14a–11. For smaller reporting companies, Rule 14a–11 will become effective three years after the date that the rule becomes effective for all other companies.

[887] As previously discussed, a shareholder proposal seeking to establish such a procedure will continue to be subject to exclusion under other provisions of Rule 14a–8.

[888] As discussed in Section II.C. above, a provision in a company's governing documents establishing a procedure for the inclusion of shareholder director nominees in a company's proxy materials will not affect the operation of Rule 14a–11, regardless of whether the company's shareholders have approved the provision.

[889] For further discussion of the comments regarding the uniform applicability of Rule 14a–11 and the amendment to Rule 14a–8(i)(8), *see* Sections II.B.2. and II.C. above.

divided on the extent to which companies and shareholders should be permitted to use Rule 14a–8 to propose alternative requirements for shareholder director nominations and on the related issue of whether shareholders and companies should be able to opt out of Rule 14a–11 entirely. Some commenters believed that the amendment to Rule 14a–8(i)(8) should facilitate private ordering under State law by enabling shareholders to include in the company's proxy materials a Rule 14a–8 proposal that would impose more restrictive eligibility criteria than those of Rule 14a–11.[890] A number of commenters also believed that shareholders should be able to elect to have their companies opt out of Rule 14a–11, including through the submission of a Rule 14a–8 proposal.[891] To facilitate private ordering, a significant number of commenters supported the adoption of the amendment to Rule 14a–8(i)(8) while opposing adoption of Rule 14a–11.[892]

By contrast, other commenters supported an amendment enabling shareholders to include in a company's proxy materials a Rule 14a–8 proposal that establishes a shareholder director nomination procedure but only if the procedure would provide shareholders with a greater ability to include their director nominees in the company's proxy materials.[893] A number of commenters also opposed any provision that would permit companies to opt out of Rule 14a–11 [894] and preferred the uniform applicability of Rule 14a–11 to all companies.[895]

We considered these comments carefully. As discussed above, and noted in the Proposal, the purpose of the rules is to facilitate shareholders' traditional State law rights to nominate and elect their own director candidates. As such, we believe that a uniform application of Rule 14a–11 to companies subject to the Federal proxy rules is the best way to enable shareholders of these companies to do so without having to incur the types of costs and other disadvantages that shareholders traditionally have encountered. A single, uniform rule will provide shareholders of any company subject to the rule with the ability to meaningfully exercise their traditional State law rights to present their own director candidates for a vote at a shareholder meeting may be invoked through the proxy process. With the adoption of the amendment to Rule 14a–8(i)(8), shareholders will be able to establish procedures that can further facilitate this ability, if they wish.

By contrast, we believe that exclusive reliance on private ordering under State law would not be as effective and efficient in facilitating the exercise of these rights. Commenters identified procedural and legal difficulties that they believe would hinder the establishment of a shareholder director nomination procedure under private ordering, including: A supermajority voting standard for approval of the proposal; [896] the constraints imposed by the 500-word limit for a Rule 14a–8 proposal; [897] the significant percentage of companies that restrict shareholders' ability to amend or propose bylaws; [898] and the potential ability of a board to repeal or amend a shareholder-adopted bylaw procedure.[899] Some commenters also expressed a general concern that under private ordering, the provisions in a company's governing documents regarding shareholder director nominations may be so restrictive that it would be impossible for shareholders to have candidates included in company proxy materials.[900] Other commenters, however, disagreed that these difficulties would actually interfere with the establishment of a procedure under a private ordering approach.[901]

As previously discussed, we believe that our rules should provide shareholders with the ability to include director nominees in a company's proxy materials without the need for shareholders to bear the burdens of overcoming substantial obstacles to creating that ability on a company-by-company basis.[902] Private ordering based on an opt-in approach would require shareholders to incur significant costs, regardless of the presence of the difficulties described above. Shareholders would need to expend both time and funds to draft and submit a proposal, such as a Rule 14a–8 proposal, establishing a shareholder director nomination procedure on a company-by-company basis.[903] These costs may be higher if the company opposes and solicits against adoption of the proposal—a possibility that is very likely at companies where disagreements between incumbent directors and a nominating shareholder or group already exist.[904] Further, shareholders may be disinclined to undergo a two-step process to submit their own nominees—first, to establish a nomination procedure through a Rule 14a–8 shareholder proposal and, second, to submit their director candidates for inclusion in the company's proxy materials—given the

[890] *See* letters from American Express; BorgWarner; Brink's; BRT; CIGNA; P. Clapman; Con Edison; CSX; Davis Polk; DTE Energy; DuPont; GE; General Mills; C. Holliday; JPMorgan Chase; Metlife; P&G; Pfizer; Safeway; Seven Law Firms; Society of Corporate Secretaries; Southern Company; Tenet; U.S. Bancorp; Verizon.

[891] *See* letters from DTE Energy; JPMorgan Chase; P&G; Seven Law Firms; Society of Corporate Secretaries; U.S. Bancorp.

[892] *See, e.g.,* letters from ABA; BRT; Society of Corporate Secretaries.

[893] *See* letters from CII; Governance for Owners; D. Nappier.

[894] *See* letters from AFL–CIO; Amalgamated Bank; W. Baker; Florida State Board of Administration; IAM; Marco Consulting; P. Neuhauser; Nine Law Firms; Norges Bank; Relational; Shamrock; TIAA–CREF; USPE; ValueAct Capital.

[895] *See* letters from AFSCME; CalPERS; CalSTRS; CII; COPERA; Florida State Board of Administration; John C. Liu ("J. Liu"); D. Nappier; Nathan Cummings Foundation; Phil Nicholas ("P. Nicholas"); OPERS; State Universities Retirement System of Illinois ("SURSI"); SWIB; WSIB.

[896] *See* B. Young, footnote 52, above ("Data on bylaw amendment limitations show that at between 38 and 43% of companies, depending on the index, shareholders are either unable to amend the bylaws or face significant challenges in the form of supermajority vote requirements."); *see also* letters from AFSCME; Bebchuk/Hirst; Florida State Board of Administration; J. Liu.

[897] *See* letters from Bebchuk/Hirst; CII; Florida State Board of Administration.

[898] *See* letters from AFSCME; Florida State Board of Administration; Nathan Cummings Foundation; SWIB.

[899] *See* letters from AFSCME; Corporate Library; Sodali. *See also* Michael E. Murphy, *The Nominating Process for Corporate Boards of Directors: A Decision-Making Analysis,* 5 Berkeley Bus. L.J. 131, 144 (2008) (discussing how a company's management defeated a shareholder proposal regarding shareholder director nominations through the use of a bylaw requiring a super-majority shareholder vote in favor of such a shareholder proposal and noting that "[t]he super-majority requirement was one of several potential defenses that management might have employed; it might also have imposed inconvenient notice requirements, stringent shareholder qualification rules, or restrictions mirroring the conditions of SEC rule 14a–8. If these barriers proved insufficient, management might have considered counter-initiatives; it is an open question in Delaware and certain other states whether the board of directors has the power to repeal a shareholder-initiated bylaw by adopting a superseding bylaw amendment.")

[900] *See* letters from Florida State Board of Administration; P. Neuhauser; Shamrock.

[901] *See* letters from AT&T; ABA; BRT; J. Grundfest; Keller Group; Lemonjuice.biz ("Lemonjuice"); Seven Law Firms.

[902] *See* Section II.B.2. above, for additional discussion of our consideration of a private ordering approach.

[903] *See* letters from CalPERS; Florida State Board of Administration; D. Nappier; P. Neuhauser. One of these commenters estimated that the approximate cost for shareholders of "running a proposal" is $30,000. *See* letter from CalPERS. The commenter estimated that it would cost $351,000,000 to attempt to establish the right of shareholders of Russell 3000 companies to include their director nominees in a company's proxy materials.

[904] The reluctance of companies to support the establishment of a shareholder director nomination procedure was noted in an article submitted by a commenter. *See* letter from Bebchuk/Hirst (referring to Bebchuk and Hirst (2010)). In their article, the authors observed that while the establishment of such a procedure is permissible under the existing laws of some states, including Delaware, only three companies have in fact established a shareholder director nomination procedure.

length of time that they will have to hold the requisite amount of securities and, perhaps more importantly, the risk of failure at each step of the process.

Different but equally significant issues would arise under an opt-out approach. Shareholders who wish to retain their ability to include their director nominees in the company's proxy materials pursuant to Rule 14a–11 may find it difficult to successfully oppose an opt-out proposal due to management's ability to draw on the company's resources to promote the adoption of the proposal.[905] We also believe that if we were to allow an opt-out approach, even one in which only shareholders could approve an opt out, there is a high likelihood that the effort to procure such approval could be supported by management and funded by company assets, while opposing views could not be advanced effectively. Shareholders of these companies would find themselves, once again, left without an effective or efficient ability to nominate and elect their own director candidates. Further, as some commenters observed, both the opt-in and opt-out approaches may impose unnecessary complexity and administrative burdens for shareholders with diversified holdings in numerous companies and may hinder their exercise of a traditional State law right.[906]

3. Potential Improved Board Performance and Company Performance

As discussed throughout this release, we are adopting the new rules with the goal of facilitating shareholders' ability under State law to nominate and elect directors for election to the board. Because State law provides shareholders with the right to nominate and elect directors to ensure that boards remain accountable to shareholders and to mitigate the agency problems associated with the separation of ownership from control, facilitating shareholders' exercise of these rights may have the potential of improviing board accountability and efficiency and increasing shareholder value. In the Proposing Release, we requested comment on the assertion that the Proposal could improve board performance and, hence, company performance—both for boards that include shareholder-nominated directors elected pursuant to the new rules and for boards that may be more attentive and responsive to shareholder concerns to avoid the submission of shareholder director nominations pursuant to the new rules.[907]

We received significant comment regarding this assertion. Many commenters agreed that the new rules may result in the benefit of more accountable, more responsive, and generally better-performing boards.[908] Other commenters, however, questioned whether the new rules would in fact promote board accountability,[909] warned of the costs of distracting and expensive election contests,[910] and disputed the conclusions of a study regarding the benefits enjoyed by companies with "hybrid boards" that was cited in the Proposing Release.[911] Commenters also challenged the basis for any suggestions in the Proposing Release that the recent economic crisis was somehow linked to the inability of shareholders to include their director nominees in the company's proxy materials, pointing out that we have contemplated similar regulatory efforts several times before the recent crisis occurred.[912]

[905] In this regard, we note that a survey that one commenter conducted showed that, if available, a large majority of its member companies—approximately two-thirds—would seek to implement an opt-out from Rule 14a–11. *See* letter from Society of Corporate Secretaries. This survey suggests that shareholders of many companies may, once again, be limited in their ability to have their director candidates included in the companies' proxy materials.

[906] *See* letters from CFA Institute; CII; COPERA; D. Nappier; OPERS. One commenter countered that most long-term institutional shareholders are unlikely to submit director candidates at a large number of companies simultaneously and predicted that private ordering will lead to "some degree of standardization" in the types of shareholder director nomination procedures. *See* letter from Society of Corporate Secretaries. While we appreciate these points, we believe that adoption of Rule 14a–11, in fact, provides such "standardization." The amendment to Rule 14a–8(i)(8) complements Rule 14a–11 by enabling shareholders to consider and vote on proposals that provide shareholders with an even greater ability to present their own director candidates for a shareholder vote. Lastly, we recognize that the amendment to Rule 14a–8(i)(8) could result in some complexity as well, in that shareholders could establish director nomination procedures that require, for example, a different ownership threshold or holding period than those contained in Rule 14a–11. We believe, however, that such complexity is justified because it furthers our goal of facilitating, as much as possible, the effective exercise of shareholders' traditional State law right of shareholders to nominate their own director candidates for a vote at a shareholder meeting.

[907] *See* Proposing Release, Section V.B.3.

[908] *See* letters from AFSCME; Bebchuk, *et al.;* Brigham; CalPERS; CII; L. Dallas; T. DiNapoli; A. Dral; GovernanceMetrics; Governance for Owners; Hermes; M. Katz; LUCRF; J. McRitchie; R. Moulton-Ely; D. Nappier; P. Neuhauser; NJSIC; OPERS; Pax World; Pershing Square; Relational; RiskMetrics; D. Romine; Shareowners.org; Social Investment Forum; Teamsters; TIAA–CREF; Universities Superannuation; USPE; Walden. One commenter added that the benefits of the right to include shareholder director nominees in the company's proxy materials, including enhanced shareholder value from hybrid boards and directors becoming "more alert to their duties," are "less easy to quantify." *See* letter from P. Neuhauser.

[909] *See, e.g.,* letters from Alaska Air; Ameriprise; Brink's; Comcast; CSX; General Mills; Piedmont; Praxair; William H. Steinbrink ("W. Steinbrink"); Time Warner Cable; United Brotherhood of Carpenters.

[910] *See* letters from ABA; Atlas; AT&T; Book Celler; Carlson; Carolina Mills; Chamber of Commerce/CCMC; Chevron; Crespin; M. Eng; Erickson; ExxonMobil; Fenwick; GE; General Mills; Glass Lewis; Glaspell; Intelect; R. Clark King; Koppers; MCO; MeadWestvaco; MedFaxx; Medical Insurance; Merchants Terminal; D. Merilatt; NAM; NIRI; NK; O3 Strategies; Roppe; Rosen; Safeway; Sara Lee; Schneider; Southland; Style Crest; Tenet; TI; tw telecom; R. VanEngelenhoven; Wachtell; Wells Fargo; Weyerhaeuser; Yahoo.

[911] *See, e.g.,* letters from IBM; Simpson Thacher. These commenters questioned the conclusions of the study by Chris Cernich, *et al.,* "Effectiveness of Hybrid Boards," IRRC Institute for Corporate Responsibility (May 2009) ("Cernich (2009)"), *available at http://www.irrcinstitute.org/pdf/IRRC_05_09_EffectiveHybridBoards.pdf* (cited in the Proposing Release, Section V.B.3.). For example, one of these commenters stated that the study "demonstrates that the objectives of successful dissidents were often short-term in nature" and "suggests that companies with dissidents on their board perform better than their peers over a one-year period, but that they perform worse over a three-year period." *See* letter from Simpson Thacher. The other commenter stated that "the only conclusion that could fairly be drawn from the data is that some companies perform better, and many perform worse, under such circumstances" and "of the companies with dissident directors studied for three years after the contest period, share performance averaged just 0.7%, which is 6.6% less than peer companies."

We recognize the limitations of the Cernich (2009) study as well. While it provides useful documentation of patterns of behavior of activist investors, its long-term findings on shareholder value creation are difficult to interpret. Return estimates are presented without standard errors. For long-term returns in particular, this shortcoming makes it difficult to infer whether results arise because returns are different than peers in expectation, or because of random chance. Other studies cited in this release do use standard statistical inference techniques to approach similar questions. *See, e.g.,* J. Harold Mulherin and Annette B. Poulsen, *Proxy Contests and Corporate Change: Implications For Shareholder Wealth,* J. Fin. Econ. (March 1998) ("Mulherin and Poulsen (1998)") (cited in the NERA Report submitted as part of the letter from BRT).

[912] *See* letters from 3M; ACE; Ameriprise; American Bankers Association; BRT; Devon; Dewey; GE; A. Goolsby; C. Holliday; Honeywell; IBM; Jones Day; Norfolk Southern; Pfizer; Sidley Austin; Simpson Thacher; TI; tw telecom; Unitrin; Wachtell. *See also* letters from BRT (submitting the study by Andrea Beltratti and René M. Stulz, *Why Did Some Banks Perform Better During the Credit Crisis? A Cross-Country Study of the Impact of Governance and Regulation* (July 2009) ("Beltratti and Stulz (2009)"), in which the authors found "no consistent evidence that better governance led to better performance during the crisis" but found "strong evidence that banks with more shareholder-friendly boards performed worse."); Chamber of Commerce/CCMC (submitting an article by Brian R. Cheffins, *Did Corporate Governance "Fail" During the 2008 Stock Market Meltdown? The Case of the S&P 500* ("Cheffins (2010)"), which stated that because "corporate governance functioned tolerably well in companies removed from the S&P 500 and that a combination of regulation and market forces will likely prompt financial firms to scale back the free-wheeling business activities that arguably helped to precipitate the stock market meltdown, the case is not yet made for fundamental reform of current corporate governance arrangements.").

The comments reflect the sharp divide on the question of whether facilitating shareholders' ability to exercise their rights to nominate and elect directors would lead to the benefit of improved board and company performance. We have considered these comments carefully and appreciate both the fact that the empirical evidence may appear mixed and the potential for negative effects due to management distraction and discord on the board that some commenters identified. After assessing the costs and benefits identified by commenters, and for reasons discussed below, we believe that the totality of the evidence and economic theory supports the view that facilitating shareholders' ability to include their director nominees in a company's proxy materials has the potential of creating the benefit of improved board performance and enhanced shareholder value—both in companies with the actual election of shareholder-nominated directors and in companies that react to shareholders' concerns because of the possibility of such directors being elected. Thus, as discussed below, it is our conclusion that the potential benefits of improved board and company performance and shareholder value justify the potential costs.

By facilitating shareholders' exercise of their traditional State law rights to nominate and elect directors, we believe that eligible shareholders may prefer to use the new rules over a costly traditional proxy contest, making election contests a more plausible avenue for shareholders to participate in the governance of their company. This may have two beneficial effects on the governance of a company. First, the board and management of a company may be increasingly responsive to shareholders' concerns, even when contested elections do not occur, because of shareholders' ability to present their director nominees more easily. Second, new shareholder-nominated directors may be more inclined to exercise judgment independent of the company's incumbent directors and management.

The new rules will remove or reduce some of the current disincentives to shareholders' exercise of their traditional State law rights to nominate director candidates. Once the rules become effective, boards' responsiveness to concerns expressed by shareholders may increase because shareholders could more easily nominate their own directors to run against incumbent directors.[913] In response to the Proposal, commenters submitted studies regarding the effects of reducing incumbent directors' insulation from removal, which showed measures that make incumbent directors more vulnerable to replacement by shareholder action have salutary deterrent effects against board complacency and improve corporate governance and shareholder value.[914] Further, by creating a new threat of removal, the new rules could lead to greater accountability on the part of incumbent directors to the extent they see a close link between their performance and the prospect of removal.[915] In response to the Proposal, one commenter also submitted studies that showed that anti-takeover provisions protecting incumbent management are associated with economically significant reductions in firm valuation, returns and performance, and share prices increase when activists prompt elimination of provisions such as staggered boards.[916] Conversely, the creation of a staggered board structure was found to be associated with a reduction in firm value.[917] Because our new rules may make director elections more competitive by facilitating shareholders' ability to nominate and elect their own director candidates and, hence, also make some incumbent directors less secure in their positions, we believe that the rules may have analogous salutary effects.

As we noted in the Proposing Release, the presence of directors nominated by shareholders may have an effect on company performance and shareholder value.[918] We also noted in the Proposing

[913] The Supreme Court's recent opinion in *Citizens United v. FEC,* 130 S.Ct. 876 (2010) underscores the importance of board responsiveness to shareholder concerns. In *Citizens United,* the government asserted an interest in limiting independent expenditures by corporations in political campaigns in order to prevent dissenting shareholders from being compelled to fund corporate political speech with which they disagreed. *Citizens United,* 130 S.Ct. at 911. The Court, however, stated that any such coercion could be addressed "through the procedures of corporate democracy." *Id., quotation omitted.*

[914] *See* letter from L. Bebchuk (noting the article by Lucian A. Bebchuk and Alma Cohen, *The Costs of Entrenched Boards,* J. Fin. Econ. (November 2005) ("Bebchuk and Cohen (2005)"), in which the authors stated: "Staggered boards are associated with an economically meaningful reduction in firm value * * * [w]e also provide suggestive evidence that staggered boards bring about, and not merely reflect, an economically significant reduction in firm value * * * [f]inally, the correlation with reduced firm value is stronger for staggered boards that are established in the corporate charter (which shareholders cannot amend) than for staggered boards established in the company's bylaws (which shareholders can amend).").

Commenters also submitted empirical studies indicating that facilitating shareholders' rights and voice may result in better company performance. *See* letters from L. Bebchuk; CalSTRS; Nathan Cummings Foundation (noting the study by Paul Gompers, Joy Ishii and Andrew Metrick, *Corporate Governance and Equity Prices,* 118 Q.J. Econ. 107 (2003), in which the authors found that "firms with stronger shareholder rights had higher firm value, higher profits, higher sales growth, lower capital expenditures, and made fewer corporate acquisitions."); letters from CalSTRS; Nathan Cummings Foundation (noting the study by B. Lawrence Brown and Marcus Caylor, *The Correlation Between Corporate Governance and Company Performance,* Research Commissioned Institutional Shareholder Services (2004), in which the authors found that "firms with weaker governance perform more poorly, are less profitable, more risky, and have lower dividends than firms with better governance."). *See also* letter from T. Yang (noting the study by Bonnie Buchanan, Jeffry M. Netter, and Tina Yang, *Proxy Rules and Proxy Practice: An Empirical Study of US and UK Shareholder Proposals* (September 2009) ("Buchanan, Netter, and Yang (2009)"), in which the authors found that "after receiving a shareholder proposal, [U.S.] firms exhibit higher stock returns and the improvement is greater [ ] when the proposal is likely to be wealth maximizing or sponsored by a shareholder owning a relatively large equity stake in the target firm.").

[915] As we noted in the Proposing Release, economists have put forth theory and evidence on the link between incentives that are associated with accountability and performance. *See, e.g.,* Benjamin E. Hermalin and Michael S. Weisbach, *Endogenously Chosen Board of Directors and Their Monitoring of the Board,* 88 Am. Econ. Rev. 96 (1998) (cited in the Proposing Release, Section V.B.3); Milton Harris and Artur Raviv, *Control of Corporate Decisions: Shareholders vs. Management* (May 29, 2008), *available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=965559* (cited in the Proposing Release, Section V.B.3.).

[916] *See* Bebchuk and Hirst (2010) (noting the "substantial empirical evidence indicating that director insulation from removal is associated with lower firm value and worse performance."). *See also* letter from L. Bebchuk (noting the following articles: Lucian A. Bebchuk, Alma Cohen and Allen Ferrell, *What Matters in Corporate Governance?,* 22 Rev. Fin. Studs. 783 (2009) ("Bebchuk, Cohen, and Ferrell (2009)") ("We put forward an entrenchment index based on six provisions: staggered boards, limits to shareholder bylaw amendments, poison pills, golden parachutes, and supermajority requirements for mergers and charter amendments * * * [w]e find that increases in the index level are monotonically associated with economically significant reductions in firm valuation as well as large negative abnormal returns during the 1990–2003 period."); Re-Jin Guo, Timothy A. Kruse and Tom Nohel, *Undoing the Powerful Anti-Takeover Force of Staggered Boards,* J. Corp. Fin. (June 2008) ("Guo, Kruse and Nohel (2008)") ("We find that de-staggering the board creates wealth and that shareholder activism is an important catalyst for pushing through this change."); Olubunmi Faleye, *Classified Boards, Firm Value, and Managerial Entrenchment,* J. Fin. Econ. (February 2007) ("Faleye (2007)") (noting that "classified boards significantly insulate management from market discipline, thus suggesting that the observed reduction in value is due to managerial entrenchment and diminished board accountability.")).

[917] *See* Bebchuk and Hirst (2010); Bebchuk and Cohen (2005).

[918] *See* Proposing Release, Section V.B.3. (citing Cernich (2009)). Moreover, as we noted in the same section of the Proposing Release, empirical evidence has indicated that the ability of significant shareholders to hold corporate managers

Continued

Release that academic literature indicates the benefit to shareholders of having an independent, active and committed board of directors.[919] Directors are charged under State law to act as disinterested fiduciaries on behalf of all shareholders, but it has been recognized that the difficult agency problem created by the separation in public companies of ownership from control creates conflicts not completely addressed by State law. We received comment expressing concern regarding the close relationships between directors and a company's management and the degree to which the nomination process is dominated by management.[920] Directors nominated by shareholders pursuant to the new rules will owe their presence on the board to their nomination by one or more significant shareholders and therefore may be independent in a way that is fundamentally different from directors nominated by the incumbent directors. We found to be relevant the empirical evidence cited in our Proposing Release and by commenters regarding the effect on shareholder value of so-called "hybrid boards" (*i.e.,* boards composed of a majority of incumbent directors and a minority of dissident directors).[921] Such boards are a close, but not perfect, analog to the results from an election in which shareholder nominees submitted pursuant to the new rules are elected and typically result when the shareholder's nominees join the board through an actual or threatened proxy contest, but without a change of control. In the study cited in the Proposing Release, ongoing businesses with a minority of dissident directors posted increases in shareholder value of 9.1%, relative to peers, during the contest period, indicating that the market viewed the contest as having a positive effect on shareholder value.[922] Other commenters adduce evidence that boards with a minority of dissident directors produce positive changes in corporate governance structures and strategy and result in increased shareholder value measured in both absolute returns and relative to peers.[923] Amending our proxy rules to facilitate the operation of State laws permitting shareholder nominations of directors may allow shareholders to elect directors who, without obtaining control, can exercise similar influence over decisions critical to shareholder value.

We recognize the existence of studies that reached conclusions contrary to those discussed above.[924] Other commenters warn that the new rules will lead to election contests that will be distracting, time-consuming, and inefficient for companies, boards, and management.[925]

We have reviewed these studies and have reason to question some of their conclusions either because of questions raised by subsequent studies,[926]

accountable for activity that does not benefit investors may reduce agency costs and increase shareholder value. *See, e.g.,* Brad M. Barber, "Monitoring the Monitor: Evaluating CalPERS' Activism" (November 2006), *available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=890321* (cited in the Proposing Release, Section V.B.3.). See also Deutsche Bank, Global Equity Research, "Beyond the Numbers: Corporate Governance in Europe," (March 5, 2005) (cited in the Proposing Release, Section V.B.3).

[919] *See* Proposing Release, Section V.B.3. (citing Fitch Ratings, "Evaluating Corporate Governance" (December 12, 2007), *available at http://www.fitchratings.com/corporate/reports/report_frame.cfm?rpt_id=363502*).

[920] *See, e.g.,* letters from CII (noting that "some boards are dominated by the chief executive officer, who often plays the key role in selecting and nominating directors" and quoting a view expressed by a prominent investor that "[t]hese people [chief executive officers] aren't looking for Dobermans. * * * They're looking for cocker spaniels."); J. McRitchie ("It is well known that until recently the vast majority of board vacancies were filled via recommendations from CEOs who also are typically chairmen of the boards * * * Recent requirements for an 'independent' nominating committee provide little assurance against continued management domination. These 'independent' board members serve at the pleasure of the CEOs and the other board members; they have no independent base of power.").

[921] Cernich (2009). *See also* letters from D. Romine; GovernanceMetrics; P. Neuhauser; Social Investment Forum; TIAA–CREF; Universities Superannuation.

As we previously noted, the Cernich (2009) study cites long-term return results, relative to peers, which are positive over the subsequent year but negative over the subsequent three years. However, these results are not reported with standard errors, making it difficult to determine whether the expected returns following contests are different from peers, or whether the realized long-term returns during the sample period are merely the result of random chance. Other research, such as Mulherin and Poulsen (1998), is consistent with these findings, but investigates the impact of proxy contests generally, rather than hybrid boards.

[922] Cernich (2009).

[923] *See* letters from D. Romine; GovernanceMetrics; P. Neuhauser; Social Investment Forum; TIAA–CREF; Universities Superannuation. *See also* Mulherin and Poulsen (1998); James F. Cotter, Anil Shivdasani, and Marc Zenner, *Do Independent Directors Enhance Target Shareholder Wealth During Tender Offers?,* J. Fin. Econ. (February 1997) (finding, after examining a sample of 169 tender offers conducted from 1989 through 1992, that target shareholder gains from tender offers were approximately 20% greater when the board was independent).

[924] *See* letter from BRT (referring to the "Report on Effects of Proposed SEC Rule 14a–11 on Efficiency, Competitiveness and Capital Formation, in Support of Comments by Business Roundtable" by NERA Economic Consulting ("NERA Report")); David Ikenberry and Joself Lakonishok, *Corporate Governance Through the Proxy Contest: Evidence and Implications,* 66 J. Bus. 420 (1993) ("Ikenberry and Lakonishok (1993)) (claiming that "companies with dissident board members substantially underperform compared to their peers.") (cited in the NERA Report); Lisa Borstadt and Thomas Zwirlein, *The Efficient Monitoring Role of Proxy Contests: An Empirical Analysis of Post-Contest Control Changes and Firm Performance,* Fin. Mgm't (1992) ("Borstadt and Zwirlein (1992)") (asserting that, in the long run, proxy contests destroy shareholder value) (cited in NERA Report); Beltratti and Stulz (2009) (submitted as part of the letter from BRT and cited in letters from AT&T, BRT, and Seven Law Firms); Cheffins (2010) (examining thirty-seven companies removed from the S&P 500 index during 2008 and concluding that corporate governance functioned "tolerably well" in these companies to negate the need for fundamental reform of the current corporate governance arrangements) (submitted as part of the letter from Chamber of Commerce/CCMC); Ali C. Akyol, Wei Fen Lim and Patrick Verwijmeren, *Shareholders in the Boardroom: Wealth Effects of the SEC's Rule to Facilitate Director Nominations* (December 14, 2009) ("Akyol, Lim, and Verwijmeren (2009)") (documenting negative stock price reactions to the announcements of regulatory activities related to shareholders' right to include director nominees in the company's proxy materials, including the Proposal) (submitted as part of the letter from J. Grundfest); David F. Larcker, Gaizka Ormazabal and Daniel J. Taylor, *The Regulation of Corporate Governance* (January 16, 2010)) ("Larcker, Ormazabal, and Taylor (2010)") (submitted as part of the letter from David F. Larcker ("D. Larcker")).

[925] *See* letters from ABA; Atlas; AT&T; Book Celler; Carlson; Carolina Mills; Chamber of Commerce/CCMC; Chevron; Crespin; M. Eng; Erickson; ExxonMobil; Fenwick; GE; General Mills; Glass Lewis; Glaspell; Intelect; R. Clark King; Koppers; MCO; MeadWestvaco; MedFaxx; Medical Insurance; Merchants Terminal; D. Merilatt; NAM; NIRI; NK; O3 Strategies; Roppe; Rosen; Safeway; Sara Lee; Schneider; Southland; Style Crest; Tenet; TI; tw telecom; R. VanEngelenhoven; Wachtell; Wells Fargo; Weyerhaeuser; Yahoo.

[926] For example, we note that a study highlighted a methodological flaw in the Ikenberry and Lakonishok (1993) study. Mulherin and Poulsen (1998) noted that this study had required that companies exist as the same entity in the COMPUSTAT database subsequent to the contest, eliminating some of the most favorable outcomes of proxy contests from consideration and biasing the estimate of long-term returns downward. After making corrections for this statistical bias and examining a sample of 270 proxy contests for board seats conducted from 1979 to 1994, the authors found that the market had a favorable response to the initiation of the proxy contest with an average abnormal return of 8.04% in the initiation period, followed by long-run returns statistically indistinguishable from those of comparable stocks. Their analysis showed that the wealth gains during proxy contests stemmed mainly from firms that were acquired. Overall, the authors concluded that proxy contests generally create value, and for companies that were not acquired, "the occurrence of management turnover [had] a significant, positive effect on shareholder wealth relative to the firms that do not replace senior management." In the Borstadt and Zwirlein (1992) study, the finding of a negative risk-adjusted return, conditional on dissidents winning, was based on a sample of 32 firms. Borstadt and Zwirlein note that, overall, "dissident activity leads to gains for shareholders and is often followed by corporate reforms * * * such that the realized gains over the contest period appear to be permanent." A survey article on corporate governance confirmed that this is the current academic consensus, stating that "[t]he latest evidence suggests that proxy fights provide a degree of managerial disciplining and enhance shareholder value." *See* Marco Becht, Patrick Bolton and Ailsa Roell, *Corporate Governance and Control,* Handbook of the Economics of Finance (2003) ("Becht, Bolton and Roell (2003)").

limitations acknowledged by the studies' authors,[927] or our own concerns about the studies' methodology or scope.[928] While we recognize that there are strongly-held views on every side of this debate, we believe that, as discussed throughout this release and supported by commenters' views and empirical data, we have a reasonable basis for expecting the benefits described above.

We are aware, of course, that the new rules are additive to many existing means of monitoring and "disciplining" a company's board and management,[929] which include: Hostile takeovers; stockholders "voting with their feet" by selling their shares; board members being replaced by other means when the company's stock performance is poor; and management turnover following poor performance or wrongdoing.[930]

We acknowledge these alternatives, but believe that, for the reasons noted above, directors nominated pursuant to the new rules will have a degree of independence that is not present in the existing means of "disciplining" a company's board and management. Moreover, the ability of shareholders to "vote with their feet" or submit to a takeover bid may be unattractive from a shareholder's perspective if those transactions occur after a period of weak management that has depressed the company's share price. Further, shareholders who invest in indices may not be readily able to sell securities of a particular company that is part of the index, making it difficult for them to "vote with their feet." The high costs involved with other existing mechanisms for "management discipline," such as a traditional proxy contest, often mean that the prospect of replacing incumbent directors is remote unless the company's performance falls below a very low threshold. By that time, a significant amount of shareholder value will have, by hypothesis, already been lost and will require additional time to recoup. We believe that the new rules will help shareholders exert "management discipline" by reducing the cost of, and otherwise making more plausible, shareholder nominations.

We also acknowledge concerns expressed by commenters that the Proposal would encourage boards to make decisions to improve results in the short-term at the expense of long-term shareholder value creation.[931] For the reasons described above, we believe the new rules have the potential to lead to improved company performance and enhanced shareholder value for both short-term and long-term shareholders. Evidence suggests that, historically, proxy contests have created value in both the short-run and long-run for shareholders.[932] The possible inclusion and potential election of shareholder director nominees in company proxy materials would not negate the board's fiduciary obligations, which are to all shareholders. Finally, shareholder director nominees are subject to election by both long-term and short-term shareholders, who will express their interest through their vote. In sum, we do not expect that the prospect that such holders would nominate directors should lead boards to take short-term actions that would detract from long-term value in order to avoid nominations.

A number of commenters expressed special concerns with respect to the Proposal's effect on investment companies, asserting that the election of a shareholder director nominee may, in some circumstances, increase costs and potentially decrease the effectiveness and efficiency of a unitary or cluster board utilized by a fund complex.[933] Some of these commenters noted their belief that investment company governance presents a special case, arguing that the rules should not be extended to them absent empirical evidence specifically related to boards in this industry.[934] Commenters also argued that investment companies are subject to a unique regulatory regime under the Investment Company Act that provides additional protection to investors, such as the requirement to obtain shareholder approval to engage in certain transactions or activities, and that investment companies and their boards have very different functions from non-investment companies and their boards.[935] We understand these concerns, but we also note that some commenters have raised governance concerns regarding the relationship between boards and investment advisers.[936] Moreover, although investment companies and their boards may have different functions from non-investment companies and their boards, investment company boards, like the boards of other companies, have significant responsibilities in protecting shareholder interests, such as the approval of advisory contracts and fees.[937] We also do not believe that the regulatory protections offered by the Investment Company Act (including requirements to obtain shareholder approval to engage in certain transactions and activities) serve to decrease the importance of the rights that are granted to shareholders under State law. In fact, the separate regulatory regime to which investment companies are subject emphasizes the importance of investment company directors in dealing with the conflicts of interest created by the external management

[927] For example, we believe that attempts to draw sharp inferences from the Beltratti and Stulz (2009) study may not be warranted because, as the authors themselves noted, the evidence leaves much to interpretation. The authors concluded that negative conclusions about board effectiveness may be unwarranted because it is unfair to evaluate ex-ante decisions using hind-sight. In particular, they explained that:

Such a result does not mean that good governance is bad. Rather it is consistent with the view that banks that were pushed by their boards to maximize shareholder wealth before the crisis took risks that were understood to create shareholder wealth, but were costly ex post because of outcomes that were not expected when the risks were taken.

Beltratti and Stulz (2009) at 3.

[928] For example, the relatively short timeframe and small number of companies examined in Cheffins (2010) study alone justify some caution in attempting to draw any sharp inferences from the study. As for the Akyol, Lim, and Verwijmeren (2009) and Larcker, Ormazabal, and Taylor (2010) studies, we note that, even if facilitating shareholders' ability to include their nominees in a company's proxy materials enhances shareholder value, it may be possible to observe negative stock price reactions for a particular set of public announcement dates. The problem lies in ascertaining the first time investors learned about the regulatory efforts to facilitate this shareholder right. On that initial date, investors may have adjusted share prices for both the capitalized value of the benefits (or costs) associated with the regulatory effort and the probability of the effort's success. Subsequent public announcements may simply cause investors to update these initial assessments of the valuation impact and the probability of success. Consequently, it is difficult to infer whether the price reactions are independent of past announcements or simply a revision of the investors' prior expectations. It is important, therefore, to disentangle investor expectations about the probability of the success of the regulatory effort from the associated valuation implications. It appears that the Akyol, Lim, and Verwijmeren (2009) and Larcker, Ormazabal, and Taylor (2010) studies did not focus on this distinction.

[929] *See* NERA Report.

[930] *Id.*

[931] *See, e.g.,* letters from BRT; GE; General Mills; IBM; Metlife; Office Depot; Safeway; Wachtell.

[932] *See* Mulherin and Poulsen (1998) and discussion in footnote 926 above.

[933] *See, e.g.,* letters from ABA; ICI; ICI/IDC; IDC; MFDF; S&C; T. Rowe Price; Vanguard.

[934] *See* letters from ICI; ICI/IDC; S&C; T. Rowe Price.

[935] *See* letters from ABA; Barclays; ICI; ICI/IDC; IDC; T. Rowe Price; S&C; Vanguard.

[936] *See* letters from J. Reid; J. Taub.

[937] *See Jones v. Harris Assocs.,* 130 S.Ct. 1418, 1423, 176 L. Ed. 2d 265, 273–274 (2010). *See also* S. Rep. No. 91–184; 91st Congress 1st Session; S. 2224 (1969) ("This section is not intended to authorize a court to substitute its business judgment for that of the mutual fund's board of directors in the area of management fees. * * * The directors of a mutual fund, like directors of any other corporation will continue to have * * * overall fiduciary duties as directors for the supervision of all of the affairs of the fund.").

structure of most investment companies.[938]

Lastly, improved board performance may result from the possible increase in the pool of qualified director candidates. When a company does not include shareholder nominees for director in its proxy materials, it loses the opportunity to increase the pool of qualified nominees. Further, it deprives shareholders of the opportunity to consider and assess all qualified candidates if asked to make an informed voting decision in director elections. As we stated in the Proposing Release, facilitating shareholders' ability to include director nominations in a company's proxy materials may result in a larger pool of qualified director nominees from which to choose.[939] By allowing shareholders to submit their own director nominees for inclusion in the company's proxy materials, the demand for qualified individuals who may be willing to serve as shareholder-nominated directors also may increase. This increased demand may, in turn, encourage more individuals to present themselves as potential shareholder director nominees, resulting in a large pool of potential candidates. We recognize, however, this benefit may be offset by the possibility that some qualified individuals may be less willing to be nominated to serve on a board if faced with a contested election.[940]

4. More Informed Voting Decisions in Director Elections Due to Improved Disclosure of Shareholder Director Nominations and Enhanced Shareholder Communications

There was widespread support among commenters for the principle that the Commission should require disclosures regarding nominating shareholders and their nominees.[941] The new requirements in Rule 14a–11, Rule 14n–1, and Schedule 14N will require certain disclosures and certifications to be provided on Schedule 14N by shareholders who submit a nominee under Rule 14a–11. A nominating shareholder or group will be required to provide disclosure of the information similar to that currently required in a proxy contest regarding the nominating shareholder and nominee[942] as well as certain certifications required for use of Rule 14a–11.[943] Rule 14a–18, Rule 14n–1 and Schedule 14N will require similar disclosures when a shareholder or group uses an applicable state or foreign law provision or company's governing documents to include shareholder nominees for director in the company's proxy materials. The information provided by the disclosures and certifications will help provide transparency to shareholders when voting on shareholder nominees for director and therefore may lead to better informed voting decisions.

With respect to Rule 14a–8(i)(8), companies previously have been permitted to exclude shareholder proposals to establish procedures for including shareholder director nominees in the company's proxy materials. This exclusion arose out of the concern that allowing such proposals would result in the occurrence of contested elections without the disclosure that otherwise would be required in a traditional proxy contest.[944] The new disclosure requirements applicable to nominations made pursuant to state or foreign law or a company's governing documents address that concern by mandating disclosure that is similar to that required in a traditional proxy contest.[945]

In addition to improved disclosure, our new rules will enhance shareholders' ability to communicate with each other regarding director nominations and elections through the proxy process. Shareholders eligible to use Rule 14a–11 will be able to utilize the company's proxy materials to present their own director nominees for a vote by other shareholders. They will be able to include in the company's proxy materials a statement supporting their director nominees.[946] Shareholders who are dissatisfied with the company's existing board or the company's director nominees will be able to communicate this view and their preference for alternative candidates through the votes they cast under the proxy process.

The new solicitation exemptions also will facilitate communications between shareholders.[947] Shareholders interested in forming a nominating group to use Rule 14a–11 can contact other shareholders—through both oral and written communications—for that purpose without fear that their communications would be viewed as solicitations under the proxy rules, as long as the exemption's conditions are satisfied.[948] If its director nominees are included in the company's proxy materials pursuant to Rule 14a–11, the nominating shareholder or group can solicit other shareholders to vote in favor of its nominees, or against the company's own nominees, as long as the exemption's conditions are satisfied.[949]

With the new amendment to Rule 14a–8(i)(8), shareholders will benefit from a greater ability to present a proposal to establish an alternative procedure under a company's governing documents for the inclusion of one or more shareholder director nominees in the company's proxy materials. Thus, shareholders will be able to present for consideration by other shareholders a director nomination procedure that they believe is appropriate for their company. Through their votes on the proposal, shareholders will then have an opportunity to communicate their views on this proposal to other shareholders and the company's management.

E. Costs

We anticipate that the new rules, where applicable, may result in costs related to (1) potential adverse effects on company and board performance; (2) additional complexity in the proxy process; and (3) preparing the required disclosures, printing and mailing, and costs of additional solicitations.

[938] *See* footnote 142 above.

[939] *See* Proposing Release, Section V.B.3.

[940] For a more detailed discussion, *see* Section IV.E.1. below.

[941] *See* letters from ABA; Alston & Bird; Americans for Financial Reform; CalSTRS; CFA Institute; CII; Corporate Library; Dominican Sisters of Hope; Florida State Board of Administration; GovernanceMetrics; ICI; Mercy Investment Program; Protective; RiskMetrics; Sisters of Mercy; Tri-State Coalition; Ursuline Sisters of Tildonk; USPE; Walden.

[942] Among the information included in Schedule 14N is the disclosure required by Items 4(b), 5(b), 7 and, for investment companies, Item 22(b) of Schedule 14A. This disclosure is the same disclosure required for a solicitation subject to Exchange Act Rule 14a–12(c).

[943] Item 8 of Schedule 14N. These certifications include: A certification that the nominating shareholder (or where there is a nominating shareholder group, each member of the nominating shareholder group) is not holding any of the company's securities with the purpose, or with the effect, of changing control of the company or to gain a number of seats on the board that exceeds the maximum number of nominees that the company could be required to include under Rule 14a–11; a certification that the nominating shareholder or group satisfies the applicable eligibility requirements of Rule 14a–11; a certification that the shareholder director nominee satisfies the applicable eligibility requirements of Rule 14a–11; and a certification that the information set forth in the notice on Schedule 14N is true, complete, and correct.

[944] *See* Shareholder Proposal Proposing Release (proposing amendments to Rule 14a–8 to "make clear that director nominations made pursuant to [bylaw amendments concerning shareholder nominations of directors] would be subject to the disclosure requirements currently applicable to proxy contests" and noting that such disclosure is of "great importance" to an informed voting decision by shareholders).

[945] *See* Rule 14a–18, Rule 14n–1, and Schedule 14N.

[946] *See* Item 7(e) of Schedule 14A and Item 5(i) of Schedule 14N.

[947] *See* Rules 14a–2(b)(7) and 14a–2(b)(8).

[948] *See* Rule 14a–2(b)(7).

[949] *See* Rule 14a–2(b)(8).

1. Costs Related to Potential Adverse Effects on Company and Board Performance

Rule 14a–11 and the amendment to Rule 14a–8(i)(8) may result in potential adverse effects on the performance of a company and its board of directors.

First, we received significant comment stating that election contests are distracting and time-consuming for companies, boards, and management.[950] Further, to the extent that a more competitive nomination and election process motivates incumbent directors to be more responsive to shareholders' concerns, the board may incur costs in attempting to institute policies and procedures it believes will address shareholder concerns. It is possible that the time a board spends on shareholder relations could reduce the time that it otherwise would spend on strategic and long-term thinking and overseeing management, which, in turn, may negatively affect shareholder value.[951]

We considered these comments and appreciate commenters' concerns regarding these costs. We believe it is important to note that these costs are associated with the traditional State law right to nominate and elect directors, and are not costs incurred for including shareholder nominees for director in the company's proxy materials. Further, the ownership threshold and holding period that we adopted in response to commenters' concerns should limit the use of Rule 14a–11 to only holders who demonstrate a long-term, significant commitment to the company. To encourage constructive dialogue between a company and a nominating shareholder or group regarding the director nominees to be presented to shareholders for a vote, we revised the rule so that if a company negotiates with the nominating shareholder or group that otherwise would be eligible to have its nominees included in the company's proxy materials after the nominating shareholder or group has submitted its nomination on Schedule 14N, and the company agrees to include the nominating shareholder's or group's nominees on the company's proxy card as company nominees, those nominees will count toward the 25% maximum set forth in the rule.[952] We believe that the cost described above may be offset by other factors as well. The additional communication between a board and the company's shareholders may lead to enhanced transparency into the board's decision-making process, more effective monitoring of this process by shareholders, and, ultimately, a better decision-making process by the board. The cost also may be offset to the extent that shareholders understand that the board's time and other resources are in scarce supply and will take these considerations into account in deciding to nominate directors, recognizing that the cost of a distracted board may not justify pursuing their own specific concerns.

Second, the new rules may lead some companies to re-examine their current procedures for shareholders to submit their own director nominees for consideration by either the company's board or nominating committee, especially if the company is subject to, or thinks it likely will be subject to, shareholder-nominated director candidates submitted pursuant to Rule 14a–11. These companies may incur costs associated with such a re-examination and any resulting adjustments to their procedures.[953] These costs may be limited, however, to the extent that the new rules improve the overall efficiency of the director nomination process and lead to improvements in the existing procedures for director nominations.

Third, the new rules could, in some cases, result in lower quality boards.[954] The quality of a company's board may decrease if, as some commenters predicted, unqualified individuals are elected to the board.[955] Commenters worried, in particular, that a shareholder director nominee will be elected without undergoing the same extensive vetting process or having to comply with the same independence or director qualification standards applicable to other director nominees.[956] The presence of directors who lack the proper qualifications may result in a lower quality board and represent a cost to companies and shareholders. It is important to recognize that Rule 14a–11 provides for only the inclusion of a shareholder director nominee in the company's proxy materials, not the election of that nominee. Further, the new disclosure requirements contained in the Proposal will provide shareholders with information for them to assess whether a shareholder nominee possesses the necessary qualifications and experience to serve as a director.[957] Accordingly, as other commenters have noted, an unqualified individual, even if nominated, will still need to receive the support of a significant number of shareholders in order to be elected to the board.[958] Therefore, the cost arising

[950] *See* letters from ABA; Atlas; AT&T; Book Celler; BRT; Carlson; Carolina Mills; Chamber of Commerce/CCMC; Chevron; Crespin; M. Eng; Erickson; ExxonMobil; Fenwick; GE; General Mills; Glass Lewis; Glaspell; Intelect; R. Clark King; Koppers; MCO; MeadWestvaco; MedFaxx; Medical Insurance; Merchants Terminal; D. Merilatt; NAM; NIRI; NK; O3 Strategies; Roppe; Rosen; Safeway; Sara Lee; Schneider; Southland; Style Crest; Tenet; TI; tw telecom; R. VanEngelenhoven; Wachtell; Wells Fargo; Weyerhaeuser; Yahoo.

[951] *See, e.g.,* Akyol, Lim, and Verwijmeren (2009) (finding that, based on the market response of a sample of 1,315 firms, "the proposed rule is perceived as costly by shareholders," "that increasing shareholder rights, specifically by facilitating director nominations by shareholders, may actually be detrimental to shareholder wealth," and that "empowering shareholders is not necessarily perceived as a good thing by most shareholders."); Stout (2007) ("Perhaps the most obvious [economic function of board governance] is promoting more efficient and informed business decisionmaking. It is difficult and expensive to arrange for thousands of dispersed shareholders to express their often-differing views on the best way to run the firm."); *see generally* Stephen M. Bainbridge, *Response to Increasing Shareholder Power: Director Primacy and Shareholder Disempowerment,* 119 Harv. L. Rev. 1735 (2006) (discussing how concern for accountability may undermine decision-making discretion and authority) (cited in the Proposing Release, Section V.C.1.). *But see* Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power,* 118 Harv. L. Rev. 833, 883 (2005) ("[M]ere recognition that back-seat driving might sometimes be counter-productive is hardly sufficient to mandate general deference to management. Such mandated deference would follow only if one assumes that shareholders are so irrational or undisciplined that they cannot be trusted to decide for themselves whether deference would best serve their interests.") (cited in the Proposing Release, Section V.C.1.).

[952] *See* new Rule 14a–11(d) (5). For a discussion of this modification, *see* Section II.B.6.c. above.

[953] *See, e.g.,* letters from Biogen; GE.

[954] *See* letters from 3M; ABA; American Electric Power; Atlantic Bingo; AT&T; Avis Budget; Biogen; Boeing; BRT; Burlington Northern; Callaway; Carlson; Chamber of Commerce/CCMC; CIGNA; Columbine; Cummins; CSX; J. Dillon; Emerson Electric; Erickson; ExxonMobil; FedEx; Headwaters; C. Holliday; IBM; Intelect; R. Clark King; Lange; Louisiana Agencies; Metlife; NIRI; O3 Strategies; V. Pelson; PepsiCo; Pfizer; Roppe; Rosen; Ryder; Sara Lee; Sidley Austin; tw telecom; Wachtell; Wells Fargo; Weyerhaeuser; Yahoo. *See also* Stephen M. Bainbridge, *A Comment on the SEC Shareholder Access Proposal* (November 14, 2003) at 17, *available at http://ssrn.com/abstract=470121* ("The likely effects of electing a shareholder representative therefore will not be better governance. It will be an increase in affectional conflict . * * * It will be a reduction in the trust-based relationships that causes horizontal monitoring within the board to provide effective constraints on agency costs.") (cited in the Proposing Release, Section V.C.1.).

[955] *See* letters from AGL; Air Tite, Inc. ("Air Tite"); All Cast; John C. Astle ("J. Astle"); Astrum Solar ("Astrum"); Atlantic Bingo; Burlington Northern; Glen Burton ("G. Burton"); R. Chicko; Columbine; Darden Restaurants; Erickson; Fluharty; Horizon; Lange; Mama's; Massey Services; NIRI; O3 Strategies; P&G; PepsiCo; W. Steinbrink; Stringer; Theragenics; VCG; Wachtell; and Wells Fargo.

[956] *See* letters from AGL; Astrum; Boeing; R. Burt; G. Burton; S. Campbell; Carolina Mills; Columbine; W. Cornwell; Erickson; Fenwick; FPL Group; Intelect; Little; McDonald's; MedFaxx; Norfolk Southern; P&G, Rosen; UnitedHealth; VCG; Wells Fargo; Xerox; Yahoo.

[957] *See* Rules 14a–11, 14a–18 and 14n–1, and Schedule 14N.

[958] *See* letters from BCI; Bebchuk, *et al.;* CII; T. DiNapoli; Florida State Board of Administration;

Continued

from unqualified directors may be limited to the extent that shareholders understand that experience and competence are important director qualifications and cast their votes for the most-qualified candidates. Moreover, as adopted, the rule will require a company to include in its proxy materials no more than one shareholder director nominee or a number of nominees that represent 25% of the company's board, whichever is greater.[959] We believe that this provision will limit the effect of any potential decrease in the overall quality of a board. Lastly, to the extent that there is a risk of unqualified individuals being elected as directors, it is a risk that arises because shareholders are given the right under state or foreign law to determine who sits on the board of directors.

The quality of a board also may decrease if, as some commenters warned, the increased likelihood of a contested election discourages experienced and capable individuals from serving on boards, making it more difficult for companies to recruit qualified directors or create a board with the proper mix of experience, skills, and characteristics.[960] Some commenters noted that it is already difficult to recruit qualified independent directors.[961] Other commenters, however, did not believe that Rule 14a–11 will discourage experienced, capable directors from serving,[962] with one commenter stating that it encountered no difficulty in finding executives willing to serve on a shareholder-nominated slate.[963] To the extent that the prospect of a contested election deters an otherwise qualified individual from considering a board seat, this will represent a cost to both the company and its shareholders. This cost may be mitigated, however, by the ability of other individuals—those who would not have been considered or nominated by the incumbent directors—to be nominated and presented for a shareholder vote pursuant to Rule 14a–11 or a procedure in the company's governing documents established through Rule 14a–8. The cost may be further mitigated to the extent that the new rules lead to the election of individuals who will present a greater diversity of views for the board's consideration, thereby leading to a better decision-making process, and, ultimately, greater shareholder value.[964] Lastly, as we stated in the Proposing Release,[965] the possibility of qualified candidates being discouraged from running for a board seat may be limited by shareholders' understanding that board dynamics can be important, and that changing them may not always be beneficial.

Fourth, potential disruptions in boardroom deliberations represent another possible cost to shareholders and companies. If a shareholder director nominee is elected and disruptions or polarization in boardroom dynamics occur as a result, the disruptions may delay or impair the board's decision-making process. Such boardroom disruption may occur when one or more directors seek to promote an agenda that conflicts with that of the rest of the board. We received significant comment that the presence of shareholder-nominated directors could disrupt the collegiality and efficiency of boards.[966] We recognize the view that for companies whose boards are already well-functioning, such disruption could be counterproductive and could delay the board's decision-making process and a delay or impairment in the decision-making process could constitute an indirect economic cost to shareholder value. For the reasons discussed above, however, we believe that boards with directors who were not nominated by the incumbent directors would, on balance, improve company performance and increase shareholder value.[967]

In addition, it may be possible for an investor to submit director nominees through the new rules with the intention of having the nominees, if elected, advocate for board decisions that maximize the investor's private gains but at the expense of other shareholders.[968] In the case of Rule 14a–11, the cost may be limited to the extent that the ownership threshold and holding requirement allow the use of the rule by only holders who demonstrated a significant, long-term commitment to the company. This cost may be limited to the extent that a director nominee with narrow interests must still gain the support of a significant number of shareholders to be elected.[969] The disclosure requirements that we are adopting also may alert shareholders to the narrow interests of the nominating shareholder or group in advance of the election so that they can cast their votes in favor of the candidate who will best serve the interests of all shareholders.[970] The cost may be further limited to the extent that a shareholder director nominee, once elected to the board, will be subject to the same fiduciary duties applicable to all other directors.[971] The possibility of a director seeking to promote private gain at the expense of shareholders generally—and the related costs to the board's overall performance and dynamics—should be limited to the extent that such a director recognizes these duties and strives to fulfill these legal obligations. The cost also may be limited to the extent that shareholders recognize the potential

Governance for Owners; A. Krakovsky; P. Neuhauser; NJSIC; Relational; Shamrock; Social Investment Forum.

[959] *See* Rule 14a–11(d)(1).

[960] *See* letters from 3M; ABA; American Electric Power; Atlantic Bingo; AT&T; Avis Budget; Biogen; Boeing; BRT; Burlington Northern; Callaway; Carlson; Chamber of Commerce/CCMC; CIGNA; Columbine; Cummins; CSX; J. Dillon; Emerson Electric; Erickson; ExxonMobil; FedEx; Headwaters; C. Holliday; IBM; Intelect; R. Clark King; Lange; Louisiana Agencies; Metlife; NIRI; O3 Strategies; V. Pelson; PepsiCo; Pfizer; Roppe; Rosen; Ryder; Sara Lee; Sidley Austin; tw telecom; Wachtell; Wells Fargo; Weyerhaeuser; Yahoo.

[961] *See, e.g.,* letters from Ameriprise; BRT; Chamber of Commerce/CCMC.

[962] *See* letters from Florida State Board of Administration; Pershing Square.

[963] *See* letter from Pershing Square.

[964] *See* letters from L. Dallas (citing Jerry Goodstein *et al., The Effects of Board Size and Diversity on Strategic Change,* 15 Strategic Mgmt. J. 241 (1994) and Lynne L. Dallas, *The New Managerialism and Diversity on Corporate Boards of Directors,* 76 Tulane L. Rev. 1363 (2002)); LIUNA; RiskMetrics (noting that it tracked over a four-year period the returns of a portfolio of companies where activists gained board seats in 2005, found that the portfolio outperformed the S&P 500 index even during the recent market turmoil, and saw no indication that the presence of dissident directors on boards had a detrimental impact on shareholder value); Teamsters.

[965] *See* Proposing Release, Section V.C.1.

[966] *See, e.g.,* letters from Association of Corporate Counsel; BRT; Chamber of Commerce/CCMC; GE; IBM; McDonald's; O'Melveny & Myers; P&G; PepsiCo; Seven Law Firms; Society of Corporate Secretaries (also presenting data that the average hedge fund ownership is 7.15%, the number of S&P 500 companies with hedge fund ownership at or above 5% is 273, and the number of S&P 500 companies with hedge fund ownership at or above 10% is 104); Vinson & Elkins; Wachtell; Xerox; Yahoo. *See also* Larcker, Ormazabal, and Taylor (2010)(stating that "the evidence suggests shareholders react negatively to regulation of proxy access, and that the reaction is decreasing in the number of large blockholders and increasing in the number of small institutional investors," and that "the market perceives that shareholders of firms with many large blockholders are harmed by proxy access and is consistent with critics' claims that large blockholders will use the privileges afforded them by proxy access regulation to manipulate the governance process to make themselves better off at the expense of other shareholders.").

[967] *See* Section IV.D.3. above.

[968] *See, e.g.,* letters from BRT; Eaton; IBM; McDonald's; Seven Law Firms; Society of Corporate Secretaries; UnitedHealth. *See also* Stout (2007) at 794 ("[B]y making it easier for large shareholders in public firms to threaten directors, a more effective shareholder franchise might increase the risk of intershareholder 'rent-seeking' in public companies.").

[969] *See* letters from BCIA; Bebchuk, *et al.;* CII; T. DiNapoli; Florida State Board of Administration; Governance for Owners; A. Krakovsky; P. Neuhauser; NJSIC; Relational; Shamrock; Social Investment Forum.

[970] *See* Rule 14a–11, Rule 14a–18, Rule 14n–1, and Schedule 14N.

[971] *See* letter from CII. *See also* Veasey & DiGuglielmo, above.

harm from misuse of the board's decision-making process and therefore do not vote for the nominee if they view the cost as sufficiently high.

Fifth, to the extent that the need to comply with the new rules makes the U.S. public equity markets less attractive,[972] discourages private companies from conducting public offerings in the U.S.,[973] or encourages U.S. reporting companies to become non-reporting companies, this would be a cost of the new rules because investors' investment opportunities could be limited. This cost may be mitigated to the extent that the new rules help improve board accountability and corporate governance, generate stronger company performance, and increase shareholder value. Investors may be more willing to invest or continue to invest in companies in which they have the ability to present their own shareholder director nominees in the company's proxy materials if they are displeased with the company's performance. We also note that shareholders in many foreign countries already have the ability to include their director nominees in the company's proxy materials.[974] We therefore believe that the new rules may bring the U.S. capital markets closer in line with international practice by giving shareholders of U.S. companies an ability that may already be enjoyed by shareholders of many non-U.S. companies.

Lastly, with respect to investment companies, a number of commenters expressed concern that the election of a shareholder director nominee may, in some circumstances, increase costs and burdens (*e.g.,* the shareholder-nominated director would have to leave during discussions that pertain to the other investment companies in the complex, board materials would have to be customized for the director, and the fund complex would face challenges in preserving the status of privileged information) and potentially decrease the efficiency of a unitary or cluster board utilized by a fund complex.[975] We recognize that for fund complexes that utilize unitary or cluster boards, the election of a shareholder director nominee may, in some circumstances, increase costs and potentially decrease the efficiency of the boards.[976] We note, however, that these costs are associated with the traditional State law right to nominate and elect directors, and are not costs incurred for including shareholder nominees in the company's proxy materials. We also note that any increased costs and decreased efficiency of an investment company's board as a result of the fund complex no longer having a unitary or cluster board would occur, if at all, only in the event that the investment company shareholders elect the shareholder nominee. Investment companies may include information in the proxy materials making investors aware of the company's views on the perceived benefits of a unitary or cluster board and the potential for increased costs and decreased efficiency if the shareholder nominees are elected. Moreover, we note that a fund complex can take steps to minimize the cost and burden of a shareholder-nominated director who is elected by, for example, entering into a confidentiality agreement in order to preserve the status of confidential information regarding the fund complex.

Two commenters in a joint comment letter argued that there are a number of practical and legal issues that prevent confidentiality agreements from being sufficient to protect the interests of fund shareholders, and included a memorandum from a law firm discussing concerns about Regulation FD, enforceability of confidentiality agreements, whether shareholder-nominated directors would sign confidentiality agreements, compliance, and loss of attorney-client privilege.[977] We considered the issues raised by the joint comment letter. To the extent that material non-public information is discussed by boards in a fund complex, we emphasize that entering into a confidentiality agreement is only one method of preserving the confidentiality of information revealed in board meetings attended by the shareholder-nominated director. The fund complex can have separate meetings and board materials for the board with the shareholder-nominated director, especially if particularly sensitive legal or other matters will be discussed or to protect attorney-client privilege. Finally, we believe the concerns expressed in the memorandum about confidentiality agreements were either not compelling or speculative in nature.

Although commenters argued that the election of a shareholder-nominated director to a unitary or cluster board will necessarily result in decreased effectiveness of the board, we disagree. In this regard, one commenter argued that competition in the board nomination process may improve efficiency by providing additional leverage for boards in negotiations with the investment adviser.[978] In any event, we believe that investment company shareholders should have the opportunity to exercise their traditional State law rights to elect a non-unitary or non-cluster board if they so choose.

2. Costs Related to Additional Complexity of Proxy Process

The new rules that we are adopting will, for the first time, require that company proxy materials include information about, and the ability to vote for, director nominees submitted by shareholders. The rules will facilitate shareholders' ability to exercise their traditional State law rights to nominate and elect their own director candidates. One of the costs of this newly-enhanced ability, however, is the additional complexity in the proxy process as both companies and shareholders may have to consider and address the issue of shareholder director nominations more frequently than in the past.

Several commenters expressed concern that the inability of companies and shareholders to opt out of Rule 14a–11, or establish a shareholder director nomination procedure with criteria different than those of Rule 14a–11, may create workability and implementation issues for companies, as they struggle to comply with a rule that does not fit their specific capital and governance structures.[979] One commenter, for example, identified several of these issues, such as: the operation of the rule in a company with multiple classes of stock, a cumulative voting standard, or a majority voting standard; the treatment of derivatives and other synthetic ownership under the rule; the need for adequate protection against use of the rule for change of control attempts; and the consequences of false

[972] *See* letter from BRT.

[973] *See* letters from Altman (stating that its survey of 36 public companies showed that 80.85% of respondents believe the new rules "will deter some U.S. private companies from going public and some foreign companies from listing on U.S. exchanges."); BRT; Richard Tullo ("R. Tullo").

[974] *See* letters from ACSI; CalPERS; ICGN; LUCRF; Pax World; RiskMetrics; Social Investment Forum; SWIB.

[975] *See, e.g.,* letters from ABA; ICI; ICI/IDC; IDC; MFDF; S&C; T. Rowe Price; Vanguard.

[976] *See, e.g.,* letters from ICI; ICI/IDC; IDC; MFDF; Vanguard.

[977] *See* letter from ICI/IDC (including attached legal memorandum).

[978] *See* letter from J. Taub.

[979] *See, e.g.,* letters from ABA ("Workability requires that the rule or bylaw be easily understandable, be able to be readily administered, address all relevant issues, operate in a time frame that permits proper conduct of shareholder meetings and action by a fully informed shareholder body, recognize the role and fiduciary responsibility of the board of directors, comply with the requirements of the Commission's rules and other applicable law and allow the company and its shareholders sufficient flexibility to respond to changed circumstances in a timely manner."); Keller Group; Wachtell.

certifications by a nominating shareholder or group.[980] We recognize the possibility that attempting to comply with a highly-complex rule without the necessary flexibility to adapt the rule to a company's specific situation may create certain costs for companies, such as the cost of legal advice and possible litigation if uncertainties must be resolved in courts. We also recognize the possibility that shareholders may have to incur similar costs if they attempt to use a highly-complex and unclear rule.

The requirements of Rule 14a–11, such as the eligibility criteria, may add a certain degree of complexity in the proxy process. For example, the process of determining which shareholder director nominee will be in the company's proxy materials and the limitations on the number of shareholder nominees for director that a company is required to include in its proxy materials may add complexity. If several shareholders or groups desire (and qualify) to nominate the maximum number of directors they are allowed to place in the company's proxy materials, only the shareholder or group holding the largest qualifying ownership interest will succeed. Another potential source of complexity under Rule 14a–11 is the number of shareholder director nominees that a nominating shareholder or group may submit to a company during a particular proxy season. For example, if the maximum allowable number of shareholder director nominees currently serves on the board, a company will not be required to include additional shareholder director nominees in the company's proxy materials. These sources of complexity and any uncertainty that may arise in implementing the new rules could result in costs to companies, shareholders seeking to have their nominees included in the companies' proxy materials, and shareholder director nominees. For example, both companies and shareholders could incur costs to seek legal advice in connection with shareholder nominations submitted pursuant to Rule 14a–11, the inclusion of shareholder director nominees in a company's proxy materials, submission of a notice of intent to exclude a nominee or nominees, and the process set forth in the rule for seeking an informal statement of the staff's views with respect to the company's determination to exclude a shareholder director nominee. Companies and shareholders also could incur costs to seek legal advice in connection with shareholder proposals submitted pursuant to Rule 14a–8 and the process for submission of a no-action request to exclude the proposal. To the extent disputes on whether to include particular nominees or proposals are not resolved between the company and shareholders, companies and/or shareholders may seek recourse in courts, which will increase costs.

As discussed throughout the release, the rules we are adopting include modifications to the proposed rules. We believe that the modifications will help minimize the complexity of the new rules and clarify uncertainties as much as possible. For example, our decision to adopt a uniform ownership threshold instead of the proposed tiered approach simplifies this particular eligibility requirement and should reduce some of the uncertainties identified by a commenter.[981] We also clarified the availability of Rule 14a–11 when there is a concurrent proxy contest,[982] provided standards for the order of priority of shareholder director nominees upon the withdrawal or disqualification of another shareholder director nominee,[983] addressed issues regarding the application of Rule 14a–11 to certain corporate structures (such as staggered boards and different classes of voting securities),[984] and adopted a uniform deadline for the submission of shareholder director nominations pursuant to Rule 14a–11 that is generally applicable to companies subject to the rule.[985] The costs arising from any complexity or uncertainty arising from the new rules may be mitigated to the extent that companies and shareholders gain greater familiarity with the new rules over time,[986] additional guidance is provided by the Commission or its staff,[987] and, if necessary, uncertain legal issues are resolved by courts.

Lastly, as discussed above, we believe the overall proxy solicitation process for contested director elections may be less confusing for shareholders as a result of our new rules.[988] Presenting the competing director nominees on one proxy card, with the related disclosure contained in one proxy statement, may simplify the shareholder's decision-making process, reduce the potential for any confusion on the part of shareholders, and address any reluctance on the part of shareholders to consider an insurgent shareholder's nominee solely because the nominee was not presented in the company's proxy materials.

3. Costs Related To Preparing Disclosure, Printing and Mailing and Costs of Additional Solicitations and Shareholder Proposals

The new rules will impose additional direct costs on companies and shareholders related to the preparation of required disclosure, printing and mailing costs, and costs of additional solicitations that may be undertaken as a result of including one or more shareholder nominees for director in the company's proxy materials pursuant to Rule 14a–11, a company's governing documents, or an applicable state or foreign law provision.[989]

First, the new rules will impose direct costs onto companies and shareholders due to the rules' disclosure and procedural requirements. For example, companies that determine that they may exclude a shareholder director nominee pursuant to Rule 14a–11 will be required to provide a notice to the nominating shareholder or group regarding any eligibility or procedural deficiencies in the nomination and provide to the Commission notice of the basis for its determination.[990] Companies also may incur costs in preparing any statements regarding the shareholder director nominees that they wish to include in their proxy materials. Nominating shareholders or groups and the nominees also will be required to disclose information about themselves, which may be costly.[991] Most of this disclosure will be provided by the nominating shareholder or group in the notice to the company, which would be filed on new Schedule 14N. The Schedule 14N also will include

[980] *See* letter from Wachtell.

[981] *See* letter from Shearman & Sterling (opposing the tiered ownership thresholds because a number of companies regularly move from one category of filer to another as the aggregate worldwide market value of their voting and non-voting common equity changes from fiscal year to fiscal year, which it believed would lead to uncertainty).

[982] *See* Section II.B.2.e. above.

[983] *See* Section II.B.7.b. above.

[984] *See* Sections II.B.4.b. and II.B.6.a. above.

[985] *See* Section II.B.8.c.ii. above.

[986] *See* letter from CII.

[987] For example, we are adopting, as proposed, a procedure by which companies could send a notice to the Commission where the company intends not to include a shareholder director nominee in its proxy materials and could seek informal staff views—through a no-action request—with respect to that determination.

[988] *See* Section IV.D.1. above.

[989] We note that these increased costs may be less for companies using the notice and access model. *See* Internet Proxy Availability Release.

[990] For purposes of the PRA analysis, we estimate these disclosure requirements would result in 225 burden hours of company time, and $30,000 for the services of outside professionals.

[991] For purposes of the PRA analysis, we estimate the total burden for Schedule 14N for shareholders submitting nominees pursuant to Rule 14a–11 would result in a total of 7,870 hours of shareholder time and $1,049,300 for the services of outside professionals.

information regarding the length of ownership, certifications, and other information. Companies could incur additional costs to investigate or verify the information regarding shareholder director nominees provided by nominating shareholders or groups, determine whether nominations will conflict with any laws, and analyze the relative merits of the shareholder director nominees and the companies' own director nominees.[992] For purposes of the PRA analysis, we estimate that the disclosure burden of Rule 14a–11 on reporting companies (other than registered investment companies) and registered investment companies is 4,113 hours of personnel time and $548,200 for the services of outside professionals. We also estimate for purposes of the PRA analysis that the disclosure burden to shareholders of Schedule 14N will be 7,870 hours of shareholder time and $1,049,300 for the services of outside professionals. We also received estimates from commenters regarding the costs described above.[993] These estimates are described in the PRA analysis above.[994]

Companies also could incur costs due to the potential increase in the number of shareholder proposals submitted to companies as a result of the expansion in the types of proposals permitted under Rule 14a–8. Under the amendment to Rule 14a–8(i)(8), companies will no longer be able to rely on this basis to exclude from their proxy materials shareholder proposals that seek to establish a procedure in the company's governing documents for the inclusion of shareholder nominees for director in the company's proxy materials. This will likely result in increased costs to companies related to reviewing and processing such proposals to determine matters such as shareholder eligibility and whether there is another basis for excluding these proposals under Rule 14a–8. If a company decides to exclude the shareholder proposal, it will have to incur the costs, such as legal fees, needed to prepare and submit a notice to the Commission regarding its basis for excluding the proposal. In this regard, we received several estimates from commenters regarding the costs related to a Rule 14a–8 shareholder proposal. Based on its July 2009 survey of its member companies, one commenter stated that companies spend an estimated 47 hours and associated costs of $47,784 to prepare and submit a notice of intent to exclude a shareholder proposal.[995] An investment company estimated that its costs for including a shareholder proposal in its complex-wide proxy materials exceeded $3 million in "tabulation expenses."[996] One commenter, however, described the costs to companies resulting from the amendment to Rule 14a–8(i)(8) as "negligible" (with such costs confined to any additional costs of printing and distributing the proposal in the company's proxy materials).[997] For purposes of the PRA analysis, we estimate that shareholders will submit a total of 147 proposals regarding procedures for the inclusion of shareholder nominees in company proxy materials per year to reporting companies, including registered investment companies. Assuming that 90% of reporting companies (including registered investment companies), or 132 companies, prepare and submit a notice of intent to exclude these proposals, the resulting costs to companies will result in approximately 11,484 hours and $1,531,200 for the services of outside professionals.[998] These costs could decrease to the extent that the Rule 14a–8 no-action process provides guidance from the staff on which types of proposals are excludable. Further, because a company that receives a shareholder proposal has no obligation to make a submission under Rule 14a–8 unless it intends to exclude the proposal from its proxy materials, these costs also may decrease to the extent that the company does not seek to exclude the proposal. Lastly, the costs may be limited to the extent that shareholders do not submit proposals related to director nomination procedures due to the uniform applicability of Rule 14a–11 to all companies subject to the rule and availability of the rule for eligible shareholders.[999]

Second, the new rules may increase the incremental costs of printing and mailing a company's proxy materials due to the need to include additional names and background information of shareholder director nominees in the proxy materials and the increased weight of these materials. These costs may increase as the number of shareholder director nominees to be included in the company's proxy materials increases. Thus, this may result in a decrease in the costs to shareholders that would have had to conduct traditional proxy contests in the absence of Rule 14a–11, but may increase the costs for companies.[1000]

Companies also will incur additional printing and mailing costs with respect to the inclusion of a shareholder proposal related to changes to a company's governing documents regarding inclusion of shareholder director nominees in the company's proxy materials. We have two sources of information estimating such costs. Based on its July 2009 survey of its member companies, one commenter stated that companies spend an estimated 20 hours and associated costs of $18,982 to print and mail one shareholder proposal.[1001] The responses to a questionnaire that the Commission made available in 1997 relating to 1998 amendments to Rule 14a–8 suggest such costs to the responding companies averaged $50,000.[1002] As noted above,

[992] *See, e.g.,* letter from S&C.

[993] *See* letters from BRT; Society of Corporate Secretaries.

[994] *See* Section III.C. above, for discussion of the estimates included in the letters from BRT and Society of Corporate Secretaries.

[995] *See* letter from BRT.

[996] *See* letter from Vanguard. The commenter did not elaborate on the nature of these "tabulation expenses." It also noted that this figure does not include "incremental printing and mailing costs because the proposal was included in the proxy statement and did not require a separate mailing."

[997] *See* letter from CII.

[998] This estimate is based on the assumption that shareholders of reporting companies (other than registered investment companies) will submit approximately 123 proposals per year regarding procedures for inclusion of shareholder nominees for director in company's proxy materials, and that 90% of companies that receive such a shareholder proposal will seek to exclude the proposal from their proxy materials. Thus, we estimate that companies will seek to exclude 110 such proposals (123 proposals × 90%) per proxy season. We estimate that the annual burden for the company's submission of a notice of its intent to exclude the proposal and its reasons for doing so would average 116 hours per proposal, for a total of 12,760 burden hours (110 proposals × 116 hours/proposal) for reporting companies (other than registered investment companies). This will correspond to 9,570 hours of company time (110 proposals × 116 hours/proposal × 0.75) and $1,276,000 for the services of outside professionals (110 proposals × 116 hours/proposal × 0.25 × $400). For registered investment companies, we estimate for purposes of the PRA that the total burden hours will be 2,552 hours, which corresponds to 1,914 hours of company time and $255,200 for the services of outside professionals. *See* Section III.D.2. above.

[999] As discussed in Section II.B.3. above, Rule 14a–11 will not apply to certain types of companies.

[1000] However, as explained in footnote 875 above, the increased costs for the company may not be as much as would otherwise result if the shareholders engaged in a traditional proxy contest.

[1001] *See* letter from BRT. This cost is in addition to the estimated 47 hours and associated costs of $47,784 that companies spend to prepare and submit a notice of intent to exclude a shareholder proposal.

[1002] In the adopting release for the amendments to Rule 14a–8 in 1998, we noted that responses to a questionnaire we made available in February 1997 suggested the average cost spent on printing costs (plus any directly related costs, such as additional postage and tabulation expenses) to include shareholder proposals in company proxy materials was approximately $50,000. The responses received may have accounted for the printing of more than one proposal.

for purposes of the PRA, we estimate that the amendment to Rule 14a–8(i)(8) could result in the annual submission of 147 shareholder proposals regarding procedures for the inclusion of shareholder director nominees in company proxy materials. Based on this information, for purposes of our analysis, we assume printing and mailing costs of one shareholder proposal in a company's proxy materials could be in the range of approximately $18,000 to $50,000. Assuming each of these proposals were included in company proxy materials, it could result in a total cost of approximately $2,646,000 to $7,350,000 for the affected companies.

Finally, the new rules may lead to an increase in soliciting activities by both companies and shareholders. Companies may increase solicitations to vote for their slate of directors, to vote against shareholder director nominees, or to vote against shareholder proposals. Shareholders may increase solicitations to vote for shareholder proposals, to withhold votes for a company's nominees for director, or to vote for the shareholder director nominees. This increase in soliciting activities by both companies and shareholders will result in an increase in costs as well. These solicitation costs are not, however, required under our rules.

We received a significant amount of comment regarding the extent to which companies will solicit against the election of a shareholder director nominee. One commenter predicted that boards will take "extraordinary efforts" to campaign against the shareholder director nominees, including significant media and public relations efforts, advertising in a number of forums, mass mailings, and other communication efforts, as well as the hiring of outside advisors and the expenditure of significant time and effort by the company's employees.[1003] As examples of these costs, the commenter pointed to the costs of recent proxy contests, which ranged from $14 million to $4 million, as well as the costs of contests at smaller companies, which ranged from $3 million to $800,000. Another commenter conducted a survey of its member companies and indicated that an average total of 302 hours of company personnel and director time will be needed if a company opposes a shareholder director nominee.[1004] One commenter estimated its own annual costs for defending against a shareholder director nominee to be approximately $330,000 and 275 hours of management's time.[1005] Another commenter noted that it had direct costs of approximately $11 million in 2008 and more than $9 million in 2009—in addition to the substantial indirect costs in management time and attention—as a result of the proxy contests that it faced.[1006]

We understand that company boards may be motivated by the issues at stake to expend significant resources to challenge shareholder director nominees, elect their own nominees, or solicit votes against a shareholder proposal. We therefore recognize that, as a practical matter, it can reasonably be expected that the boards of some companies likely would oppose the election of shareholder director nominees. If the incumbent board members incur large expenditures to defeat shareholder director nominees, those expenditures will represent a cost to the company and, indirectly, all shareholders. It is also possible that some shareholders may perceive the use of corporate funds to oppose the election of nominees submitted by shareholders as having a negative effect on the value of their investments.

These costs, however, may be limited by two factors. They may be limited to the extent that the directors' fiduciary duties prevent them from using corporate funds to resist shareholder director nominations for no good-faith corporate purpose.[1007] Some commenters, in fact, characterized the costs incurred by incumbent directors to defeat shareholder director nominees as discretionary because Rule 14a–11 itself does not require such efforts.[1008] Other commenters disagreed with this characterization, asserting that the directors' fiduciary duties may compel them to expend company resources to oppose a shareholder director nominee.[1009] We recognize that, under certain circumstances, company directors likely would oppose a particular shareholder director nominee and expend company resources in that effort, which would increase the costs to the company resulting from Rule 14a–11.[1010] However, the costs for companies may be less to the extent that directors determine not to expend such resources to oppose the election of the shareholder director nominees and simply include the shareholder director nominees and the related disclosure in the company's proxy materials.[1011] The requisite ownership threshold and holding period of Rule 14a–11 may also limit the number of shareholder director nominations that a board may receive, consider, and possibly contest.

4. Other Costs

The new rules may result in additional costs, as described below.

With respect to investment companies, one commenter stated that if a shareholder nomination causes an election to be "contested" under rules of the New York Stock Exchange, brokers would not be able to vote client shares on a discretionary basis, making it difficult and more expensive for investment companies to achieve a quorum for a meeting.[1012] We recognize that it may be more costly for investment companies to achieve a quorum at shareholder meetings if a shareholder director nomination causes an election to be "contested" under the rules of the New York Stock Exchange and brokers cannot vote shares on a discretionary basis. We believe, however, that the costs imposed on investment companies will be limited for three reasons. First, to the extent investment companies do not hold annual meetings as permitted by State law, investment company shareholders will have less opportunity to take advantage of the new rules.[1013] Second, even when investment company shareholders do have the opportunity to take advantage of the new rules, the disproportionately large and generally passive retail shareholder base of investment companies suggests that the new rules will be used less frequently than will be the case with non-

[1003] *See* letter from Chamber of Commerce/CCMC.

[1004] *See* letter from BRT.

[1005] *See* letter from Ryder.

[1006] *See* letter from Biogen.

[1007] *See Hall* v. *Trans-Lux Daylight Picture Screen Corp.,* 171 A. 226, 228 (Del. Ch. 1934) ("where reasonable expenditures are in the interest of an intelligent exercise of judgment on the part of the stockholders upon policies to be pursued, the expenditures are proper; but where the expenditures are solely in the personal interest of the directors to maintain themselves in office, expenditures made in their campaign for proxies are not proper.").

[1008] *See* letters from CalSTRS; CII; Florida State Board of Administration.

[1009] *See* letters from ABA; BRT.

[1010] The Commission is not expressing a view as to the scope of directors' State law fiduciary duties in responding to shareholder director nominations or expressing a view as to what conduct would be consistent with these duties.

[1011] For example, the costs that are incurred only if the incumbent directors choose to challenge or solicit against a shareholder director nominee (*e.g.,* the legal fees arising from the company's efforts to exclude the nominee from its proxy materials) are distinguishable from the costs that must be incurred irrespective of whether the directors oppose the shareholder director nomination (*e.g.,* the increased printing costs caused by the inclusion of the shareholder director nominees and related disclosures in the company's proxy materials).

[1012] *See* letter from S&C. NYSE Rule 452 provides that, with respect to registered investment companies, brokers may not vote uninstructed shares in contested elections.

[1013] *See* letters from ABA; MFDF.

investment companies.[1014] Third, because we have sought to limit the cost and burden on all companies, including investment companies, by limiting Rule 14a–11 to nominations by shareholders who have maintained significant continuous holdings in the company for at least three years, and because, as suggested by one commenter, many funds, such as money market funds, are held by shareholders on a short-term basis,[1015] we believe that the situations where shareholders will meet the eligibility requirements will be limited.

Our decision to adopt, as proposed, the revisions to Rule 14a–6(a)(4) and Note 3 to the rule [1016] means that the inclusion of a shareholder director nominee in the company's proxy materials will not require the company to file preliminary proxy materials, provided that the company was otherwise qualified to file directly in definitive form. Because the proxy materials will not be filed in preliminary form, the Commission staff may not have the opportunity to review these proxy materials before companies make definitive copies available to shareholders. Staff review of preliminary materials can benefit shareholders by helping to assure that companies comply with the Federal proxy rules and provide appropriate disclosure to shareholders. We believe, however, that any cost related to the staff's inability to review preliminary proxy materials is mitigated by the staff's ability to review the disclosure contained in the Schedule 14N as well as in any additional soliciting materials filed by either the company or the nominating shareholder or group. Further, as we recently stated, the staff retains the right to comment on proxy materials filed in definitive form if the staff deems that to be appropriate under the circumstances.[1017]

V. Consideration of Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Section 23(a)(2) of the Exchange Act [1018] requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Section 3(f) of the Exchange Act [1019] and Section 2(c) of the Investment Company Act [1020] require us, when engaging in rulemaking that requires us 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.

We are adopting new rules that will, under certain circumstances, require that company proxy materials include information about, and the ability to vote for, director nominees submitted by shareholders. The rules will facilitate the exercise of shareholders' rights to nominate and elect directors and provide shareholders with information about a nominating shareholder or group and its nominees for director. Rule 14a–11 will provide for the inclusion of shareholder nominees for director in the company's proxy materials under certain circumstances and disclosure regarding the nominating shareholder or group and nominees submitted pursuant to the rule. The amendment to Rule 14a–8(i)(8) will provide an avenue for shareholders to submit proposals that would seek to establish a procedure under a company's governing documents for the inclusion of one or more shareholder director nominees in the company's proxy materials. No longer permitting companies to exclude these types of proposals pursuant to Rule 14a–8(i)(8) should enable shareholders to better reflect their preferences for director nomination procedures that would further facilitate their ability to nominate and elect their own director candidates. In addition, the new rules require disclosure of information regarding nominating shareholders or groups and any nominees submitted pursuant to an applicable state or foreign law provision or a company's governing documents, which provides shareholders a more informed basis for deciding how to vote for nominees for election to the board of directors.

We requested comment on whether the new rules will promote efficiency, competition and capital formation or have an impact or burden on competition. We received a number of comments that addressed this section. The comments we received, and our consideration of those comments, are discussed below.

The analysis below is based on our understanding that while no state currently prohibits shareholders from nominating candidates for the board of directors,[1021] shareholders generally do not have a right under existing State law to require a company to include their director nominees in the company's proxy materials.[1022]

We expect that the new rules will promote efficiency in the capital markets in a number of ways. First, we have already considered extensively the expected costs and benefits of the new rules in the Cost-Benefit Analysis and throughout the release. As we believe the benefits (including the possible benefit of improved board accountability and company performance) justify the costs, we expect the new rules to promote efficiency of the economy on the whole.

We believe the new rules will promote efficiency by reducing several different types of costs that previously discouraged potentially beneficial actions. The new rules will reduce the cost of shareholders' exercise of their rights to nominate and elect directors.[1023] To the extent that facilitating shareholders' ability to nominate and elect directors of their own choosing is expected to produce the economic benefits for investors described elsewhere in this release, the

[1014] *See* letter from J. Taub.

[1015] *See* letter from ABA.

[1016] The revisions make clear that inclusion of a shareholder director nominee would not be deemed a solicitation in opposition for purposes of the exclusion from filing preliminary proxy materials.

[1017] *See Shareholder Approval of Executive Compensation of TARP Recipients,* Exchange Act Release No. 34–61335 (Jan. 12, 2010) (adopting an amendment to Exchange Act Rule 14a–6(a) to add the shareholder advisory vote on executive compensation required for participants in the Troubled Asset Relief Program ("TARP") to the list of items that do not trigger a preliminary filing requirement).

[1018] 15 U.S.C. 78w(a)(2).

[1019] 15 U.S.C. 78c(f).

[1020] 15 U.S.C. 80a–2(c).

[1021] We are not aware of any law in any state or in the District of Columbia that prohibits shareholders from nominating directors. For further discussion, *see* Section II.B.2.a. above.

[1022] One notable exception exists under the North Dakota Publicly Traded Corporations Act, which permits holders of at least five percent of the outstanding shares of a company subject to the statute to submit a notice of intent to nominate directors and requires the company to include each such shareholder nominee in its proxy statement and form of proxy. *See* North Dakota Publicly Traded Corporations Act, N.D. Cent. Code § 10–35–08 (2009).

[1023] Many commenters noted the general ineffectiveness or prohibitive cost of the existing means to effect a change in the membership of a board, such as a traditional proxy contest, Rule 14a–8 shareholder proposals, and communications with a company's nominating committee or board. *See* letters from Americans for Financial Reform; Brigham; CalPERS; CII; Florida State Board of Administration; Ironfire; M. Katz; J. McRitchie; Nathan Cummings Foundation; P. Neuhauser; Pax World; S. Ranzini; Teamsters; TIAA–CREF; USPE. Moreover, only a traditional proxy contest was viewed by some commenters to be a realistic method of effecting change in the board's membership. *See* letters from Americans for Financial Reform; CalPERS; CII; Florida State Board of Administration; M. Katz; J. McRitchie; S. Ranzini; Teamsters. Yet, according to these commenters, the high costs of such a proxy contest hinder shareholders' ability to nominate and elect directors. For further discussion of these costs, *see* Section IV.C.1. above.

new rules will bring about these benefits at a reduced cost and thereby promote efficiency. Some commenters asserted that although the new rules may relieve certain shareholders of costs that they are unwilling to incur to run a traditional short-slate election contest, those costs will simply be shifted onto the company and indirectly borne by all shareholders.[1024] This burden may be justified, however, because these costs may not be as much as would otherwise result if that shareholder engaged in a traditional proxy contest,[1025] resulting in a reduction in the overall cost of changing a limited percentage of a board's membership. The burden may be further justified because the new rules may mitigate any collective action concerns.[1026]

The new rules also will promote efficiency by reducing the cost of administering informed shareholder voting—to the extent that a shareholder director nominee is submitted for inclusion in a company's proxy materials pursuant to Rule 14a–11, a company's governing documents, or a state or foreign law provision—by providing for director nominees to be included on one proxy card with clear disclosure [1027] for shareholders to evaluate when deciding whether and how to grant authority to vote their shares by proxy, as opposed to having to evaluate more than one set of proxy materials sent by a company and an insurgent shareholder.[1028] Presenting the competing director nominees on one proxy card, with the related disclosure contained in one proxy statement, may simplify the shareholder's decision-making process, reduce the potential for any confusion on the part of shareholders, and address any reluctance on the part of shareholders to consider an insurgent shareholder's nominee solely because the nominee was not presented in the company's proxy materials.[1029]

The new rules could promote efficiency by reducing the cost of effective communication between shareholders and directors, potentially resulting in enhanced board responsiveness and accountability as described elsewhere in the release.[1030] Such communications may, in some cases, address the concerns that prompted the shareholders to submit their own director nominations and help avert any distracting election contests.[1031] Enhanced communication with shareholders also may result in better decision-making by the board as shareholders may provide the board with new ideas or information that the board has not considered.

We considered potential negative effects of the new rules on the efficiency of U.S. public companies, as discussed below.

As discussed elsewhere in the release, if the number of election contests increases as a result of the new rules, boards may end up devoting less time to overseeing their companies' business operations. Election contests have been described by many commenters as distracting, time-consuming, and inefficient for companies, boards, and management.[1032] To the extent that a board's attention is drawn away by the demands of election contests or shareholders, the new rules may impair companies' ability to compete efficiently. To limit the use of Rule 14a–11 to only holders who demonstrate a significant, long-term commitment to the company, we adopted a uniform 3% ownership threshold and 3-year holding period. We also continue to believe that this concern may be mitigated to the extent that shareholders, while voicing their concerns and seeking the board's attention, understand the board's time may be in scarce supply and take this factor into consideration when deciding to nominate director candidates.[1033]

The efficiency of U.S. public companies could be negatively affected if shareholders use the new rules to promote their narrow interests at the expense of other shareholders.[1034] If the new rules facilitate the ability of shareholders with narrow interests to place directors on the board, the new rules may impair efficiency by increasing the cost of board deliberations and resulting in companies taking actions that benefit only a few shareholders. This negative effect, however, could be limited to the extent that the disclosure requirements related to Rule 14a–11 alert shareholders to the narrow interests of the nominating shareholder or group in advance of the election so that they can cast their votes in favor of the candidate who will best serve the interests of all shareholders.[1035] Directors with potentially narrow interests also will be subject to the same fiduciary duties as directors nominated by the company.[1036]

[1024] *See* letter from ABA.

[1025] *See* Bainbridge 2003 Letter.

[1026] *See* Section IV.D.1. above.

[1027] It is assumed here that the private cost of making the required disclosure and the cost to the company for including the disclosure in the company's proxy materials is lower than the total information cost for voting shareholders.

[1028] As discussed in footnote 884 above, we do not believe that our recent adoption of rules enhancing proxy solicitation disclosure dispenses with the need for Rule 14a–11 and the amendment to Rule 14a–8(i)(8).

[1029] *See* Section IV.D.1. above.

[1030] *See* letters from AFSCME; Bebchuk, *et al.;* Brigham; CalPERS; CII; L. Dallas; T. DiNapoli; A. Dral; GovernanceMetrics; Governance for Owners; Hermes; M. Katz; LUCRF; J. McRitchie; R. Moulton-Ely; D. Nappier; P. Neuhauser; NJSIC; OPERS; Pax World; Pershing Square; Relational; RiskMetrics; D. Romine; Shareowners.org; Social Investment Forum; Teamsters; TIAA–CREF; Universities Superannuation; USPE; Walden. According to these commenters, the prospect of an election contest may create greater incentives for incumbent directors to communicate with shareholders, address their concerns, and consider shareholders' preferences regarding nominations for director.

[1031] We have changed certain provisions of Rule 14a–11 from their proposed form to further encourage communication between boards and shareholders. *See, e.g.,* Rule 14a–11(d)(5).

[1032] *See, e.g.,* letters from ABA; Atlas; AT&T; Book Celler; Carlson; Carolina Mills; Chamber of Commerce/CCMC; Chevron; Crespin; M. Eng; Erickson; ExxonMobil; Fenwick; GE; General Mills; Glass Lewis; Glaspell; Intelect; R. Clark King; Koppers; MCO; MeadWestvaco; MedFaxx; Medical Insurance; Merchants Terminal; D. Merilatt; NAM; NIRI; NK; O3 Strategies; Roppe; Rosen; Safeway; Sara Lee; Schneider; Southland; Style Crest; Tenet; TI; tw telecom; R. VanEngelenhoven; Wachtell; Wells Fargo; Weyerhaeuser; Yahoo.

[1033] *See* Proposing Release, Section V.C.1.

[1034] *See, e.g.,* letters from 3M; ACE; AGL; Alaska Air; Alcoa; Allstate; American Bankers Association; American Business Conference; American Express; Ameriprise; Artistic Land Designs; Association of Corporate Counsel; J. Astle; Astrum; Atlantic Bingo; Avis Budget; J. Blanchard, Board Institute; Boeing; Boston Scientific; Brink's; BRT; Burlington Northern; Callaway; S. Campbell; Cargill; Carpet and Tile ("Carpet and Tile"); Caterpillar; Chamber of Commerce/CCMC; Kevin F. Clune ("K. Clune"); P. Clapman; Chevron; J. Chico; CIGNA; CNH Global; Columbine; Competitive Enterprise Institute; A. Conte; W. Cornwell; Crown Battery; Cummins; Darden Restaurants; Data Forms, Inc. ("Data Forms"); Deere; T. Dermody; Dewey; A. Dickerson; W. B. Dickerson; J. Dillon; Eaton; Emerson Electric; A. England; Engledow; Mike Emis ("M. Emis"); FedEx; FMC Corp.; FPL Group; Frontier; GE; General Mills; Healthcare Practice; Home Depot; Honeywell; Horizon; Karen L. Hubbard ("K. Hubbard"); IBM; ICI; Instrument Piping Tech; Theodore S. Jablonski ("T. Jablonski"); Keating Muething; Koppers; C. Leadbetter; Leggett; Little; Louisiana Agencies; ITT; Leggett; Brittany D. Lunceford ("B. Lunceford"); Melvin Maltz ("M. Maltz"); Massey Services; J. McCoy; McDonald's; D. McDonald; MCO; McTague; MeadWestvaco; MedFaxx; D. Merilatt; Metlife; M. Metz; J. Miller; E. Mitchell; Moore Brothers; Motorola; MT Glass; NAM; NIRI; Norfolk Southern; O'Melveny & Myers; Office Depot; Omaha Door; P&G; V. Pelson; PepsiCo; Pinch a Penny ("Pinch a Penny"); Protective; Realogy; J. Rosen; RTW; Ryder; S&C; Safeway; Sara Lee; R. Saul; Schneider; Seven Law Firms; Sidley Austin; Southern Company; Southern Services; M. Sposato; Ralph Strangis ("R. Strangis"); Tenet; Tesoro; E. Tremaine; tw telecom; L. Tyson; UnitedHealth; U.S. Bancorp; VCG; Vinson & Elkins; Wachtell; Wagner Industries; Wells Fargo; Weyerhaeuser; Xerox; Yahoo. One commenter added that many recent election contests were directed towards achieving short-term financial objectives, including proposals to sell the company or effect a buyback or special dividend. *See* letter from Simpson Thacher.

[1035] *See* Rule 14a–11, Rule 14a–18, Rule 14n–1, and Schedule 14N.

[1036] Veasey & DiGuglielmo, at 774 ("Directors will generally be responsible for protecting the best interests of the corporation and all its stockholders, despite the directors' designation by some particular constituency, because fiduciary duties

The increased likelihood of a contested election may discourage some qualified candidates from running for a board seat, making it more difficult for companies to recruit qualified directors and negatively affecting the efficiency of U.S. public companies.[1037] Nevertheless, as discussed elsewhere in the release, a countervailing effect that the new rules may have is the impact on the labor market for director candidates and potential increase in the demand for individuals who can serve as shareholder director nominees.[1038]

Finally, compliance with the new rules may impose additional financial costs on companies, such as for legal services, printing and mailing of proxy materials, and additional proxy solicitation efforts.[1039] The workability and implementation issues identified by commenters, in particular, may force companies to incur significant time and funds to resolve.[1040] Increased litigation costs also represent a possible negative effect of the new rules, as companies and nominating shareholders or groups expend resources to resolve legal disputes in Federal and state courts. Incurring such costs could negatively affect the efficiency of the capital markets. As discussed throughout the release, we have modified several aspects of the rules we proposed to clarify any uncertainties identified by commenters and to address workability issues. We also have taken steps to address commenters' concerns regarding a company's liability for misrepresentations or omissions in the nominating shareholder's or group's information that is repeated in the company's proxy materials.[1041] As described above, we have made modifications to clarify that a company will not be liable for materially false or misleading information provided by the nominating shareholder or group.[1042] Finally, additional guidance from the Commission, its staff, or courts should further resolve any uncertainties regarding the new rules' implementation and may reduce the need for parties to resort to litigation.

With respect to investment companies, a number of commenters expressed concern that the election of a shareholder director nominee may, in some circumstances, decrease the effectiveness and efficiency of a unitary or cluster board utilized by a fund complex.[1043] In addition, one commenter noted that small investment companies are likely to be particularly affected by the Proposal and its attendant costs, including the loss of the benefits of a cluster or unitary board.[1044] According to the commenter, "the expected smaller rate of return on capital may dissuade some entrepreneurs from entering the investment company industry, and force the exit of some fund advisers with thin profit margins," negatively affecting both efficiency and competition.

We recognize that for fund complexes that utilize unitary or cluster boards, the election of a shareholder director nominee may, in some circumstances, increase costs and potentially decrease the efficiency of the boards.[1045] We note, however, that any decrease in efficiency and competition is associated with the State law right to nominate and elect directors, and not from including shareholder nominees in the company's proxy materials. We also note that any decreased efficiency of an investment company's board, or any decrease in competition, as a result of the fund complex no longer having a unitary or cluster board would occur, if at all, only in the event that investment company shareholders elect the shareholder nominee. Investment companies may include information in the proxy materials making investors aware of the company's views on the perceived benefits of a unitary or cluster board and the potential for increased costs and decreased efficiency if the shareholder nominees are elected. Furthermore, we believe that exempting small investment companies from the new rules would not be appropriate because doing so would interfere with achieving the goal of facilitating shareholders' ability to participate more meaningfully in the nomination and election of directors and to promote the exercise of shareholders' traditional State law rights to nominate and elect directors.[1046] Although commenters argued that the election of a shareholder-nominated director to a unitary or cluster board will necessarily result in decreased effectiveness of the board, we disagree. In this regard, one commenter argued that competition in the board nomination process may improve efficiency by providing additional leverage for boards in negotiations with the investment adviser.[1047] In any event, we believe that investment company shareholders should have the opportunity to exercise their traditional State law rights to elect a non-unitary or non-cluster board if they so choose.

We considered the possible effects that the new rules may have on competition, as discussed below.

With the possible effect of improved board accountability and corporate governance, the new rules may ultimately increase shareholder value, generate stronger company performance, and increase competition. Investors also may be more willing to invest in companies in which they have the ability to present their own shareholder director nominees in the company's proxy materials if they become displeased with the company's performance. Nevertheless, it is possible that some companies may be more reluctant to conduct public offerings in the U.S. or may wish to avoid being a reporting company due to the need to comply with new rules, making the U.S. public equity markets less attractive.[1048] Companies may instead attempt to raise capital through private placements or in foreign equity markets instead of through public offerings in the U.S. equity markets. We note that shareholders in many foreign countries

generally will trump contractual expectations in the corporate context."). *See also* letters from ACSI; LUCRF (indicating that they are unaware of any breaches of fiduciary or statutory duties, including Regulation FD, by shareholder-nominated directors in jurisdictions that allow shareholder director nominations in the company's proxy materials).

[1037] *See* letters from 3M; ABA; American Electric Power; Atlantic Bingo; AT&T; Avis Budget; Biogen; Boeing; BRT; Burlington Northern; Callaway; Carlson; Chamber of Commerce/CCMC; CIGNA; Columbine; Cummins; CSX; J. Dillon; Emerson Electric; Erickson; ExxonMobil; FedEx; Headwaters; C. Holliday; IBM; Intelect; R. Clark King; Lange; Louisiana Agencies; Metlife; NIRI; O3 Strategies; V. Pelson; PepsiCo; Pfizer; Roppe; Rosen; Ryder; Sara Lee; Sidley Austin; tw telecom; Wachtell; Wells Fargo; Weyerhaeuser; Yahoo.

[1038] *See* Section IV.D.3. above.

[1039] For a discussion of these costs, *see* Section IV.E.3. above.

[1040] *See, e.g.,* letters from ABA; Wachtell.

[1041] *See* letters from ABA; Alaska Air; American Bankers Association; Ameriprise; BorgWarner; BRT; Caterpillar; Cleary; DTE Energy; ExxonMobil; Honeywell; ICI; Protective; S. Quinlivan; Seven Law Firms; Sidley Austin; Society of Corporate Secretaries; Southern Company; UnitedHealth; Verizon.

As originally proposed, under Rule 14a–11(e) and Note to Rule 14a–19, a company would not be responsible for information that is provided by the nominating shareholder or group under Rule 14a–11, an applicable State law provision, or the company's governing documents and then repeated by the company in its proxy statement, except where the company "knows or has reason to know that the information is false or misleading."

[1042] For further discussion, *see* Section II.E. above.

[1043] *See, e.g.,* letters from ABA; ICI; ICI/IDC; IDC; MFDF; S&C; T. Rowe Price; Vanguard.

[1044] *See* letter from ICI.

[1045] *See, e.g.,* letters from ICI; ICI/IDC; IDC; MFDF; Vanguard.

[1046] For a specific discussion of the impact of the rule on small companies and the alternatives we considered in lieu of applying the rule to such entities, *see* Section VI. below.

[1047] *See* letter from J. Taub.

[1048] *See* letters from Altman (stating that its survey of 36 public companies showed that 80.85% of respondents believe the new rules "will deter some U.S. private companies from going public and some foreign companies from listing on U.S. exchanges."); BRT; R. Tullo.

already have the ability to include their director nominees in the company's proxy materials.[1049] We therefore believe that the new rules may bring the U.S. capital markets closer in line with international practice by giving shareholders of U.S. companies an ability that may already be enjoyed by shareholders of many non-U.S. companies. Lastly, we note that the new rules will not apply to foreign private issuers because they are exempt from the Commission's proxy rules.[1050] Therefore, we do not believe that the new rules will affect the willingness of such issuers to raise capital in the U.S. capital markets.

We also believe that directors nominated by shareholders pursuant to the new rules and elected to the board may be more inclined to exercise independent judgment in the boardroom due to the fact that they were nominated by shareholders, not the incumbent directors. The impact of these shareholder-nominated directors may lead to greater competition when the board considers strategic alternatives, including in the market for corporate control. Board members play a key role in evaluating corporate control transactions and, while the new rules are not intended to facilitate a change in control, shareholder-nominated directors may not share the same bias as incumbent directors regarding a transaction that may be contrary to their interests but beneficial for shareholders. The presence of these directors, therefore, may lead to increased competition in the market for corporate control. We recognize that since the number of shareholder director nominees that a company is required to include in its proxy materials pursuant to Rule 14a–11 is limited, the potential effect on competition for corporate control may also be limited.

Lastly, the requirement that a nominating shareholder or member of the nominating shareholder group using Rule 14a–11 provide proof of ownership in the form of written statements with respect to securities held on deposit with a clearing agency acting as a securities depository may affect the competitive position of brokers or banks that are not securities depository participants.[1051] Due to the need for a nominating shareholder or member of a nominating shareholder group to obtain a separate written statement from a broker or bank that is not a clearing agency participant (*e.g.,* when a broker or bank of the nominating shareholder or member of the nominating shareholder group holds shares of the shareholder or member in an omnibus account at another broker or bank), it is possible that some shareholders may prefer to hold their securities directly through a clearing agency participant to avoid having to obtain more than one written statement to prove their ownership of the requisite amount of securities. If so, the competitive positions of clearing agency participants and clearing agencies themselves in the marketplace may be enhanced. Their competitive position also may be enhanced if a nominating shareholder is reluctant to change its broker or bank because it would need to obtain a written statement from each broker or bank with respect to the shares that it is using to meet the ownership threshold and specify the time period during which the shares were held.

We considered the possible effects that the new rules may have on capital formation, as discussed below.

We expect that potential investors may be more willing to invest in a company if they have greater confidence in the abilities of the company's board members. The new rules allow for a more competitive election process—one in which shareholders will have the opportunity to evaluate qualified alternatives to the board's own nominees and select the person that they feel is most qualified. To the extent that the overall quality of a company's board increases as a result of a more competitive election, the company's ability to attract the necessary capital in the marketplace may be enhanced as well.

Further, potential investors may be more willing to invest in a company if they know that they have a meaningful way to nominate directors for election. The new rules will facilitate investors' ability to nominate and elect director candidates, and may thereby have the effect of holding boards more accountable. Investors may also be attracted to the potential increase in shareholder value that may result from an increased ability to replace directors and enhancement of shareholders' rights.[1052] Lastly, potential investors could prefer to invest in companies with boards that they feel are more open and responsive to their views.

By enabling greater board accountability to shareholders, the new rules also may contribute to restoring investor confidence in the U.S. markets and address any reluctance to invest in U.S. companies.[1053] Companies attempting to raise capital in the U.S. markets may therefore encounter greater willingness on the part of potential investors to participate in their securities offerings.[1054]

As part of our rulemaking process, we considered possible alternatives to the new rules that may serve the same function—and to the same degree—of promoting efficiency, competition, and capital formation. In this regard, we received significant comment that the rules are unnecessary in light of recent corporate governance reforms that already increased the accountability of boards to shareholders.[1055] While each of these reforms may enhance to some degree the boards' accountability and responsiveness to shareholders or shareholders' ability to effect change in the board's membership, we believe they may not be as efficient, effective, or optimal as the new rules. Our consideration of recent corporate governance reforms and suggested alternatives are discussed throughout the release.

We recognize the passage of recent amendments to state corporation laws to enable companies to provide in their governing documents an ability for shareholders to include their director

[1049] *See* letters from ACSI; CalPERS; ICGN; LUCRF; Pax World; RiskMetrics; Social Investment Forum; SWIB.

[1050] Exchange Act Rule 3a12–3 exempts securities of certain foreign issuers from Section 14(a) of the Exchange Act.

[1051] *See* Instruction 4 to new Schedule 14N.

[1052] *See* Section IV.D.3. above.

[1053] *See, e.g.,* letters from AFSCME and Sodali (noting a June 2009 survey of investors conducted by ShareOwners.org that indicated 57% of the respondents feel strong Federal action would "restore their lost confidence in the fairness of the markets" and 81% of the respondents identified "overpaid CEOs and/or unresponsive management and boards" as the top reason for the loss of investor confidence in the markets); letter from Universities Superannuation (noting that "Governance Metrics International now ranks the United States behind Britain, Australia, Canada, and Ireland in corporate governance quality" and that "the CFA Institute 2009 Financial Market Integrity Index survey of investment professionals found a marked decline over the past year in global sentiment of investment professionals toward the United States, with only 43 percent of non-U.S. respondents reporting they would recommend investing in the United States (based solely on ethical behavior and regulation of capital market systems), down from 67 percent a year earlier.").

[1054] *See* letter from Universities Superannuation.

[1055] *See* letters from 26 Corporate Secretaries; 3M; Advance Auto Parts; Allstate; Avis Budget; American Express; Anadarko; Association of Corporate Counsel; AT&T; L. Behr; Best Buy; Boeing; BRT; R. Burt; California Bar; S. Campbell; Carlson; Caterpillar; Chamber of Commerce/CCMC; Chevron; CIGNA; W. Cornwell; CSX; Cummins; Davis Polk; Dewey; DuPont; Eaton; M. Eng; FedEx; FMC Corp.; FPL Group; Frontier; GE; General Mills; C. Holliday; Honeywell; C. Horner; IBM; Jones Day; Keating Muething; J. Kilts; R. Clark King; N. Lautenbach; MeadWestvaco; Metlife; Motorola; O'Melveny & Myers; Office Depot; Pfizer; Protective; S&C; Safeway; Sara Lee; Shearman & Sterling; Sherwin-Williams; Sidley Austin; Simpson Thacher; Tesoro; Textron; TI; G. Tooker; UnitedHealth; Unitrin; U.S. Bancorp; Wachtell; Wells Fargo; West Chicago Chamber; Weyerhaeuser; Xerox; Yahoo.

nominees in the company's proxy materials, and that private ordering is an alternative to our new rules.[1056] However, as discussed throughout the release, we have reason to believe that reliance on private ordering under State law would be insufficient to meet our goal of facilitating the exercise of shareholders' traditional State law rights to nominate and elect directors.[1057] For example, companies, particularly those that have performed poorly or have activist shareholders, may be reluctant to amend their governing documents to provide for an ability of shareholders to include director nominees in the company's proxy materials, even if permitted by state corporation law.[1058] In that regard, one commenter observed that most of the companies currently able to provide such an ability in their governing documents under State law have, in fact, not done so.[1059] Further, as previously discussed, establishing such an ability on a company-by-company basis may be more costly and inefficient than under our new rules.[1060] For shareholders with a diverse portfolio of securities, the administrative burden of tracking each company's requirements for including a director nominee in the company's proxy materials may add another degree of inefficiency.[1061] Some commenters also expressed concerns about the ability of shareholders to adopt a provision in a company's governing documents for the inclusion of shareholder director nominees through the Rule 14a–8 process due to the rule's requirements (such as the 500-word limit on shareholder proposals)[1062] or procedural requirements for shareholder-proposed bylaw amendments, such as a super-majority voting requirement for adoption of amendments.[1063]

We considered the recent amendments to state corporation laws to enable a company to include in its governing documents a provision for reimbursement of a shareholder's proxy solicitation costs.[1064] We note, however, that poorly performing companies may be reluctant to include such a provision, forcing shareholders to undergo the potentially costly and time-consuming process of establishing such a provision themselves (for example, through a Rule 14a–8 shareholder proposal). Even if reimbursement arrangements were to exist at all public companies, we believe that the ability of shareholders to be reimbursed for their proxy solicitation costs may be less efficient in facilitating changes in the board or increasing board accountability or responsiveness because shareholders would still need funds to maintain an election contest.[1065] This may create a disparity among shareholders as shareholders with greater resources are able to take advantage of the right and conduct a proxy contest (with the knowledge they will be reimbursed) while those who lack such resources are unable to do so.

We also considered the trend towards adopting a majority voting standard in director elections, which gives shareholders a greater voice in director elections and the company's corporate governance. It is important to note, however, that a majority voting standard in director elections, while increasingly common, is not yet used by all companies.[1066] Further, commenters pointed out that even with a majority voting standard, some boards have disregarded the outcome of the elections by, for example, refusing to accept the resignations of directors who failed to receive a majority vote.[1067] Further, while a majority voting standard facilitates shareholders' ability to elect candidates put forth by a company's management, it does not facilitate shareholders' ability to exercise their right to nominate candidates for director.

We considered the growing effectiveness of "withhold" or "vote no" campaigns in director elections, particularly at companies with a majority voting standard for director elections. "Withhold" or "vote no" campaigns have long been available but appear only occasionally to have resulted in a change in composition of the board or senior management.[1068] By definition, however, such campaigns lack what Rule 14a–11 facilitates, namely a direct means to include shareholder-nominated candidates for election as directors, rather than merely express disapproval of incumbent directors.[1069]

We considered the effect of adoption of our notice and access model for electronic delivery of proxy materials, which reduces the printing and mailing costs for shareholders' proxy solicitations. As discussed above, the notice and access model, while reducing the printing and mailing costs, does not necessarily provide the same cost savings as Rule 14a–11.[1070] Further, a shareholder may find the use of the model to be unattractive for the reasons related to its strategy for the conduct of the election contest.[1071]

Lastly, one commenter pointed out that the market already provides multiple means of "management discipline."[1072] Shareholders could express their displeasure with current management by selling their securities

[1056] For example, Delaware recently amended the Delaware General Corporation Law to add new Section 112 clarifying that the bylaws of a Delaware corporation may provide that, if the corporation solicits proxies with respect to an election of directors, the corporation may be required to include in its solicitation materials one or more individuals nominated by a shareholder in addition to the individuals nominated by the board of directors. The obligation of the corporation to include such shareholder nominees will be subject to the procedures and conditions set forth in the bylaw adopted under Section 112. In addition, the American Bar Association's Committee on Corporate Laws has adopted similar changes to the Model Business Corporation Act. *See* American Bar Association, Section of Business Law, Committee on Corporate Laws Amendments to The Model Business Corporation Act Approved on Third Reading at the Committee's Meeting on December 12, 2009 (*available at http://www.abanet.org/media/docs/Amendments_to_MCBA_121709.pdf*).

[1057] *See* Sections II.B.2. and IV.D.2. above.

[1058] *See* letters from CalPERS; D. Nappier; P. Neuhauser; Pershing Square; Schulte Roth & Zabel.

[1059] *See* letter from TIAA–CREF. Further, based on its survey of its member companies, one commenter stated that a large majority—approximately two-thirds—would seek to opt out of Rule 14a–11, if possible. *See* letter from Society of Corporate Secretaries.

[1060] *See* letters from CalPERS; D. Nappier; P. Neuhauser.

[1061] *See* letter from CII.

[1062] *Id.*

[1063] *See* letter from CII (stating that, based on a November 2009 white paper commissioned by the CII and ShareOwners.org, many companies have supermajority voting requirements to amend the bylaws, thereby "making shareholder-proposed bylaw amendments nearly impossible to implement").

[1064] Delaware also added new Section 113 of the Delaware General Corporation Law, which allows a Delaware corporation's bylaws to include a provision that the corporation, under certain circumstances, will reimburse a shareholder for the expenses incurred in soliciting proxies in connection with an election of directors.

[1065] *See* letter from Florida State Board of Administration.

[1066] *See* letters from CalPERS (noting that the standard has "only been adopted by 294 companies in the S&P 500 and just 734 companies out of the 3,369 companies according to the Corporate Library Board Analyst database."); TIAA–CREF (noting that "[o]nly about half of S&P 500 companies and a small minority of Russell 3000 companies have adopted this reform.").

[1067] *See* letters from CalPERS; RiskMetrics; TIAA–CREF (noting that "[t]here are currently over 40 directors at U.S. companies who continue to serve without having received majority support."). *See also City of Westland Police & Fire Ret. Sys. v. Axcelis Technologies, Inc.*, 2009 Del. Ch. LEXIS 173 (September 28, 2009), aff'd, 2010 Del. LEXIS 382 (Del., August 11, 2010) (finding "no credible basis" to infer wrongdoing by directors who refused to accept resignations by other directors who failed to achieve the majority vote required by board policy).

[1068] *See* J.W. Verret, *Pandora's Ballot Box, Or a Proxy with Moxie? Majority Voting, Corporate Ballot Access, and the Legend of Martin Lipton Re-Examined,* 62 Bus. Law. 1007, 1014 (2007) (reporting on one replacement of a board chairman following a withhold campaign resulting in a 43% withhold vote).

[1069] *See* letter from AFSCME.

[1070] *See* Section IV.D.1. above.

[1071] *Id.*

[1072] *See* letter from BRT (referring to the NERA Report).

in the company, board members could be replaced, and managers could be removed for wrongdoing. In addition, the commenter stated that the threat of takeover attempts that management faces and higher levels of board independence suggest the success of existing means of "management discipline."

While we are aware of these means of "management discipline," we believe the relevant issue is whether investors will benefit from our new rules. Shareholders' ability to express their displeasure with current management through the sale of securities may be limited if the market for the securities is illiquid or the shareholder is constrained by its policies to invest in all companies within a given index. Replacing board members or removing managers under the current regulatory scheme is expensive and often requires considerable time during which significant shareholder value may be lost. By providing a more efficient means for shareholders with a significant, long-term stake to nominate directors, the new rules will promote competition and enable shareholders to nominate and elect directors.

Commenters also argued that it was not necessary to make investment companies subject to the new rules because they are subject to a unique regulatory regime under the Investment Company Act that provides additional protection to investors, such as the requirement to obtain shareholder approval to engage in certain transactions or activities.[1073] However, we do not believe that the regulatory protections offered by the Investment Company Act (including requirements to obtain shareholder approval to engage in certain transactions and activities) serve to decrease the importance of the rights that are granted to shareholders under State law. In fact, the separate regulatory regime to which investment companies are subject emphasizes the importance of investment company directors in dealing with the conflicts of interest created by the external management structure of most investment companies.[1074]

VI. Final Regulatory Flexibility Analysis

This Final Regulatory Flexibility Analysis ("FRFA") has been prepared in accordance with the Regulatory Flexibility Act.[1075] It relates to amendments to the rules and forms under the Exchange Act and the Investment Company Act that would, under certain limited circumstances, require companies to include in their proxy materials shareholder nominees for election as director. It also relates to the amendments to the rules that will prohibit companies from excluding shareholder proposals pursuant to Rule 14a–8(i)(8) that seek to establish a procedure under a company's governing documents for the inclusion of one or more shareholder director nominees in the company's proxy materials. The amendments will require, under certain circumstances, a company's proxy materials to provide shareholders with information about, and the ability to vote for, a shareholder's, or group of shareholders', nominees for director. The amendments will facilitate the exercise of shareholders' traditional State law rights to nominate and elect directors to boards of directors and thereby enable shareholders to participate more meaningfully in the nomination and election of directors at the companies in which they invest.

A. Need for the Amendments

As described in this release and the Proposing Release, the final rules include features from the proposals on this topic in 2003 and 2007, and reflect much of what we learned through the public comment that the Commission has received concerning this topic over the past seven years. The final rules are intended to facilitate shareholders' ability to participate more meaningfully in the nomination and election of directors, to promote the exercise of shareholders' traditional State law rights to nominate and elect directors, to open up communication between a company and its shareholders, and to provide shareholders with more information to make an informed voting decision by requiring disclosure about a nominating shareholder or group and its nominee or nominees. In particular, the final rules will enable long-term shareholders, or groups of long-term shareholders, with significant holdings to have their nominees for director included in company proxy materials. In addition, the amendment to Rule 14a–8(i)(8) will narrow the exclusion and will not permit companies to exclude, under Rule 14a–8(i)(8), shareholder proposals that seek to establish a procedure under a company's governing documents for the inclusion of one or more shareholder director nominees in the company's proxy materials.

The final rules are intended to achieve the stated objectives without unduly burdening companies. We sought to limit the cost and burden on companies by limiting Rule 14a–11 to nominations by shareholders who have maintained a significant continuous ownership interest in the company for at least three years at the time the notice of nomination is submitted, and by limiting the number of nominees a company is required to include in its proxy materials under Rule 14a–11. These aspects of the final rules will limit the number of nominees a company will be required to consider for inclusion in its proxy materials and thus will lower the cost to companies while facilitating the exercise of shareholders' traditional State law rights to nominate and elect directors to boards of directors, thereby enabling shareholders to participate more meaningfully in the nomination and election of directors at the companies in which they invest. We believe the new rules will benefit shareholders by improving corporate suffrage, the disclosure provided in connection with proxy solicitations, and communication between shareholders through the proxy process.

The final rules include a phase-in period that delays the compliance date for Rule 14a–11 for smaller reporting companies, which include most small entities, for three years from the effective date of the rule for other companies.[1076] We believe the delayed compliance date will allow those companies to observe how the rule operates for other companies and may allow them to better prepare for the implementation of the rules. We also believe that delayed implementation for these companies will provide us with the opportunity to evaluate the implementation of Rule 14a–11 by larger companies and to consider whether adjustments to the rule would be appropriate for smaller reporting companies before the rule becomes applicable to them.[1077] In addition, in

[1073] ABA; Barclays; ICI; IDC; T. Rowe Price; S&C; Vanguard.

[1074] *See* footnote 142 above.

[1075] 5 U.S.C. 601.

[1076] For purposes of this FRFA, we are required to consider the impact of our rules on small entities, including "small business." *See* footnote 1088 and the related discussion. The new rules will have a delayed effective date for smaller reporting companies as defined in Exchange Act Rule 12b–2. Whether a company is a small business is determined based on a company's assets while the determination of whether a company is a smaller reporting company is generally based on a company's public float. We expect that most small businesses that would be subject to the new rules also would qualify as smaller reporting companies.

[1077] As discussed in Section II.B.3. above, the recent Dodd-Frank Wall Street Reform and Consumer Protection Act provided the Commission with exemptive authority with respect to rules permitting the inclusion of shareholder director nominations in company proxy materials. In doing so, Congress noted that the Commission shall take into account whether any such requirement to permit inclusion of shareholder nominees for

an effort to limit the cost and burden on all companies subject to the rule, including smaller reporting companies, we have limited use of Rule 14a–11 to nominations by shareholders who have maintained significant continuous holdings in the company, and we have extended the required holding period to at least three years at the time the notice of nomination is filed with the Commission and transmitted to the company. We expect that these eligibility requirements will help achieve the stated objective without unduly burdening any particular group of companies.

B. Significant Issues Raised by Public Comments

In the Proposing Release, we requested comment on any aspect of the Initial Regulatory Flexibility Act Analysis ("IRFA"), including the number of small entities that would be affected by the proposed rules, the nature of the impact, how to quantify the number of small entities that would be affected, and how to quantify the impact of the proposed rules. We also considered, and sought comment on, excluding from operation of the rule smaller reporting companies either permanently or on a temporary basis through staggered compliance dates based on company size. We did not receive comments specifically addressing the IRFA. Several commenters, however, addressed aspects of the proposed rules that could potentially affect small entities.

In particular, many commenters stated generally that Rule 14a–11 should not apply to small businesses.[1078] Some commenters argued that the Proposal, if adopted, would hurt their larger corporate suppliers which would, in turn, increase their own costs of doing business.[1079] Two commenters recommended that Rule 14a–11 exclude companies that are not at least accelerated filers and be limited, at least initially, to large accelerated filers.[1080] These commenters expressed concern about the burden Rule 14a–11 would place on smaller companies, including difficulty in recruiting qualified directors and costs of conducting due diligence on shareholder nominees.[1081] One commenter noted that small investment companies, which may operate with thin profit margins, would be particularly affected by the Proposal and its attendant costs, including the loss of the benefits of a cluster or unitary board.[1082] By contrast, some commenters stated that Rule 14a–11 should apply to small businesses.[1083] At least one commenter argued that Rule 14a–11 would not impose a material burden on any company subject to the proxy rules because companies already have to distribute proxy cards and it would not be an imposition if they were required to add additional nominees to those cards.[1084] Another commenter argued that exempting small entities would be inconsistent with the stated goals of the Proposal and the costs and burden to such entities would be minimal.[1085]

We believe that exempting small companies, including small investment companies, from the new rules would not be appropriate because doing so would interfere with achieving the goal of facilitating shareholders' ability to participate more meaningfully in the nomination and election of directors, to promote the exercise of shareholders' rights to nominate and elect directors, to open up communication between a company and its shareholders and to provide shareholders with better information from which to make an informed voting decision. Some commenters noted that small companies are "just as likely" to have dysfunctional boards as their larger counterparts.[1086] Also, one commenter agreed that exempting small entities would be inconsistent with the stated goals of the Proposal and the costs and burdens to these entities would be minimal.[1087] However, we are cognizant of the fact that the new rules will increase the burden on all companies and therefore the potential burden on smaller reporting companies as defined in Rule 12b–2 under the Exchange Act. To address concerns about the potential impact on smaller reporting companies, the final rule delays the compliance date for Rule 14a–11 for smaller reporting companies for a period of three years from the effective date of the rule for other companies so that smaller reporting companies can observe how the rule operates and allow them to better prepare for the implementation of the rules. We also believe that delayed implementation for these companies will allow us to evaluate the implementation of Rule 14a–11 by larger companies and provide us with the additional opportunity to consider whether adjustments to the rule would be appropriate for smaller reporting companies before the rule becomes applicable to them. In addition, in an effort to limit the cost and burden on all companies subject to the rule, including smaller reporting companies, we have limited use of Rule 14a–11 to nominations by shareholders who have maintained significant continuous holdings in the company, and we have extended the required holding period to at least three years at the time the notice of nomination is filed with the Commission and transmitted to the company. We expect that these eligibility requirements will help achieve the stated objective without unduly burdening any particular group of companies.

C. Small Entities Subject to the Rules

The final rules will affect some companies that are small entities. The Regulatory Flexibility Act defines "small entity" to mean "small business," "small organization," or "small governmental jurisdiction." [1088] The Commission's rules define "small business" and "small organization" for purposes of the Regulatory Flexibility Act for each of the types of entities regulated by the Commission. Securities Act Rule

director in company proxy materials would disproportionately burden small issuers.

[1078] *See* letters from ABA; American Mailing; All Cast; Always N Bloom; American Carpets; J. Arquilla; B. Armburst; Artistic Land Designs; C. Atkins; Book Celler; K. Bostwick; Brighter Day Painting; Colletti; Commercial Concepts; Complete Home Inspection; D. Courtney; S. Crawford; Crespin; Don's; T. Ebreo; M. Eng; eWareness; Evans; Fluharty; Flutterby; Fortuna Italian Restaurant; Future Form; Glaspell; C. Gregory; Healthcare Practice; B. Henderson; S. Henning; J. Herren; A. Iriarte; J. Jones; Juz Kidz; Kernan; LMS Wine; T. Luna; Mansfield Children's Center; D. McDonald; Meister; Merchants Terminal; Middendorf; Mingo; Moore Brothers; Mouton; D. Mozack; Ms. Dee; G. Napolitano; NK; H. Olson; PESC; Pioneer Heating & Air Conditioning; RC; RTW; D. Sapp; SBB; SGIA; P. Sicilia; Slycers Sandwich Shop; Southern Services; Steele Group; Sylvron; Theragenics; E. Tremaine; Wagner; Wagner Industries; Wellness; West End; Y.M.; J. Young.

[1079] *See* letters from Always N Bloom; Brighter Day Painting; Caswells; Complete Home Inspection; Darrell's Automotive; Data Forms; Fluharty; E. Garcia; S. Henning; T. Luna; Magnolia; American Mailing; H. Olson; T. Roper; Solar Systems; E. Sprenkle; Steele Group; R. Trummel; T. Trummel; V. Trummel; Wagner; T. White.

[1080] *See* letters from ABA; Theragenics.

[1081] In this regard, one commenter suggested that our estimate of the burden to companies of evaluating a shareholder nominee's background to determine eligibility, investigation and verification of information provided by the nominee, research into the nominee's background, analysis of the relative merits of the shareholder nominee as compared to management's own nominee, meetings of the relevant board committees, and analysis of whether a nomination would conflict with any Federal or State law, or director qualification standards was too low. This commenter estimated that the burden hours associated with the above actions would be 99 hours of company personnel time. *See* letter from S&C (citing results of a survey conducted by BRT). For a discussion of burden estimates, *see* Section III. above.

[1082] *See* letter from ICI.

[1083] *See* letters from AFSCME; CII; D. Nappier.

[1084] *See* letter from USPE.

[1085] *See* letter from CII.

[1086] *See* letters from AFSCME; D. Nappier.

[1087] *See* letter from CII.

[1088] 5 U.S.C. 601(6).

157 [1089] and Exchange Act Rule 0–10(a) [1090] define a company, other than an investment company, to be a "small business" or "small organization" if it had total assets of $5 million or less on the last day of its most recent fiscal year. We estimate that there are approximately 1,209 issuers that may be considered small entities.[1091]

For purposes of the Regulatory Flexibility Act, an investment company is a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[1092] We estimate that approximately 168 registered investment companies and 33 business development companies meet this definition. The new rules may affect each of the approximately 201 issuers that may be considered small entities, to the extent companies and shareholders take advantage of the rules.

D. Reporting, Recordkeeping and Other Compliance Requirements

The final rules are designed to require, under certain circumstances, Exchange Act reporting companies (other than debt-only companies and companies whose applicable state or foreign law provisions or governing documents prohibit shareholder nominations) subject to the Federal proxy rules, including small entities, to include shareholder nominees for director in the company's proxy materials. Nominating shareholders or groups, including nominating shareholders that are small entities, will be required to meet certain eligibility requirements and to provide disclosure in Schedule 14N about the nominating shareholders and the nominee, and companies will be required to include the disclosure provided by the nominating shareholder or group in the company's proxy materials.

The final rules also will enable shareholders to include proposals in the company's proxy materials that seek to establish a procedure under a company's governing documents for the inclusion of one or more shareholder director nominees in the company's proxy materials. A nominating shareholder or group, including a nominating shareholder or group that is a small entity, using an applicable state or foreign law provision or a provision in the company's governing documents to submit a nomination for director to be included in a company's proxy materials will be required to provide disclosure in new Schedule 14N about the nominating shareholder or group and the nominee. Companies also will be required to include disclosure about the nominating shareholder or group and the nominee in the company's proxy materials when a shareholder submits a nomination for director for inclusion in the company's proxy materials pursuant to an applicable state or foreign law provision or a company's governing documents.

We have no reason to expect that the amendment to Rule 14a–8(i)(8) will substantially increase the number of shareholder proposals to smaller companies and likely will have little impact on small entities. With respect to Rule 14a–11, there is some data indicating that smaller companies are subject to more proxy contests as a group than larger companies,[1093] but the data do not demonstrate that the frequency is disproportionately larger at smaller companies relative to other companies. In addition, we did not receive data substantiating a disproportionate impact on smaller companies.

With respect to investment companies, we assume that small investment companies, which may operate with thin profit margins, would be particularly affected by the rules and the attendant costs, including the loss of the benefits of a cluster or unitary board.[1094] However, the costs resulting from the loss of the benefits of a cluster or unitary board are costs associated with the traditional State law rights to nominate and elect directors, and are not costs incurred for including shareholder nominees in the company's proxy materials. We also note that any increased costs and decreased efficiency of an investment company's board as a result of the fund complex no longer having a unitary or cluster board would occur, if at all, only in the event that investment company shareholders elect the shareholder nominee. Investment companies may include information in the proxy materials making investors aware of the company's views on the perceived benefits of a unitary or cluster board and the potential for increased costs and decreased efficiency if the shareholder nominees are elected.

E. Agency Action To Minimize Effect on Small Entities

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. In connection with the new rules, we considered the following alternatives:

- The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
- The clarification, consolidation or simplification of the rule's compliance and reporting requirements for small entities;
- The use of performance rather than design standards; and
- An exemption for small entities from coverage under the proposals.

As noted in the Proposing Release, the Commission has considered a variety of reforms to achieve its regulatory objectives while minimizing the impact on small entities. As one possible approach, we considered in 2003 requiring companies to include shareholder nominees for director in a company's proxy materials only upon the occurrence of certain events so that the rule would apply only in situations where there was a demonstrated failure in the proxy process related to director nominations and elections. We sought comment in the Proposing Release on this approach, with commenters arguing both for [1095] and against [1096] the approach. We have not taken this approach in the final rules because we do not believe it is appropriate to limit the rule to companies where specified events have occurred. Moreover, we are not aware of data suggesting that such specified events are less likely to occur at smaller companies than at larger companies.

We considered changes to Rule 14a–8(i)(8) in 2007 that would enable shareholders to have their proposals for bylaw amendments regarding the

[1089] 17 CFR 230.157.

[1090] 17 CFR 240.0–10(a).

[1091] The estimated number of reporting small entities is based on 2009 data, including the Commission's EDGAR database and Standard & Poor's.

[1092] 17 CFR 270.0–10(a).

[1093] *See, e.g.,* Bebchuk (2007).

[1094] *See* letter from ICI.

[1095] *See* letters from ADP; Alaska Air; Allstate; American Electric Power; Anadarko; AT&T; Avis Budget; Barclays; Biogen; Boeing; BRT; Burlington Northern; R. Burt; Callaway; Chevron; CIGNA; CNH Global; Comcast; Cummins; Deere; Eaton; ExxonMobil; FedEx; FMC Corp.; FPL Group; Frontier; General Mills; C. Holliday; IBM; ITT; J. Kilts; E.J. Kullman; N. Lautenbach; McDonald's; J. Miller; Motorola; Office Depot; O'Melveny & Myers; P&G; PepsiCo; Pfizer; Protective; Ryder; Sara Lee; Sherwin Williams; Theragenics; TI; TW Telecom; G. Tooker; UnitedHealth; Xerox.

[1096] *See* letters from ABA; AFSCME; CalSTRS; CFA Institute; CII; COPERA; T. DiNapoli; Florida State Board of Administration; ICGN; N. Lautenbach; LIUNA; D. Nappier; Nathan Cummings Foundation; OPERS; Pax World; Relational; Sodali; SWIB; TIAA–CREF; G. Tooker; USPE; ValueAct Capital.

procedures for nominating directors included in the company's proxy materials provided the shareholder submitting the proposal made certain disclosures and beneficially owned more than 5% of the company's shares. Although this approach could potentially reduce the number of shareholder proposals submitted to smaller entities by establishing a minimum threshold for having such proposals included in the company's proxy statement, we have not taken this approach because, as noted above, we do not expect the final rule to substantially increase the number of shareholder proposals to smaller companies. In addition, we have not relied exclusively on an amendment to Rule 14a–8(i)(8) to achieve our regulatory goals because we seek to provide shareholders with a more immediate and direct means of effecting change in the boards of directors of the companies in which they invest. For these reasons, as well as the reasons discussed throughout the release, we believe that these final rules may better achieve the Commission's objectives.

We also sought comment on whether the proposed tiered approach—under which shareholders or shareholder groups at larger companies would have to satisfy a lower ownership threshold than shareholders or shareholder groups at smaller companies in order to rely on Rule 14a–11—is appropriate and workable. We considered whether the effect of the tiered approach may make it less likely that shareholders at smaller companies will nominate directors under Rule 14a–11, but determined not to adopt this approach because the data available to us did not indicate a meaningful difference between small entities and entities generally in regard to concentration of long-term share ownership.[1097]

We considered whether a delayed compliance date for Rule 14a–11 for smaller reporting companies, which would include most small entities, would reduce the burden on these entities. After considering the comments discussed above, we have determined to delay the compliance date of Rule 14a–11 for smaller reporting companies for a period of three years from the effective date for other companies. We believe that a delayed compliance date for smaller reporting companies will allow those companies to observe how Rule 14a–11 operates for other companies and may allow them to better prepare for the implementation of the rules and, as noted, will give us a further opportunity to consider adjustments for smaller reporting companies. In addition, in an effort to limit the cost and burden on all companies subject to the rule, including smaller reporting companies, we have limited use of Rule 14a–11 to nominations by shareholders who have maintained significant continuous holdings in the company, and we have extended the required holding period to at least three years at the time the notice of nomination is filed with the Commission and transmitted to the company. We expect that these eligibility requirements will help achieve the stated objective without unduly burdening any particular group of companies.

We are not adopting different disclosure standards based on the size of the issuer. We believe uniform disclosure will be helpful to voting decisions on shareholder-nominated directors at companies of all sizes. Because we are delaying the compliance date of Rule 14a–11 for smaller reporting companies, we believe this will allow them additional time to prepare to comply with the new rule and observe the rule's impact on larger companies, which should allow smaller reporting companies to be able to comply with the same disclosure standards when the rule becomes applicable to them.

We considered the use of performance standards rather than design standards in the final rules. The final rule contains both performance standards and design standards. We proposed design standards to the extent that we believe compliance with particular requirements are necessary. However, to the extent possible, our rules impose performance standards. For example, under Rule 14a–11, a nominating shareholder or group can provide a 500-word statement of support concerning each of its nominee or nominees for director, but we do not specify the content. Similarly, shareholders can submit a proposal that seeks to establish a procedure under a company's governing documents for the inclusion of one or more shareholder director nominees in the company's proxy materials. By allowing shareholders to submit such proposals, we seek to provide shareholders and companies with a measure of flexibility to tailor the means through which they can comply with the standards. Even though Rule 14a–11 provides a procedure from which companies may not opt out, companies and shareholders are not prohibited from adopting nominating procedures that could further facilitate shareholders' ability to include their own director nominees in company proxy materials. Amended Rule 14a–8(i)(8) facilitates this process. In that respect, the rules provide both design and performance standards, as appropriate.

Lastly, as discussed above, we believe that the final rules should apply regardless of company size, as was proposed.[1098] The purpose of the rules is to facilitate the exercise of shareholders' traditional State law rights to nominate and elect directors to company boards of directors and thereby enable shareholders to participate more meaningfully in the nomination and election of directors at the companies in which they invest. We believe that shareholders of smaller reporting companies should be able to exercise these rights to the same extent as shareholders of larger reporting companies. Therefore, we are not persuaded that exempting smaller reporting companies from the final rules would be consistent with this goal.

Nonetheless, as discussed above, we recognize that smaller reporting companies may have had less experience with existing forms of shareholder involvement in the proxy process and may have less-developed infrastructures for managing these matters. The final rules therefore include a phase-in period that delays the compliance date of Rule 14a–11 for smaller reporting companies for three years from the effective date of the rule.

VII. Statutory Authority and Text of the Amendments

The amendments are made pursuant to Sections 3(b), 13, 14, 15, 23(a) and 36 of the Securities Exchange Act of 1934, as amended, Sections 10, 20(a) and 38 of the Investment Company Act of 1940, as amended, and Sections 971(a) and (b) of the Dodd-Frank Act.

List of Subjects

17 CFR Parts 200

Freedom of information, Reporting and recordkeeping requirements, Securities.

17 CFR Parts 232, 240, and 249

Reporting and recordkeeping requirements, Securities.

■ In accordance with the foregoing, the Securities and Exchange Commission is amending Title 17, chapter II of the Code of Federal Regulations as follows:

[1097] For further discussion, *see* Section II.B.4. above.

[1098] *See* Section II.B.3.f. above.

PART 200—ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

Subpart D—Information and Requests

■ 1. The authority citation for Part 200, Subpart D, continues to read, in part, as follows:

Authority: 5 U.S.C. 552, as amended, 15 U.S.C. 77f(d), 77s, 77ggg(a), 77sss, 78m(F)(3), 78w, 80a–37, 80a–44(a), 80a–44(b), 80b–10(a), and 80b–11.

* * * * *

■ 2. Add § 200.82a to read as follows:

§ 200.82a Public availability of materials filed pursuant to § 240.14a–11(g) and related materials.

Materials filed with the Commission pursuant to Rule 14a–11(g) under the Securities Exchange Act of 1934 (17 CFR 240.14a–11(g)), written communications related thereto received from interested persons, and each related no-action letter or other written communication issued by the staff of the Commission, shall be made available to any person upon request for inspection or copying.

PART 232—REGULATION S–T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

■ 3. The authority citation for Part 232 continues to read, in part, as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77z–3, 77sss(a), 78c(b), 78*l,* 78m, 78n, 78o(d), 78w(a), 78*ll,* 80a–6(c), 80a–8, 80a–29, 80a–30, 80a–37, and 7201 *et seq.;* and 18 U.S.C. 1350.

* * * * *

■ 4. Amend § 232.13 by revising paragraph (a)(4) (the note remains unchanged) to read as follows:

§ 232.13 Date of filing; adjustment of filing date.

(a) * * *

(4) Notwithstanding paragraph (a)(2) of this section, a Form 3, 4 or 5 (§§ 249.103, 249.104, and 249.105 of this chapter) or a Schedule 14N (§ 240.14n–101 of this chapter) submitted by direct transmission on or before 10 p.m. Eastern Standard Time or Eastern Daylight Saving Time, whichever is currently in effect, shall be deemed filed on the same business day.

* * * * *

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 5. 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, 78*l,* 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, *80b*–3, 80b–4, 80b–11, and 7201, *et seq.;* and 18 U.S.C. 1350 and 12 U.S.C. 5221(e)(3), unless otherwise noted.

* * * * *

■ 6. Amend § 240.13a–11 by revising paragraph (b) to read as follows:

§ 240.13a–11 Current reports on Form 8–K (§ 249.308 of this chapter).

* * * * *

(b) This section shall not apply to foreign governments, foreign private issuers required to make reports on Form 6–K (17 CFR 249.306) pursuant to § 240.13a–16, issuers of American Depositary Receipts for securities of any foreign issuer, or investment companies required to file reports pursuant to § 270.30b1–1 of this chapter under the Investment Company Act of 1940, except where such an investment company is required to file:

(1) Notice of a blackout period pursuant to § 245.104 of this chapter;

(2) Disclosure pursuant to Instruction 2 to § 240.14a–11(b)(1) of information concerning outstanding shares and voting; or

(3) Disclosure pursuant to Instruction 2 to § 240.14a–11(b)(10) of the date by which a nominating shareholder or nominating shareholder group must submit the notice required pursuant to § 240.14a–11(b)(10).

* * * * *

■ 7. Amend § 240.13d–1 by revising paragraphs (b)(1)(i) and (c)(1) and adding Instruction 1 to paragraph (b)(1) to read as follows:

§ 240.13d–1 Filing of Schedules 13D and 13G.

* * * * *

(b)(1) * * *

(i) Such person has acquired such securities in the ordinary course of his business and not with the purpose nor with the effect of changing or influencing the control of the issuer, nor in connection with or as a participant in any transaction having such purpose or effect, including any transaction subject to § 240.13d–3(b), other than activities solely in connection with a nomination under § 240.14a–11; and

* * * * *

Instruction 1 to paragraph (b)(1). For purposes of paragraph (b)(1)(i) of this section, the exception for activities solely in connection with a nomination under § 240.14a–11 will not be available after the election of directors.

* * * * *

(c) * * *

(1) Has not acquired the securities with any purpose, or with the effect, of changing or influencing the control of the issuer, or in connection with or as a participant in any transaction having that purpose or effect, including any transaction subject to § 240.13d–3(b), other than activities solely in connection with a nomination under § 240.14a–11;

* * * * *

Instruction 1 to paragraph (c)(1). For purposes of paragraph (c)(1) of this section, the exception for activities solely in connection with a nomination under § 240.14a–11 will not be available after the election of directors.

* * * * *

■ 8. Amend § 240.13d–102 by revising the sentences following the introductory text in Items 10(a) and (c) as follows:

§ 240.13d–102 Schedule 13G—Information to be included in statements filed pursuant to § 240.13d–1(b), (c), and (d) and amendments thereto filed pursuant to § 240.13d–2.

* * * * *

Item 10. Certifications

(a) * * *

By signing below I certify that, to the best of my knowledge and belief, the securities referred to above were acquired and are held in the ordinary course of business and were not acquired and are not held for the purpose of or with the effect of changing or influencing the control of the issuer of the securities and were not acquired and are not held in connection with or as a participant in any transaction having that purpose or effect, other than activities solely in connection with a nomination under § 240.14a–11.

* * * * *

(c) * * *

By signing below I certify that, to the best of my knowledge and belief, the securities referred to above were not acquired and are not held for the purpose of or with the effect of changing or influencing the control of the issuer of the securities and were not acquired and are not held in connection with or as a participant in any transaction having that purpose or effect, other than activities solely in connection with a nomination under § 240.14a–11.

* * * * *

■ 9. Amend § 240.14a–2 by:

■ a. Revising paragraph (b) introductory text; and

■ b. Adding paragraphs (b)(7) and (b)(8).

The revision and additions read as follows:

§ 240.14a–2 Solicitations to which § 240.14a–3 to § 240.14a–15 apply.

* * * * *

(b) Sections 240.14a–3 to 240.14a–6 (other than paragraphs 14a–6(g) and

14a–6(p)), § 240.14a–8, § 240.14a–10, and §§ 240.14a–12 to 240.14a–15 do not apply to the following:

* * * * *

(7) Any solicitation by or on behalf of any shareholder in connection with the formation of a nominating shareholder group pursuant to § 240.14a–11, provided that:

(i) The soliciting shareholder is not holding the registrant's securities with the purpose, or with the effect, of changing control of the registrant or to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the registrant could be required to include under § 240.14a–11(d);

(ii) Each written communication includes no more than:

(A) A statement of each soliciting shareholder's intent to form a nominating shareholder group in order to nominate one or more directors under § 240.14a–11;

(B) Identification of, and a brief statement regarding, the potential nominee or nominees or, where no nominee or nominees have been identified, the characteristics of the nominee or nominees that the shareholder intends to nominate, if any;

(C) The percentage of voting power of the registrant's securities that are entitled to be voted on the election of directors that each soliciting shareholder holds or the aggregate percentage held by any group to which the shareholder belongs; and

(D) The means by which shareholders may contact the soliciting party.

(iii) Any written soliciting material published, sent or given to shareholders in accordance with this paragraph must be filed by the shareholder with the Commission, under the registrant's Exchange Act file number, or, in the case of a registrant that is an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), under the registrant's Investment Company Act file number, no later than the date the material is first published, sent or given to shareholders. Three copies of the material must at the same time be filed with, or mailed for filing to, each national securities exchange upon which any class of securities of the registrant is listed and registered. The soliciting material must include a cover page in the form set forth in Schedule 14N (§ 240.14n–101) and the appropriate box on the cover page must be marked.

(iv) In the case of an oral solicitation made in accordance with the terms of this section, the nominating shareholder must file a cover page in the form set forth in Schedule 14N (§ 240.14n–101), with the appropriate box on the cover page marked, under the registrant's Exchange Act file number (or in the case of an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), under the registrant's Investment Company Act file number), no later than the date of the first such communication.

Instruction to paragraph (b)(7). The exemption provided in paragraph (b)(7) of this section shall not apply to a shareholder that subsequently engages in soliciting or other nominating activities outside the scope of § 240.14a–2(b)(8) and § 240.14a–11 in connection with the subject election of directors or is or becomes a member of any other group, as determined under section 13(d)(3) of the Act (15 U.S.C. 78m(d)(3) and § 240.13d–5(b)), or otherwise, with persons engaged in soliciting or other nominating activities in connection with the subject election of directors.

(8) Any solicitation by or on behalf of a nominating shareholder or nominating shareholder group in support of its nominee that is included or that will be included on the registrant's form of proxy in accordance with § 240.14a–11 or for or against the registrant's nominee or nominees, provided that:

(i) The soliciting party does not, at any time during such solicitation, seek directly or indirectly, either on its own or another's behalf, the power to act as proxy for a shareholder and does not furnish or otherwise request, or act on behalf of a person who furnishes or requests, a form of revocation, abstention, consent or authorization;

(ii) Any written communication includes:

(A) The identity of each nominating shareholder and a description of his or her direct or indirect interests, by security holdings or otherwise;

(B) A prominent legend in clear, plain language advising shareholders that a shareholder nominee is or will be included in the registrant's proxy statement and that they should read the registrant's proxy statement when available because it includes important information (or, if the registrant's proxy statement is publicly available, advising shareholders of that fact and encouraging shareholders to read the registrant's proxy statement because it includes important information). The legend also must explain to shareholders that they can find the registrant's proxy statement, other soliciting material, and any other relevant documents at no charge on the Commission's Web site; and

(iii) Any written soliciting material published, sent or given to shareholders in accordance with this paragraph must be filed by the nominating shareholder or nominating shareholder group with the Commission, under the registrant's Exchange Act file number, or, in the case of a registrant that is an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), under the registrant's Investment Company Act file number, no later than the date the material is first published, sent or given to shareholders. Three copies of the material must at the same time be filed with, or mailed for filing to, each national securities exchange upon which any class of securities of the registrant is listed and registered. The soliciting material must include a cover page in the form set forth in Schedule 14N (§ 240.14n–101) and the appropriate box on the cover page must be marked.

Instruction 1 to paragraph (b)(8). A nominating shareholder or nominating shareholder group may rely on the exemption provided in paragraph (b)(8) of this section only after receiving notice from the registrant in accordance with § 240.14a–11(g)(1) or § 240.14a–11(g)(3)(iv) that the registrant will include the nominating shareholder's or nominating shareholder group's nominee or nominees in its form of proxy.

Instruction 2 to paragraph (b)(8). Any solicitation by or on behalf of a nominating shareholder or nominating shareholder group in support of its nominee included or to be included on the registrant's form of proxy in accordance with § 240.14a–11 or for or against the registrant's nominee or nominees must be made in reliance on the exemption provided in paragraph (b)(8) of this section and not on any other exemption.

Instruction 3 to paragraph (b)(8). The exemption provided in paragraph (b)(8) of this section shall not apply to a person that subsequently engages in soliciting or other nominating activities outside the scope of § 240.14a–11 in connection with the subject election of directors or is or becomes a member of any other group, as determined under section 13(d)(3) of the Act (15 U.S.C. 78m(d)(3) and § 240.13d–5(b)), or otherwise, with persons engaged in soliciting or other nominating activities in connection with the subject election of directors.

* * * * *

■ 10. Amend § 240.14a–4 by:

■ a. Revising the first sentence of paragraph (b)(2) introductory text; and

■ b. Adding a sentence to the end paragraph (b)(2) concluding text.

The revision and addition read as follows:

§ 240.14a–4 Requirements as to proxy.

* * * * *

(b) * * *

(2) A form of proxy that provides for the election of directors shall set forth the names of persons nominated for election as directors, including any person whose nomination by a shareholder or shareholder group satisfies the requirements of § 240.14a–11, an applicable state or foreign law provision, or a registrant's governing documents as they relate to the inclusion of shareholder director nominees in the registrant's proxy materials. * * *

* * * Means to grant authority to vote for any nominees as a group or to withhold authority for any nominees as a group may not be provided if the form of proxy includes one or more shareholder nominees in accordance with § 240.14a–11, an applicable state or foreign law provision, or a registrant's governing documents as they relate to the inclusion of shareholder director nominees in the registrant's proxy materials.

* * * * *

■ 11. Amend § 240.14a–5 by:

■ a. Revising paragraph (e)(1) to remove "and" at the end of the paragraph;

■ b. Revising paragraph (e)(2) to remove the period at the end of the paragraph and add in its place "; and"; and

■ c. Adding paragraph (e)(3) to read as follows:

§ 240.14a–5 Presentation of information in proxy statement.

* * * * *

(e) * * *

(3) The deadline for submitting nominees for inclusion in the registrant's proxy statement and form of proxy pursuant to § 240.14a–11, an applicable state or foreign law provision, or a registrant's governing documents as they relate to the inclusion of shareholder director nominees in the registrant's proxy materials for the registrant's next annual meeting of shareholders.

* * * * *

■ 12. Amend § 240.14a–6 by:

a. Redesignating paragraphs (a)(4), (a)(5), (a)(6), and (a)(7) as paragraphs (a)(5), (a)(6), (a)(7), and (a)(8) respectively;

■ b. Adding new paragraph (a)(4);

■ c. Adding a sentence at the end of Note 3 to paragraph (a); and

■ d. Adding paragraph (p).

The revisions and additions read as follows:

§ 240.14a–6 Filing requirements.

(a) * * *

(4) A shareholder nominee for director included pursuant to § 240.14a–11, an applicable state or foreign law provision, or a registrant's governing documents as they relate to the inclusion of shareholder director nominees in the registrant's proxy materials.

* * * * *

Note 3. * * * The inclusion of a shareholder nominee in the registrant's proxy materials pursuant to § 240.14a–11, an applicable state or foreign law provision, or a registrant's governing documents as they relate to the inclusion of shareholder director nominees in the registrant's proxy materials does not constitute a "solicitation in opposition" for purposes of Rule 14a–6(a) (§ 240.14a–6(a)), even if the registrant opposes the shareholder nominee and solicits against the shareholder nominee and in favor of a registrant nominee.

* * * * *

(p) *Solicitations subject to § 240.14a–11.* Any soliciting material that is published, sent or given to shareholders in connection with § 240.14a–2(b)(7) or (b)(8) must be filed with the Commission as specified in that section.

■ 13. Amend § 240.14a–8 by revising paragraph (i)(8) as follows:

§ 240.14a–8 Shareholder proposals.

* * * * *

(i) * * *

(8) *Director elections:* If the proposal:

(i) Would disqualify a nominee who is standing for election;

(ii) Would remove a director from office before his or her term expired;

(iii) Questions the competence, business judgment, or character of one or more nominees or directors;

(iv) Seeks to include a specific individual in the company's proxy materials for election to the board of directors; or

(v) Otherwise could affect the outcome of the upcoming election of directors.

* * * * *

■ 14. Amend § 240.14a–9 by adding a paragraph (c), removing the authority citation following the section, and redesignating notes (a), (b), (c), and (d) as a., b., c., and d.

The addition reads as follows:

§ 240.14a–9 False or misleading statements.

* * * * *

(c) No nominee, nominating shareholder or nominating shareholder group, or any member thereof, shall cause to be included in a registrant's proxy materials, either pursuant to the Federal proxy rules, an applicable state or foreign law provision, or a registrant's governing documents as they relate to including shareholder nominees for director in a registrant's proxy materials, include in a notice on Schedule 14N (§ 240.14n–101), or include in any other related communication, any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to a solicitation for the same meeting or subject matter which has become false or misleading.

* * * * *

■ 15. Add § 240.14a–11 to read as follows:

§ 240.14a–11 Shareholder nominations.

(a) *Applicability.* In connection with an annual (or a special meeting in lieu of an annual) meeting of shareholders, or a written consent in lieu of such meeting, at which directors are elected, a registrant will be required to include in its proxy statement and form of proxy the name of a person or persons nominated by a shareholder or group of shareholders for election to the board of directors and include in its proxy statement the disclosure about such nominee or nominees and the nominating shareholder or members of the nominating shareholder group as specified in Item 5 of Schedule 14N (§ 240.14n–101), provided that the conditions set forth in paragraph (b) of this section are satisfied. This rule will not apply to a registrant if:

(1) The registrant is subject to the proxy rules solely because it has a class of debt securities registered under section 12 of the Exchange Act (15 U.S.C. 78*l*); or

(2) Applicable state or foreign law or a registrant's governing documents prohibit the registrant's shareholders from nominating a candidate or candidates for election as director.

(b) *Eligibility.* A shareholder nominee or nominees shall be included in a registrant's proxy statement and form of proxy if the following requirements are satisfied:

(1) The nominating shareholder individually, or the nominating shareholder group in the aggregate, holds at least 3% of the total voting power of the registrant's securities that are entitled to be voted on the election of directors at the annual (or a special

meeting in lieu of the annual) meeting of shareholders or on a written consent in lieu of such meeting, on the date the nominating shareholder or nominating shareholder group files the notice on Schedule 14N (§ 240.14n–101) with the Commission and transmits the notice to the registrant;

Instruction 1 to paragraph (b)(1). In the case of a registrant other than an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), for purposes of (b)(1) of this section, in determining the total voting power of the registrant's securities that are entitled to be voted on the election of directors, the nominating shareholder or nominating shareholder group may rely on information set forth in the registrant's most recent quarterly or annual report, and any current report subsequent thereto, filed with the Commission pursuant to this Act, unless the nominating shareholder or nominating shareholder group knows or has reason to know that the information contained therein is inaccurate. In the case of a registrant that is an investment company registered under the Investment Company Act of 1940, for purposes of (b)(1) of this section, in determining the total voting power of the registrant's securities that are entitled to be voted on the election of directors, the nominating shareholder or nominating shareholder group may rely on information set forth in the following documents, unless the nominating shareholder or nominating shareholder group knows or has reason to know that the information contained therein is inaccurate:

a. In the case of a registrant that is a series company as defined in Rule 18f–2(a) under the Investment Company Act of 1940 (§ 270.18f–2(a) of this chapter), the Form 8–K (§ 249.308 of this chapter) described in Instruction 2 to paragraph (b)(1) of this section; or

b. In the case of other investment companies, the registrant's most recent annual or semi-annual report filed with the Commission on Form N–CSR (§ 249.331 and § 274.128 of this chapter).

Instruction 2 to paragraph (b)(1). If the registrant is an investment company that is a series company (as defined in § 270.18f–2(a) of this chapter), the registrant must disclose pursuant to Item 5.08 of Form 8–K (§ 249.308 of this chapter) the total number of shares of the registrant outstanding and entitled to be voted (or if the votes are to be cast on a basis other than one vote per share, then the total number of votes entitled to be voted and the basis for allocating such votes) on the election of directors as of the end of the most recent calendar quarter.

Instruction 3 to paragraph (b)(1).

a. When determining the total voting power of the registrant's securities, which is the denominator in the calculation of the percentage of voting power held by the nominating shareholder individually or the nominating shareholder group in the aggregate, calculate the aggregate number of votes derived from all classes of securities of the registrant that are entitled to vote on the election of directors regardless of whether solicitation of a proxy with respect to those securities would require compliance with Exchange Act Regulation 14A (§ 240.14a–1 *et seq.*).

b. When determining the total voting power of the registrant's securities held by the nominating shareholder or any member of the nominating shareholder group, which is the numerator in the calculation of the percentage:

1. Calculate the number of votes derived only from securities with respect to which solicitation of a proxy would require compliance with Exchange Act Regulation 14A (§ 240.14a–1 *et seq.*) and over which the nominating shareholder or any member of the nominating shareholder group, as the case may be, has voting power and investment power, either directly or through any person acting on their behalf;

2. Notwithstanding the voting power calculation specified in paragraph b.1. of this instruction, add to the result of the calculation specified in paragraph b.1. of this instruction any votes attributable to securities with respect to which solicitation of a proxy would require compliance with Exchange Act Regulation 14A (§ 240.14a–1 *et seq.*) that have been loaned by or on behalf of the nominating shareholder or any member of the nominating shareholder group to another person, if the nominating shareholder or member of the nominating shareholder group, as the case may be, or any person acting on their behalf, has the right to recall the loaned securities, and will recall the loaned securities upon being notified that any of the nominating shareholder's or group's nominees will be included in the registrant's proxy statement and proxy card; and

3. Subtract from the result of the calculation specified in paragraphs b.1. and b.2. of this instruction the number of votes attributable to securities of the registrant entitled to vote on the election of directors, regardless of whether solicitation of a proxy with respect to those securities would require compliance Exchange Act Regulation 14A (§ 240.14a–1 *et seq.*), that the nominating shareholder or any member of the nominating shareholder group, as the case may be, or any person acting on their behalf, has sold in a short sale, as defined in 17 CFR 242.200(a), that is not closed out, or has borrowed for purposes other than a short sale.

c. For purposes of the voting power calculation in paragraph b.1. of this instruction:

1. A shareholder has voting power directly only when the shareholder has the power to vote or direct the voting, and investment power directly only when the shareholder has the power to dispose or direct the disposition, of the securities; and

2. A securities intermediary (as defined in § 240.17Ad–20(b)) shall not have voting power or investment power over securities for purposes of paragraph b.1. of this instruction solely because such intermediary holds such securities by or on behalf of another person, notwithstanding that pursuant to the rules of a national securities exchange such intermediary may vote or direct the voting of such securities without instruction.

Instruction 4 to paragraph (b)(1). If a registrant has more than one class of outstanding securities entitled to vote on the election of directors and those classes do not vote together in the election of all directors, then the voting power of the registrant's securities for purposes of the calculation of both the numerator and denominator specified in Instruction 3 to paragraph (b)(1) should be determined only on the basis of the voting power of the class or classes of securities that would be voting together on the election of the person or persons sought to be nominated by the nominating shareholder or the nominating shareholder group.

(2) The nominating shareholder or each member of the nominating shareholder group has held the amount of securities that are used for purposes of satisfying the minimum ownership requirement of paragraph (b)(1) of this section continuously for at least three years as of the date the notice on Schedule 14N (§ 240.14n–101) is filed with the Commission and transmitted to the registrant and must continue to hold that amount of securities through the date of the subject election of directors;

Instruction to paragraph (b)(2). To determine whether the amount of securities that are used for purposes of satisfying the minimum ownership requirement of paragraph (b)(1) has been held continuously during the three year period prior to the date the Schedule 14N (§ 240.14n–101) is filed and during the period after the Schedule 14N is filed through the date of the subject election of directors, and with respect to all points in time during those periods:

a. Include only the amount of securities with respect to which a solicitation of a proxy would require compliance with Exchange Act Regulation 14A (§ 240.14a–1 *et seq.*) and over which the nominating shareholder or the member of the nominating shareholder group, as the case may be, has voting power and investment power, either directly or through any person acting on their behalf;

b. Notwithstanding the voting power determination specified in paragraph a. of this instruction, include the amount of securities that have been loaned by or on behalf of the nominating shareholder or any member of the nominating shareholder group to another person, if the nominating shareholder or member of the nominating shareholder group, as the case may be, or any person acting on their behalf:

1. Has the right to recall the loaned securities; and

2. With respect to the period from the date the Schedule 14N (§ 240.14n–01) is filed through the date of the subject election of directors, will recall the loaned securities upon being notified that any of the person's nominees will be included in the registrant's proxy statement and proxy card;

c. Reduce the amount of securities held by the amount of securities, on a class basis, that the nominating shareholder or any member of the nominating shareholder group, as the case may be, or any person acting on their

behalf, sold in a short sale, as defined in 17 CFR 242.200(a), during the periods, or borrowed for purposes other than a short sale; and

d. Adjust the amount of securities held to give effect to any changes in the amount of securities during the periods resulting from stock splits, reclassifications or other similar adjustments by the registrant.

(3) The nominating shareholder or each member of the nominating shareholder group provides proof of ownership of the amount of securities that are used for purposes of satisfying the ownership and holding period requirements of paragraphs (b)(1) and (b)(2) of this section. If the nominating shareholder or each member of the nominating shareholder group is not the registered holder of the securities, the nominating shareholder or each member of the nominating shareholder group must provide proof of ownership in the form of one or more written statements from the registered holder of the nominating shareholder's securities (or the brokers or banks through which those securities are held) verifying that, as of a date within seven calendar days prior to filing the notice on Schedule 14N (§ 240.14n–101) with the Commission and transmitting the notice to the registrant, the nominating shareholder or each member of the nominating shareholder group, continuously held the amount of securities being used to satisfy the ownership threshold for a period of at least three years. The written statement or statements proving ownership must be attached as an appendix to Schedule 14N on the date the notice is filed with the Commission and transmitted to the registrant, and provide the information specified in Item 4 of Schedule 14N. In the alternative, if the nominating shareholder or member of the nominating shareholder group has filed a Schedule 13D (§ 240.13d–101), Schedule 13G (§ 240.13d–102), Form 3 (§ 249.103 of this chapter), Form 4 (§ 249.104 of this chapter), and/or Form 5 (§ 249.105 of this chapter), or amendments to those documents, reflecting ownership of the securities as of or before the date on which the three-year eligibility period begins, the nominating shareholder or member of the nominating shareholder group may attach the filing as an appendix to the Schedule 14N or incorporate the filing by reference into the Schedule 14N;

Instruction to paragraph (b)(3). If the nominating shareholder or member of the nominating shareholder group must provide proof of ownership in the form of a written statement with respect to securities held through a broker or bank that is a participant in the Depository Trust Company or other clearing agency acting as a securities depository, then a statement from such broker or bank will satisfy the requirements of paragraph (b)(3) of this section. If the securities are held through a broker or bank (*e.g.,* in an omnibus account) that is not a participant in a clearing agency acting as a securities depository, the nominating shareholder or member of the nominating shareholder group must also obtain and submit a separate written statement specified in the Instruction to Item 4 of Schedule 14N (§ 240.14n–101).

(4) The nominating shareholder or each member of the nominating shareholder group provides a statement, as specified in Item 4(b) of Schedule 14N (§ 240.14n–101), on the date the notice on Schedule 14N is filed with the Commission and transmitted to the registrant, that the nominating shareholder or each member of the nominating shareholder group intends to continue to hold the amount of securities that are used for purposes of satisfying the minimum ownership requirement of paragraph (b)(1) of this section through the date of the meeting;

(5) The nominating shareholder or each member of the nominating shareholder group provides a statement, as specified in Item 4(b) of Schedule 14N (§ 240.14n–101), on the date the notice on Schedule 14N is filed with the Commission and transmitted to the registrant, regarding the nominating shareholder's or group's intent with respect to continued ownership of the registrant's securities after the election;

(6) The nominating shareholder (or where there is a nominating shareholder group, each member of the nominating shareholder group) is not holding any of the registrant's securities with the purpose, or with the effect, of changing control of the registrant or to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the registrant could be required to include under paragraph (d) of this section;

(7) Neither the nominee nor the nominating shareholder (or where there is a nominating shareholder group, any member of the nominating shareholder group) has an agreement with the registrant regarding the nomination of the nominee;

Instruction to paragraph (b)(7). Negotiations between the nominee, the nominating shareholder or nominating shareholder group and the nominating committee or board of the registrant to have the nominee included in the registrant's proxy statement and form of proxy as a registrant nominee, where those negotiations are unsuccessful, or negotiations that are limited to whether the registrant is required to include the shareholder nominee in the registrant's proxy statement and form of proxy in accordance with this section, will not represent a direct or indirect agreement with the registrant.

(8) The nominee's candidacy or, if elected, board membership would not violate controlling Federal law, State law, foreign law, or rules of a national securities exchange or national securities association (other than rules regarding director independence) or, in the case that the nominee's candidacy or, if elected, board membership would violate such laws or rules, such violation could not be cured by the time provided in paragraph (g)(2) of this section;

(9) In the case of a registrant other than an investment company, the nominee meets the objective criteria for "independence" of the national securities exchange or national securities association rules applicable to the registrant, if any, or, in the case of a registrant that is an investment company, the nominee is not an "interested person" of the registrant as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(19));

Instruction to paragraph (b)(9). For purposes of this provision, the nominee would be required to meet the definition of "independence" that is generally applicable to directors of the registrant and not any particular definition of independence applicable to members of the audit committee of the registrant's board of directors. To the extent a national securities exchange or national securities association rule imposes a standard regarding independence that requires a subjective determination by the board or a group or committee of the board (for example, requiring that the board of directors or any group or committee of the board of directors make a determination regarding the existence of factors material to a determination of a nominee's independence), the nominee would not be required to meet the subjective determination of independence as part of the shareholder nomination process.

(10) The nominating shareholder or nominating shareholder group provides notice to the registrant on Schedule 14N (§ 240.14n–101), as specified by § 240.14n–1, of its intent to require that the registrant include that shareholder's or group's nominee in the registrant's proxy statement and form of proxy. This notice must be transmitted to the registrant on the date it is filed with the Commission. The notice must be filed with the Commission and transmitted to the registrant no earlier than 150 calendar days, and no later than 120 calendar days, before the anniversary of the date that the registrant mailed its proxy materials for the prior year's annual meeting, except that, if the registrant did not hold an annual

meeting during the prior year, or if the date of the meeting has changed by more than 30 calendar days from the prior year, or if the registrant is holding a special meeting or conducting an election of directors by written consent, then the nominating shareholder or nominating shareholder group must transmit the notice to the registrant and file its notice with the Commission a reasonable time before the registrant mails its proxy materials, as specified by the registrant in a Form 8–K (§ 249.308 of this chapter) filed pursuant to Item 5.08 of Form 8–K; and

Instruction 1 to paragraph (b)(10). If the registrant held a meeting the previous year and the date of the current year's annual meeting has not changed by more than 30 calendar days from the date of the previous year's annual meeting, the window period for filing a notice on Schedule 14N (§ 240.14n–101) with the Commission and transmitting that notice to the registrant should be calculated by determining the release date disclosed in the registrant's previous year's proxy statement, increasing the year by one, and counting back 150 calendar days and 120 calendar days for the beginning and end of the window period, respectively. Where the 120 calendar day deadline falls on a Saturday, Sunday or holiday, the deadline will be treated as the first business day following the Saturday, Sunday or holiday.

Instruction 2 to paragraph (b)(10). If the registrant did not hold an annual meeting the previous year, or if the date of the current year's annual meeting has been changed by more than 30 calendar days from the date of the previous year's annual meeting, or if the registrant is holding a special meeting or conducting the election of directors by written consent, the registrant must disclose pursuant to Item 5.08 of Form 8–K (§ 249.308 of this chapter) the date by which a shareholder or group must submit the notice required pursuant to paragraph (b)(10) of this section, which date shall be a reasonable time prior to the date the registrant mails its proxy materials for the meeting.

(11) The nominating shareholder or nominating shareholder group provides the certifications required by Schedule 14N (§ 240.14n–101) on the date the notice on Schedule 14N is filed with the Commission and transmitted to the registrant.

Instruction to paragraph (b). A registrant will not be required to include a nominee or nominees submitted by a nominating shareholder or nominating shareholder group pursuant to this section if the nominating shareholder or any member of the nominating shareholder group also submits any other nomination to that registrant and/or is participating in more than one nominating shareholder group for that registrant. In addition, a registrant will not be required to include a nominee or nominees if a nominating shareholder or member of a nominating shareholder group:

a. Is or becomes a member of any other group, as determined under section 13(d)(3) of the Act (15 U.S.C. 78m(d)(3) and § 240.13d–5(b)), or otherwise, with persons engaged in soliciting or other nominating activities in connection with the subject election of directors;

b. Is separately conducting a solicitation in connection with the subject election of directors other than a solicitation subject to § 240.14a–2(b)(8) in relation to those nominees it has nominated pursuant to this section or for or against the registrant's nominees; or

c. Is acting as a participant in another person's solicitation in connection with the subject election of directors.

(c) *Statement of support.* A registrant will be required to include a statement of support submitted by a nominating shareholder or nominating shareholder group in Item 5(i) of the notice on Schedule 14N (§ 240.14n-101), provided that the statement of support does not exceed 500 words per nominee. If a statement of support submitted by a nominating shareholder or nominating shareholder group exceeds 500 words per nominee, the registrant will be required to include the nominee or nominees, provided that the eligibility requirements and other conditions of the rule are satisfied, but the registrant may exclude the supporting statement(s).

(d) *Maximum number of shareholder nominees.* (1) A registrant will be required to include in its proxy statement and form of proxy one shareholder nominee or the number of nominees that represents 25% of the total number of the registrant's board of directors, whichever is greater, submitted by a nominating shareholder or nominating shareholder group pursuant to this section, subject to the limitations in paragraphs (d)(2), (d)(3), (d)(4), and (d)(5) of this section. A registrant may exclude a nominee or nominees if including the nominee or nominees would result in the registrant exceeding the maximum number of nominees it is required to include in its proxy statement and form of proxy pursuant to this provision.

Instruction to paragraph (d)(1). Depending on board size, 25% of the board may not result in a whole number. In those instances, the registrant will round down to the closest whole number below 25% to determine the maximum number of shareholder nominees for director that the registrant is required to include in its proxy statement and form of proxy.

(2) Where the registrant has one or more directors currently serving on its board of directors who were elected as a shareholder nominee pursuant to this section, and the term of that director or directors extends past the election of directors for which it is soliciting proxies, the registrant will not be required to include in the proxy statement and form of proxy more shareholder nominees than could result in the total number of directors who were elected as shareholder nominees pursuant to this section and serving on the board being more than one shareholder nominee or 25% of the total number of the registrant's board of directors, whichever is greater.

(3) Where the registrant has multiple classes of securities and each class is entitled to elect a specified number of directors, the registrant will be required to include the lesser of the number of nominees that the nominating shareholder's or group's class is entitled to elect or 25% of the registrant's board of directors, but in no case less than one nominee.

(4) Where the registrant agrees to include in its proxy statement and form of proxy, as an unopposed registrant nominee, the nominee or nominees of the nominating shareholder or nominating shareholder group that otherwise would be eligible under this section to have its nominees included in the registrant's proxy materials, the nominee will be considered a shareholder nominee for purposes of calculating the maximum number of shareholder nominees that must be included in the registrant's proxy statement and form of proxy, provided that the nominating shareholder or nominating shareholder group filed its notice on Schedule 14N (§ 240.14n–101) before beginning communications with the registrant about the nomination.

(5) A nominee included in a registrant's proxy statement and form of proxy as a result of an agreement between the nominee or nominating shareholder (or where there is a nominating shareholder group, any member of the nominating shareholder group) and the registrant, other than as specified in paragraph (d)(4) of this section, will not be counted as a shareholder nominee for purposes of calculating the maximum number of shareholder nominees that the registrant is required to include in its proxy statement and form of proxy.

Instruction to paragraph (d)(5). Negotiations between the nominee, the nominating shareholder or nominating shareholder group and the nominating committee or board of the registrant to have the nominee included in the registrant's proxy statement and form of proxy as a registrant nominee, where those negotiations are unsuccessful, or negotiations that are limited to whether the registrant is required to include the shareholder nominee in the registrant's proxy statement and form of proxy in accordance with this section, will not represent a direct or indirect agreement with the registrant.

(e) *Order of priority for shareholder nominees.* (1) In the event that more than one eligible shareholder or group of shareholders submits a nominee or nominees for inclusion in the registrant's proxy materials pursuant to this section, the registrant shall include in the proxy statement and form of proxy the nominee or nominees of the nominating shareholder or nominating shareholder group with the highest qualifying voting power percentage disclosed as of the date of filing the Schedule 14N (§ 240.14n–101) (as determined in calculating ownership to satisfy the requirement as specified in paragraph (b)(1) of this section) from which the registrant received a notice filed and transmitted as specified in paragraph (b)(10) of this section, up to and including the total number of nominees required to be included by the registrant pursuant to this section. Where the nominating shareholder or nominating shareholder group with the highest qualifying voting power percentage that is otherwise eligible to rely on this section and that filed and transmitted the notice as specified in paragraph (b)(10) of this section does not nominate the maximum number of individuals required to be included by the registrant, the nominee or nominees of the nominating shareholder or nominating shareholder group with the next highest qualifying voting power percentage from which the registrant received the notice filed and transmitted as specified in paragraph (b)(10) of this section would be included in the registrant's proxy statement and form of proxy, if any, up to and including the total number required to be included by the registrant. This process would continue until the registrant has included the maximum number of nominees it is required to include in its proxy statement and form of proxy pursuant to paragraph (d) of this section or the registrant exhausts the list of eligible nominees.

(2) Prior to the time a registrant has commenced printing its proxy statement and form of proxy, if a nominating shareholder or nominating shareholder group withdraws or is disqualified, a registrant will be required to include in its proxy statement and form of proxy the nominee or nominees of the nominating shareholder or nominating shareholder group with the next highest qualifying voting power percentage, disclosed as of the date of filing the Schedule 14N (§ 240.14n–101) (as determined in calculating ownership to satisfy the requirement as specified in paragraph (b)(1) of this section), from which the registrant received a notice filed and transmitted as specified in paragraph (b)(10) of this section, if any, up to and including the total number required to be included by the registrant. This process would continue until the registrant included the maximum number of nominees it is required to include in its proxy statement and form of proxy pursuant to paragraph (d) of this section or the registrant exhausts the list of eligible nominees. If the registrant has commenced printing its proxy statement and form of proxy, the registrant will not be required to include a nominee or nominees in its proxy statement and form of proxy in place of a nominee or nominees that has withdrawn or has been disqualified.

(3) If a nominee or nominees withdraws or is disqualified after the registrant provides notice to the nominating shareholder or nominating shareholder group of the registrant's intent to include the nominee or nominees in its proxy statement and form of proxy, the registrant will be required to include in its proxy statement and form of proxy any other eligible nominee submitted by that nominating shareholder or nominating shareholder group. If that nominating shareholder or nominating shareholder group did not include any other eligible nominees in its notice filed on Schedule 14N (§ 240.14n–101), then the registrant will be required to include the nominee or nominees of the nominating shareholder or nominating shareholder group with the next highest voting power percentage, disclosed as of the date of filing the Schedule 14N (§ 240.14n–101) (as determined in calculating ownership to satisfy the requirement as specified in paragraph (b)(1) of this section), from which the registrant received a notice filed and transmitted as specified in paragraph (b)(10) of this section, if any, up to and including the total number required to be included by the registrant. This process would continue until the registrant included the maximum number of nominees it is required to include in its proxy statement and form of proxy pursuant to paragraph (d) of this section or the registrant exhausts the list of eligible nominees. If the registrant has commenced printing its proxy statement and form of proxy, the registrant will not be required to include a nominee or nominees in its proxy statement and form of proxy in place of a nominee or nominees that has withdrawn or has been disqualified.

(4) Notwithstanding the other provisions of this paragraph, if a registrant has multiple classes of securities and each class is entitled to elect a specified number of directors, and nominating shareholders or groups of nominating shareholders of more than one of those classes submit a number of eligible nominees for inclusion in the registrant's proxy materials pursuant to this section that is greater than 25% of the total number of the registrant's board of directors, the registrant shall include in the proxy statement and form of proxy the nominee or nominees of the nominating shareholders or groups on the basis of the proportion of total voting power in the election of directors attributable to each class, rounding to the closest whole number, if necessary, and otherwise in accordance with paragraph (e) of this section.

Instruction 1 to paragraph (e). In determining the priority of the nominee or nominees to be included in the registrant's proxy materials, the registrant will be required to consider only the nominee or nominees that would otherwise be required to be included under the provisions of this section.

Instruction 2 to paragraph (e). If the registrant is including shareholder director nominees from more than one nominating shareholder or nominating shareholder group, as described in this paragraph, and including all of the shareholder director nominees of the nominating shareholder or nominating shareholder group that is last in priority would result in exceeding the maximum number required under paragraph (d) of this section, the nominating shareholder or nominating shareholder group that is last in priority may specify which of its nominees are to be included in the registrant's proxy materials.

(f) *False or misleading statements.* The registrant is not responsible for any information in the notice from the nominating shareholder or nominating shareholder group submitted as required by paragraph (b)(10) of this section or otherwise provided by the nominating shareholder or nominating shareholder group that is included in the registrant's proxy materials.

(g) *Determinations regarding eligibility.* (1) If the registrant determines that it will include a shareholder nominee, it must notify the nominating shareholder or nominating shareholder group (or their authorized representative) upon making this determination. In no event should the notification be postmarked or transmitted electronically later than 30 calendar days before it files its definitive proxy statement and form of proxy with the Commission.

(2) If the registrant determines that it may exclude a shareholder nominee pursuant to a provision in paragraph (a), (b), (d), or (e) of this section, or exclude a statement of support pursuant to

paragraph (c) of this section, the registrant must notify in writing the nominating shareholder or nominating shareholder group (or their authorized representative) of this determination. This notice must be postmarked or transmitted electronically to the nominating shareholder or nominating shareholder group (or their authorized representative) no later than 14 calendar days after the close of the period for submission specified in paragraph (b)(10) of this section.

(i) The registrant's notice to the nominating shareholder or nominating shareholder group (or their authorized representative) that it has determined that it may exclude a shareholder nominee or statement of support must include an explanation of the registrant's basis for determining that it may exclude the nominee or statement of support.

(ii) The nominating shareholder or nominating shareholder group shall have 14 calendar days after receipt of the registrant's notice pursuant to paragraph (g)(2)(i) of this section to respond to the registrant's notice and correct any eligibility or procedural deficiencies identified in that notice. The nominating shareholder's or nominating shareholder group's response must be postmarked or transmitted electronically to the registrant no later than 14 calendar days after receipt of the registrant's notice.

(3) If the registrant intends to exclude a shareholder nominee or statement of support, after providing the requisite notice of and time for the nominating shareholder or nominating shareholder group to remedy any eligibility or procedural deficiencies in the nomination or statement, the registrant must provide notice of the basis for its determination to the Commission no later than 80 calendar days before it files its definitive proxy statement and form of proxy with the Commission. The Commission staff may permit the registrant to make its submission later than 80 calendar days before the registrant files its definitive proxy statement and form of proxy if the registrant demonstrates good cause for missing the deadline.

(i) The registrant's notice to the Commission shall include:

(A) Identification of the nominating shareholder or each member of the nominating shareholder group, as applicable;

(B) The name of the nominee or nominees;

(C) An explanation of the registrant's basis for determining that the registrant may exclude the nominee or nominees or a statement of support; and

(D) A supporting opinion of counsel when the registrant's basis for excluding a nominee or nominees relies on a matter of state or foreign law.

(ii) The registrant must file its notice to the Commission and simultaneously provide a copy to the nominating shareholder or each member of the nominating shareholder group (or their authorized representative). At the time the registrant files its notice, the registrant also may seek an informal statement of the Commission staff's views with regard to its determination to exclude from its proxy materials a nominee or nominees or a statement of support. The Commission staff may provide an informal statement of its views to the registrant along with a copy to the nominating shareholder or nominating shareholder group (or their authorized representative);

(iii) The nominating shareholder or nominating shareholder group may submit a response to the registrant's notice to the Commission. This response must be postmarked or transmitted electronically to the Commission no later than 14 calendar days after the nominating shareholder's or nominating shareholder group's receipt of the registrant's notice to the Commission. The nominating shareholder or nominating shareholder group must simultaneously provide to the registrant a copy of its response to the Commission.

(iv) If the registrant seeks an informal statement of the Commission staff's views with regard to its determination to exclude a shareholder nominee or nominees, the registrant shall provide the nominating shareholder or nominating shareholder group (or their authorized representative) with notice, either postmarked or transmitted electronically, promptly following receipt of the staff's response, of whether it will include or exclude the shareholder nominee; and

(v) The exclusion of a shareholder nominee or a statement of support by a registrant where that exclusion is not permissible under paragraph (a), (b), (c), (d), or (e) of this section shall be a violation of this section.

Instruction 1 to paragraph (g). When a registrant must provide a notice to a nominating shareholder, member of a nominating shareholder group, or authorized representative of a nominating shareholder group, the registrant is responsible for providing the notice in a manner that evidences timely transmission. Where a nominating shareholder, member of a nominating shareholder group, or authorized representative of a nominating shareholder group responds to a notice, the nominating shareholder, member of a nominating shareholder group, or authorized representative of a nominating shareholder group is responsible for providing the response in a manner that evidences timely transmission.

Instruction 2 to paragraph (g). Neither the composition of the nominating shareholder group nor the shareholder nominee may be changed as a means to correct a deficiency identified in the registrant's notice to the nominating shareholder or nominating shareholder group under paragraph (g)(2) of this section; however, where a nominating shareholder or nominating shareholder group submits a number of nominees that exceeds the maximum number required to be included by the registrant under the circumstances set forth in paragraph (d) of this section, the nominating shareholder or nominating shareholder group may specify which nominee or nominees are not to be included in the registrant's proxy materials.

Instruction 3 to paragraph (g). Unless otherwise indicated in this section, the burden is on the registrant to demonstrate that it may exclude a nominee or statement of support.

■ 16. Amend § 240.14a–12 by removing the heading following paragraph (c)(2)(iii) "Instructions to § 240.14a–12"; by removing the numbers 1. and 2. of instructions 1 and 2 to § 240.14a–12 and adding in their places the phrases "*Instruction 1 to § 240.14a–12.*" and "*Instruction 2 to § 240.14a–12.*", respectively; and adding Instruction 3 to § 240.14a–12 to read as follows:

§ 240.14a–12 Solicitation before furnishing a proxy statement.

* * * * *

Instruction 3 to § 240.14a–12. Inclusion of a nominee pursuant to § 240.14a–11, an applicable state or foreign law provision, or a registrant's governing documents as they relate to the inclusion of shareholder director nominees in the registrant's proxy materials, or solicitations by a nominating shareholder or nominating shareholder group that are made in connection with that nomination constitute solicitations in opposition subject to § 240.14a–12(c), except for purposes of § 240.14a–6(a).

■ 17. Add § 240.14a–18 to read as follows:

§ 240.14a–18 Disclosure regarding nominating shareholders and nominees submitted for inclusion in a registrant's proxy materials pursuant to applicable state or foreign law, or a registrant's governing documents.

To have a nominee included in a registrant's proxy materials pursuant to a procedure set forth under applicable state or foreign law, or the registrant's governing documents addressing the inclusion of shareholder director nominees in the registrant's proxy materials, the nominating shareholder or nominating shareholder group must

provide notice to the registrant of its intent to do so on a Schedule 14N (§ 240.14n–101) and file that notice, including the required disclosure, with the Commission on the date first transmitted to the registrant. This notice shall be postmarked or transmitted electronically to the registrant by the date specified by the registrant's advance notice provision or, where no such provision is in place, no later than 120 calendar days before the anniversary of the date that the registrant mailed its proxy materials for the prior year's annual meeting, except that, if the registrant did not hold an annual meeting during the prior year, or if the date of the meeting has changed by more than 30 calendar days from the prior year, then the nominating shareholder or nominating shareholder group must provide notice a reasonable time before the registrant mails its proxy materials, as specified by the registrant in a Form 8–K (§ 249.308 of this chapter) filed pursuant to Item 5.08 of Form 8–K.

Instruction to § 240.14a–18. The registrant is not responsible for any information provided in the Schedule 14N (§ 240.14n–101) by the nominating shareholder or nominating shareholder group, which is submitted as required by this section or otherwise provided by the nominating shareholder or nominating shareholder group that is included in the registrant's proxy materials.

■ 18. Amend § 240.14a–101 by:

■ a. Revising Item 7 as follows:

■ i. Redesignating paragraph (e) as paragraph (g); and

■ ii. Adding new paragraph (e) and paragraph (f); and

■ b. Adding paragraphs (18) and (19) to Item 22(b).

The additions read as follows:

§ 240.14a–101 Schedule 14A. Information required in proxy statement.

SCHEDULE 14A INFORMATION

* * * * *

Item 7. * * *

* * * * *

(e) If a shareholder nominee or nominees are submitted to the registrant for inclusion in the registrant's proxy materials pursuant to § 240.14a–11 and the registrant is not permitted to exclude the nominee or nominees pursuant to the provisions of § 240.14a–11, the registrant must include in its proxy statement the disclosure required from the nominating shareholder or nominating shareholder group under Item 5 of § 240.14n–101 with regard to the nominee or nominees and the nominating shareholder or nominating shareholder group.

Instruction to Item 7(e). The information disclosed pursuant to paragraph (e) of this Item will not be deemed incorporated by reference into any filing under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), or the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), except to the extent that the registrant specifically incorporates that information by reference.

(f) If a registrant is required to include a shareholder nominee or nominees submitted to the registrant for inclusion in the registrant's proxy materials pursuant to a procedure set forth under applicable state or foreign law, or the registrant's governing documents providing for the inclusion of shareholder director nominees in the registrant's proxy materials, the registrant must include in its proxy statement the disclosure required from the nominating shareholder or nominating shareholder group under Item 6 of § 240.14n–101 with regard to the nominee or nominees and the nominating shareholder or nominating shareholder group.

Instruction to Item 7(f). The information disclosed pursuant to paragraph (f) of this Item will not be deemed incorporated by reference into any filing under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), or the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), except to the extent that the registrant specifically incorporates that information by reference.

* * * * *

Item 22. Information required in investment company proxy statement.

* * * * *

(b) * * *

(18) If a shareholder nominee or nominees are submitted to the Fund for inclusion in the Fund's proxy materials pursuant to § 240.14a–11 and the Fund is not permitted to exclude the nominee or nominees pursuant to the provisions of § 240.14a–11, the Fund must include in its proxy statement the disclosure required from the nominating shareholder or nominating shareholder group under Item 5 of § 240.14n–101 with regard to the nominee or nominees and the nominating shareholder or nominating shareholder group.

Instruction to paragraph (b)(18). The information disclosed pursuant to paragraph (b)(18) of this Item will not be deemed incorporated by reference into any filing under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), or the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), except to the extent that the Fund specifically incorporates that information by reference.

(19) If a Fund is required to include a shareholder nominee or nominees submitted to the Fund for inclusion in the Fund's proxy materials pursuant to a procedure set forth under applicable state or foreign law or the Fund's governing documents providing for the inclusion of shareholder director nominees in the Fund's proxy materials, the Fund must include in its proxy statement the disclosure required from the nominating shareholder or nominating shareholder group under Item 6 of § 240.14n–101 with regard to the nominee or nominees and the nominating shareholder or nominating shareholder group.

Instruction to paragraph (b)(19). The information disclosed pursuant to paragraph (b)(19) of this Item will not be deemed incorporated by reference into any filing under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), or the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), except to the extent that the Fund specifically incorporates that information by reference.

* * * * *

■ 19. Amend part 240 by adding an undesignated center heading and §§ 240.14n–1 through 240.14n–3 and § 240.14n–101 to read as follows:

Regulation 14N: Filings Required by Certain Nominating Shareholders

§ 240.14n–1 Filing of Schedule 14N.

(a) A shareholder or group of shareholders that submits a nominee or nominees in accordance with § 240.14a–11 or a procedure set forth under applicable state or foreign law, or a registrant's governing documents providing for the inclusion of shareholder director nominees in the registrant's proxy materials shall file with the Commission a statement containing the information required by Schedule 14N (§ 240.14n–101) and simultaneously provide the notice on Schedule 14N to the registrant.

(b)(1) Whenever two or more persons are required to file a statement containing the information required by Schedule 14N (§ 240.14n–101), only one statement need be filed. The statement must identify all such persons, contain the required information with regard to each such person, indicate that the statement is filed on behalf of all such

persons, and include, as an appendix, their agreement in writing that the statement is filed on behalf of each of them. Each person on whose behalf the statement is filed is responsible for the timely filing of that statement and any amendments thereto, and for the completeness and accuracy of the information concerning such person contained therein; such person is not responsible for the completeness or accuracy of the information concerning the other persons making the filing.

(2) If the group's members elect to make their own filings, each filing should identify all members of the group but the information provided concerning the other persons making the filing need only reflect information which the filing person knows or has reason to know.

§ 240.14n–2 Filing of amendments to Schedule 14N.

(a) If any material change occurs with respect to the nomination, or in the disclosure or certifications set forth in the Schedule 14N (§ 240.14n–101) required by § 240.14n–1(a), the person or persons who were required to file the statement shall promptly file or cause to be filed with the Commission an amendment disclosing that change.

(b) An amendment shall be filed within 10 calendar days of the final results of the election being announced by the registrant stating the nominating shareholder's or the nominating shareholder group's intention with regard to continued ownership of their shares.

§ 240.14n–3 Dissemination.

One copy of Schedule 14N (§ 240.14n–101) filed pursuant to §§ 240.14n–1 and 240.14n–2 shall be mailed by registered or certified mail or electronically transmitted to the registrant at its principal executive office. Three copies of the material must at the same time be filed with, or mailed for filing to, each national securities exchange upon which any class of securities of the registrant is listed and registered.

§ 240.14n–101 Schedule 14N—Information to be included in statements filed pursuant to § 240.14n–1 and amendments thereto filed pursuant to § 240.14n–2.

Securities and Exchange Commission,
Washington, DC 20549
Schedule 14N
Under the Securities Exchange Act of 1934
(Amendment No. _)*

(Name of Issuer)

_____

(Title of Class of Securities)

_____

(CUSIP Number)

_____

[ ] Solicitation pursuant to § 240.14a–2(b)(7)
[ ] Solicitation pursuant to § 240.14a–2(b)(8)
[ ] Notice of Submission of a Nominee or Nominees in Accordance with § 240.14a–11
[ ] Notice of Submission of a Nominee or Nominees in Accordance with Procedures Set Forth Under Applicable State or Foreign Law, or the Registrant's Governing Documents

* The remainder of this cover page shall be filled out for a reporting person's initial filing on this form, and for any subsequent amendment containing information which would alter the disclosures provided in a prior cover page.

The information required in the remainder of this cover page shall not be deemed to be "filed" for the purpose of Section 18 of the Securities Exchange Act of 1934 ("Act") or otherwise subject to the liabilities of that section of the Act but shall be subject to all other provisions of the Act.

(1) Names of reporting persons:

_____

(2) Mailing address and phone number of each reporting person (or, where applicable, the authorized representative):

_____

(3) Amount of securities held that are entitled to be voted on the election of directors held by each reporting person (and, where applicable, amount of securities held in the aggregate by the nominating shareholder group), but including loaned securities and net of securities sold short or borrowed for purposes other than a short sale:

_____

(4) Number of votes attributable to the securities entitled to be voted on the election of directors represented by amount in Row (3) (and, where applicable, aggregate number of votes attributable to the securities entitled to be voted on the election of directors held by group):

_____

Instructions for Cover Page:

(1) *Names of Reporting Persons*—Furnish the full legal name of each person for whom the report is filed—*i.e.,* each person required to sign the schedule itself—including each member of a group. Do not include the name of a person required to be identified in the report but who is not a reporting person.

(3) and (4) *Amount Held by Each Reporting Person*—Rows (3) and (4) are to be completed in accordance with the provisions of Item 3 of Schedule 14N.

Notes: Attach as many copies of parts one through three of the cover page as are needed, one reporting person per copy.

Filing persons may, in order to avoid unnecessary duplication, answer items on Schedule 14N by appropriate cross references to an item or items on the cover page(s). This approach may only be used where the cover page item or items provide all the disclosure required by the schedule item. Moreover, such a use of a cover page item will result in the item becoming a part of the schedule and accordingly being considered as "filed" for purposes of Section 18 of the Act or otherwise subject to the liabilities of that section of the Act.

Special Instructions for Complying With Schedule 14N

Under Sections 14 and 23 of the Securities Exchange Act of 1934 and the rules and regulations thereunder, the Commission is authorized to solicit the information required to be supplied by this Schedule. The information will be used for the primary purpose of determining and disclosing the holdings and interests of a nominating shareholder or nominating shareholder group. This statement will be made a matter of public record. Therefore, any information given will be available for inspection by any member of the public.

Because of the public nature of the information, the Commission can use it for a variety of purposes, including referral to other governmental authorities or securities self-regulatory organizations for investigatory purposes or in connection with litigation involving the Federal securities laws or other civil, criminal or regulatory statutes or provisions. Failure to disclose the information requested by this schedule may result in civil or criminal action against the persons involved for violation of the Federal securities laws and rules promulgated thereunder, or in some cases, exclusion of the nominee from the registrant's proxy materials.

General Instructions to Item Requirements

The item numbers and captions of the items shall be included but the text of the items is to be omitted. The answers to the items shall be prepared so as to indicate clearly the coverage of the items without referring to the text of the items. Answer every item. If an item is inapplicable or the answer is in the negative, so state.

Item 1(a). Name of Registrant

Item 1(b). Address of Registrant's Principal Executive Offices

Item 2(a). Name of Person Filing

Item 2(b). Address or Principal Business Office or, if None, Residence

Item 2(c). Title of Class of Securities

Item 2(d). CUSIP No.

Item 3. Ownership

Provide the following information, in accordance with Instruction 3 to § 240.14a–11(b)(1):

(a) Amount of securities held and entitled to be voted on the election of directors (and, where applicable, amount of securities held in the aggregate by the nominating shareholder group): _____.

(b) The number of votes attributable to the securities referred to in paragraph (a) of this Item: _____.

(c) The number of votes attributable to securities that have been loaned but which the reporting person:

(i) has the right to recall; and

(ii) will recall upon being notified that any of the nominees will be included in the registrant's proxy statement and proxy card: _____.

(d) The number of votes attributable to securities that have been sold in a short sale that is not closed out, or that have been borrowed for purposes other than a short sale: _____.

(e) The sum of paragraphs (b) and (c), minus paragraph (d) of this Item, divided by the aggregate number of votes derived from all classes of securities of the registrant that are entitled to vote on the election of directors, and expressed as a percentage: _____.

Item 4. Statement of Ownership From a Nominating Shareholder or Each Member of a Nominating Shareholder Group Submitting this Notice Pursuant to § 240.14a–11

(a) If the nominating shareholder, or each member of the nominating shareholder group, is the registered holder of the shares, please so state. Otherwise, attach to the Schedule 14N one or more written statements from the persons (usually brokers or banks) through which the nominating shareholder's securities are held, verifying that, within seven calendar days prior to filing the shareholder notice on Schedule 14N with the Commission and transmitting the notice to the registrant, the nominating shareholder continuously held the amount of securities being used to satisfy the ownership threshold for a period of at least three years. In the alternative, if the nominating shareholder has filed a Schedule 13D (§ 240.13d–101), Schedule 13G (§ 240.13d–102), Form 3 (§ 249.103 of this chapter), Form 4 (§ 249.104 of this chapter), and/or Form 5 (§ 249.105 of this chapter), or amendments to those documents, reflecting ownership of the securities as of or before the date on which the three-year eligibility period begins, so state and incorporate that filing or amendment by reference.

(b) Provide a written statement that the nominating shareholder, or each member of the nominating shareholder group, intends to continue to hold the amount of securities that are used for purposes of satisfying the minimum ownership requirement of § 240.14a–11(b)(1) through the date of the meeting of shareholders, as required by § 240.14a–11(b)(4). Additionally, provide a written statement from the nominating shareholder or each member of the nominating shareholder group regarding the nominating shareholder's or nominating shareholder group member's intent with respect to continued ownership after the election of directors, as required by § 240.14a–11(b)(5).

Instruction to Item 4. If the nominating shareholder or any member of the nominating shareholder group is not the registered holder of the securities and is not proving ownership for purposes of § 240.14a–11(b)(3) by providing previously filed Schedules 13D or 13G or Forms 3, 4, or 5, and the securities are held in an account with a broker or bank that is a participant in the Depository Trust Company ("DTC") or other clearing agency acting as a securities depository, a written statement or statements from that participant or participants in the following form will satisfy § 240.14a–11(b)(3):

As of [date of this statement], [name of nominating shareholder or member of the nominating shareholder group] held at least [number of securities owned continuously for at least three years] of the [registrant's] [class of securities], and has held at least this amount of such securities continuously for [at least three years]. [Name of clearing agency participant] is a participant in [name of clearing agency] whose nominee name is [nominee name].

[name of clearing agency participant]

By: [name and title of representative]

Date:

If the securities are held through a broker or bank (*e.g.* in an omnibus account) that is not a participant in a clearing agency acting as a securities depository, the nominating shareholder or member of the nominating shareholder group must (a) obtain and submit a written statement or statements (the "initial broker statement") from the broker or bank with which the nominating shareholder or member of the nominating shareholder group maintains an account that provides the information about securities ownership set forth above and (b) obtain and submit a separate written statement from the clearing agency participant through which the securities of the nominating shareholder or member of the nominating shareholder group are held, that (i) identifies the broker or bank for whom the clearing agency participant holds the securities, and (ii) states that the account of such broker or bank has held, as of the date of the separate written statement, at least the number of securities specified in the initial broker statement, and (iii) states that this account has held at least that amount of securities continuously for at least three years.

If the securities have been held for less than three years at the relevant entity, provide written statements covering a continuous period of three years and modify the language set forth above as appropriate.

For purposes of complying with § 240.14a–11(b)(3), loaned securities may be included in the amount of securities set forth in the written statements.

Item 5. Disclosure Required for Shareholder Nominations Submitted Pursuant to § 240.14a–11

If a nominating shareholder or nominating shareholder group is submitting this notice in connection with the inclusion of a shareholder nominee or nominees for director in the registrant's proxy materials pursuant to § 240.14a–11, provide the following information:

(a) A statement that the nominee consents to be named in the registrant's proxy statement and form of proxy and, if elected, to serve on the registrant's board of directors;

(b) Disclosure about the nominee as would be provided in response to the disclosure requirements of Items 4(b), 5(b), 7(a), (b) and (c) and, for investment companies, Item 22(b) of Schedule 14A (§ 240.14a–101), as applicable;

(c) Disclosure about the nominating shareholder or each member of a nominating shareholder group as would be required of a participant in response to the disclosure requirements of Items 4(b) and 5(b) of Schedule 14A (§ 240.14a–101), as applicable;

(d) Disclosure about whether the nominating shareholder or any member of a nominating shareholder group has been involved in any legal proceeding during the past ten years, as specified in Item 401(f) of Regulation S–K (§ 229.10 of this chapter). Disclosure pursuant to this paragraph need not be provided if provided in response to Item 5(c) of this section;

Instruction 1 to Item 5(c) and (d). Where the nominating shareholder is a general or limited partnership, syndicate or other group, the information called for in paragraphs (c) and (d) of this Item must be given with respect to:

a. Each partner of the general partnership;

b. Each partner who is, or functions as, a general partner of the limited partnership;

c. Each member of the syndicate or group; and

d. Each person controlling the partner or member.

Instruction 2 to Item 5(c) and (d). If the nominating shareholder is a corporation or if a person referred to in a., b., c. or d. of Instruction 1 to paragraphs (c) and (d) of this Item is a corporation, the information called for in paragraphs (c) and (d) of this Item must be given with respect to:

a. Each executive officer and director of the corporation;

b. Each person controlling the corporation; and

c. Each executive officer and director of any corporation or other person ultimately in control of the corporation.

(e) Disclosure about whether, to the best of the nominating shareholder's or group's knowledge, the nominee meets the director qualifications, if any, set forth in the registrant's governing documents;

(f) A statement that, to the best of the nominating shareholder's or group's knowledge, in the case of a registrant other than an investment company, the nominee meets the objective criteria for "independence" of the national securities exchange or national securities association rules applicable to the registrant, if any, or, in the case of a registrant that is an investment company, the nominee is not an "interested person" of the registrant as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(19)).

Instruction to Item 5(f). For this purpose, the nominee would be required to meet the definition of "independence" that is generally applicable to directors of the registrant and not any particular definition of independence applicable to members of the audit committee of the registrant's board of directors. To the extent a national securities exchange or national securities association rule imposes a standard regarding independence that requires a subjective determination by the board or a group or committee of the board (for example, requiring that the board of directors or any group or committee of the board of directors make a determination regarding the existence of factors material to a determination of a nominee's independence), the nominee would not be required to meet the subjective determination of independence as part of the shareholder nomination process.

(g) The following information regarding the nature and extent of the relationships between the nominating shareholder or nominating shareholder group, the nominee, and/or the registrant or any affiliate of the registrant:

(1) Any direct or indirect material interest in any contract or agreement between the nominating shareholder or any member of the nominating shareholder group, the nominee, and/or the registrant or any affiliate of the registrant (including any employment agreement, collective bargaining agreement, or consulting agreement);

(2) Any material pending or threatened legal proceeding in which the nominating shareholder or any member of the nominating shareholder group and/or the nominee is a party or a material participant, and that involves the registrant, any of its executive officers or directors, or any affiliate of the registrant; and

(3) Any other material relationship between the nominating shareholder or any member of the nominating shareholder group, the nominee, and/or the registrant or any affiliate of the registrant not otherwise disclosed;

Note to Item 5(g)(3). Any other material relationship of the nominating shareholder or any member of the nominating shareholder group or nominee with the registrant or any affiliate of the registrant may include, but is not limited to, whether the nominating shareholder or any member of the nominating shareholder group currently has, or has had in the past, an employment relationship with the registrant or any affiliate of the registrant (including consulting arrangements).

(h) The Web site address on which the nominating shareholder or nominating shareholder group may publish soliciting materials, if any; and

(i) Any statement in support of the shareholder nominee or nominees, which may not exceed 500 words for each nominee, if the nominating shareholder or nominating shareholder group elects to have such statement included in the registrant's proxy materials.

Item 6. Disclosure Required by § 240.14a–18

If a nominating shareholder or nominating shareholder group is submitting this notice in connection with the inclusion of a shareholder nominee or nominees for director in the registrant's proxy materials pursuant to a procedure set forth under applicable state or foreign law, or the registrant's governing documents provide the following disclosure:

(a) A statement that the nominee consents to be named in the registrant's proxy statement and form of proxy and, if elected, to serve on the registrant's board of directors;

(b) Disclosure about the nominee as would be provided in response to the disclosure requirements of Items 4(b), 5(b), 7(a), (b) and (c) and, for investment companies, Item 22(b) of Schedule 14A (§ 240.14a–101), as applicable;

(c) Disclosure about the nominating shareholder or each member of a nominating shareholder group as would be required in response to the disclosure requirements of Items 4(b) and 5(b) of Schedule 14A (§ 240.14a–101), as applicable;

(d) Disclosure about whether the nominating shareholder or any member of a nominating shareholder group has been involved in any legal proceeding during the past ten years, as specified in Item 401(f) of Regulation S–K (§ 229.10 of this chapter). Disclosure pursuant to this paragraph need not be provided if provided in response to Item 6(c) of this section;

Instruction 1 to Item 6(c) and (d). Where the nominating shareholder is a general or limited partnership, syndicate or other group, the information called for in paragraphs (c) and (d) of this Item must be given with respect to:

a. Each partner of the general partnership;

b. Each partner who is, or functions as, a general partner of the limited partnership;

c. Each member of the syndicate or group; and

d. Each person controlling the partner or member.

Instruction 2 to Item 6(c) and (d). If the nominating shareholder is a corporation or if a person referred to in a., b., c. or d. of Instruction 1 to paragraphs (c) and (d) of this Item is a corporation, the information called for

in paragraphs (c) and (d) of this Item must be given with respect to:

a. Each executive officer and director of the corporation;

b. Each person controlling the corporation; and

c. Each executive officer and director of any corporation or other person ultimately in control of the corporation.

(e) The following information regarding the nature and extent of the relationships between the nominating shareholder or nominating shareholder group, the nominee, and/or the registrant or any affiliate of the registrant:

(1) Any direct or indirect material interest in any contract or agreement between the nominating shareholder or any member of the nominating shareholder group, the nominee, and/or the registrant or any affiliate of the registrant (including any employment agreement, collective bargaining agreement, or consulting agreement);

(2) Any material pending or threatened legal proceeding in which the nominating shareholder or any member of the nominating shareholder group and/or nominee is a party or a material participant, involving the registrant, any of its executive officers or directors, or any affiliate of the registrant; and

(3) Any other material relationship between the nominating shareholder or any member of the nominating shareholder group, the nominee, and/or the registrant or any affiliate of the registrant not otherwise disclosed; and

Instruction to Item 6(e)(3). Any other material relationship of the nominating shareholder or any member of the nominating shareholder group with the registrant or any affiliate of the registrant may include, but is not limited to, whether the nominating shareholder or any member of the nominating shareholder group currently has, or has had in the past, an employment relationship with the registrant or any affiliate of the registrant (including consulting arrangements).

(f) The Web site address on which the nominating shareholder or nominating shareholder group may publish soliciting materials, if any.

Item 7. Notice of Dissolution of Group or Termination of Shareholder Nomination

Notice of dissolution of a nominating shareholder group or the termination of a shareholder nomination shall state the date of the dissolution or termination.

Item 8. Signatures

(a) The following certifications shall be provided by the filing person submitting this notice pursuant to § 240.14a–11, or in the case of a group, each filing person whose securities are being aggregated for purposes of meeting the ownership threshold set out in § 240.14a–11(b)(1) exactly as set forth below:

I, [identify the certifying individual], after reasonable inquiry and to the best of my knowledge and belief, certify that:

(1) I [or if signed by an authorized representative, the name of the nominating shareholder or each member of the nominating shareholder group, as appropriate] am [is] not holding any of the registrant's securities with the purpose, or with the effect, of changing control of the registrant or to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the registrant could be required to include under § 240.14a–11(d);

(2) I [or if signed by an authorized representative, the name of the nominating shareholder or each member of the nominating shareholder group, as appropriate] otherwise satisfy [satisfies] the requirements of § 240.14a–11(b), as applicable;

(3) The nominee or nominees satisfies the requirements of § 240.14a–11(b), as applicable; and

(4) The information set forth in this notice on Schedule 14N is true, complete and correct.

(b) The following certification shall be provided by the filing person or persons submitting this notice in connection with the submission of a nominee or nominees in accordance with procedures set forth under applicable state or foreign law or the registrant's governing documents:

I, [identify the certifying individual], after reasonable inquiry and to the best of my knowledge and belief, certify that the information set forth in this notice on Schedule 14N is true, complete and correct.

Dated: _____

Signature: _____

Name/Title: _____

The original statement shall be signed by each person on whose behalf the statement is filed or his authorized representative. If the statement is signed on behalf of a person by his authorized representative other than an executive officer or general partner of the filing person, evidence of the representative's authority to sign on behalf of such person shall be filed with the statement, *provided, however,* that a power of attorney for this purpose which is already on file with the Commission may be incorporated by reference. The name and any title of each person who signs the statement shall be typed or printed beneath his signature.

Attention: Intentional misstatements or omissions of fact constitute Federal criminal violations (see 18 U.S.C. 1001).

■ 20. Amend § 240.15d–11 by revising paragraph (b) to read as follows:

§ 240.15d–11 Current reports on Form 8–K (§ 249.308 of this chapter).

* * * * *

(b) This section shall not apply to foreign governments, foreign private issuers required to make reports on Form 6–K (17 CFR 249.306) pursuant to § 240.15d–16, issuers of American Depositary Receipts for securities of any foreign issuer, or investment companies required to file reports pursuant to § 270.30b1–1 of this chapter under the Investment Company Act of 1940, except where such an investment company is required to file:

(1) Notice of a blackout period pursuant to § 245.104 of this chapter;

(2) Disclosure pursuant to Instruction 2 to § 240.14a–11(b)(1) of information concerning outstanding shares and voting; or

(3) Disclosure pursuant to Instruction 2 to § 240.14a–11(b)(10) of the date by which a nominating shareholder or nominating shareholder group must submit the notice required pursuant to § 240.14a–11(b)(10).

* * * * *

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 21. The authority citation for Part 249 continues to read, in part, as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 22. Amend Form 8–K (referenced in § 249.308) by:

■ a. Adding a sentence at the end of General Instruction B.1;

■ b. Removing the phrase "Section 5.06" in the heading and adding in its place "Item 5.06"; and

■ c. Adding Item 5.08.

The additions read as follows:

Note: The text of Form 8–K does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 8–K

* * * * *

GENERAL INSTRUCTIONS

* * * * *

B. Events To Be Reported and Time for Filing Reports

1. * * * A report pursuant to Item 5.08 is to be filed within four business days after the registrant determines the anticipated meeting date.

* * * * *

Item 5.08 Shareholder Director Nominations

(a) If the registrant did not hold an annual meeting the previous year, or if the date of this year's annual meeting has been changed by more than 30 calendar days from the date of the previous year's meeting, then the registrant is required to disclose the date by which a nominating shareholder or nominating shareholder group must submit the notice on Schedule 14N (§ 240.14n–101) required pursuant to § 240.14a–11(b)(10), which date shall be a reasonable time before the registrant mails its proxy materials for the meeting. Where a registrant is required to include shareholder director nominees in the registrant's proxy materials pursuant to either an applicable state or foreign law provision, or a provision in the registrant's governing documents, then the registrant is required to disclose the date by which a nominating shareholder or nominating shareholder group must submit the notice on Schedule 14N required pursuant to § 240.14a–18.

(b) If the registrant is a series company as defined in Rule 18f–2(a) under the Investment Company Act of 1940 (§ 270.18f–2 of this chapter), then the registrant is required to disclose in connection with the election of directors at an annual meeting of shareholders (or, in lieu of such an annual meeting, a special meeting of shareholders) the total number of shares of the registrant outstanding and entitled to be voted (or if the votes are to be cast on a basis other than one vote per share, then the total number of votes entitled to be voted and the basis for allocating such votes) on the election of directors at such meeting of shareholders as of the end of the most recent calendar quarter.

* * * * *

By the Commission.

Dated: August 25, 2010.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–22218 Filed 9–15–10; 8:45 am]

BILLING CODE 8010–01–P

Federal Register

Thursday,
September 16, 2010

Part III

Department of Energy

10 CFR Parts 429, 430 and 431

Energy Conservation Program: Certification, Compliance, and Enforcement for Consumer Products and Commercial and Industrial Equipment; Proposed Rule

DEPARTMENT OF ENERGY

10 CFR Parts 429, 430 and 431

[Docket No. EERE–2010–BT–CE–0014]

RIN 1904–AC23

Energy Conservation Program: Certification, Compliance, and Enforcement for Consumer Products and Commercial and Industrial Equipment

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of proposed rulemaking and public meeting.

SUMMARY: The U.S. Department of Energy (DOE or the "Department") is proposing to revise and expand its existing certification, compliance, and enforcement regulations for certain consumer products and commercial and industrial equipment covered under the Energy Policy and Conservation Act of 1975, as amended (EPCA or the "Act"). These regulations provide for sampling plans used in determining compliance with existing standards, manufacturer submission of compliance statements and certification reports to DOE, maintenance of compliance records by manufacturers, and the availability of enforcement actions for improper certification or noncompliance with an applicable standard. Ultimately, these proposals will allow DOE to systematically enforce applicable energy and water conservation standards for covered products and covered equipment and provide for more accurate, comprehensive information about the energy and water use characteristics of products sold in the United States. Additionally, today's notice announces a public meeting on the proposed amendments.

DATES: DOE will hold a public meeting on Thursday, September 23, 2010, from 9 a.m. to 4 p.m., in Washington, DC. DOE must receive requests to speak at the public meeting before 4 p.m., Thursday, September 23, 2010. Additionally, DOE plans to conduct the public meeting via webinar. To participate via webinar, DOE must be notified by no later than Thursday, September 16, 2010. Participants seeking to present statements in person during the meeting must submit to DOE a signed original and an electronic copy of statements to be given at the public meeting before 4 p.m., Thursday, September 23, 2010.

DOE will accept comments, data, and information regarding this notice of proposed rulemaking (NOPR) before and after the public meeting but no later than October 18, 2010. *See* section V, "Public Participation," of this NOPR for details.

ADDRESSES: Interested persons are encouraged to submit comments using the Federal eRulemaking Portal at *http://www.regulations.gov.* Follow the instructions for submitting comments. Alternatively, interested persons may submit comments, identified by docket number EERE–2010–BT–CE–0014, by any of the following methods:

- *E-mail: CCE–2010–BT–CE–0014@ee.doe.gov.* Include EERE–2010–BT–CE–0014 in the subject line of the message.
- *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, Revisions to Energy Efficiency Enforcement Regulations, EERE–2010–BT–CE–0014, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Phone: (202) 586–2945. Please submit one signed paper original.
- *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 6th Floor, 950 L'Enfant Plaza, SW., Washington, DC 20024. Phone: (202) 586–2945. Please submit one signed paper original.

Instructions: All submissions received must include the agency name and docket number or RIN for this rulemaking. Note that all comments received will be posted without change, including any personal information provided.

Docket: For access to the docket to read background documents, or comments received, go to the *Federal eRulemaking Portal* at *http://www.regulations.gov.*

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I. Authority and Background

Title III of the Energy Policy and Conservation Act of 1975, as amended ("EPCA" or, in context, "the Act") sets forth a variety of provisions designed to improve energy efficiency. Part A of Title III (42 U.S.C. 6291–6309) provides for the Energy Conservation Program for Consumer Products Other Than Automobiles. The National Energy Conservation Policy Act (NECPA), Public Law 95–619, amended EPCA to add Part A–1 of Title III, which established an energy conservation program for certain industrial equipment. (42 U.S.C. 6311–6317) [1]

Under the Act, the regulatory program consists of three parts: Labeling, testing, and Federal conservation standards, which include energy conservation, water conservation and design standards. The Federal Trade Commission (FTC) is primarily responsible for labeling consumer products, and DOE implements the remainder of the program. The testing requirements consist of test procedures prescribed under the authority of EPCA, which are used to aid in the development of standards for covered products or covered equipment, to make representations about equipment efficiency, and to determine whether covered products or covered equipment comply with standards promulgated under EPCA.

[1] For editorial reasons, Parts B (consumer products) and C (commercial equipment) of Title III of EPCA were re-designated as parts A and A–1, respectively, in the United States Code.

Sections 6299–6305, and 6316 of EPCA authorize DOE to enforce compliance with the energy and water conservation standards (all non-product specific references herein referring to energy use and consumption include water use and consumption; all references to energy efficiency include water efficiency) established for certain consumer products and commercial equipment. (42 U.S.C. 6299–6305 (consumer products), 6316 (commercial equipment)) To ensure that all covered products and covered equipment distributed in the United States comply with DOE's conservation standards, DOE has promulgated enforcement regulations that include specific certification and compliance requirements. See 10 CFR part 430, subpart F; 10 CFR 430.23–25; 10 CFR part 431, subparts B, J, K, S, T, U, and V.

On May 7, 2010, the Department published in the **Federal Register** a Request for Information (RFI) regarding Revisions to Energy Efficiency Enforcement Regulations. 75 FR 25121. The RFI requested suggestions, comments, and information relating to the Department's intent to expand and revise its existing energy efficiency enforcement regulations for consumer products and commercial and industrial equipment covered under EPCA. The comment period for written submissions closed on June 7, 2010.

The record of the RFI reflects that the consideration of many of the procedural changes to DOE's certification requirements and enforcement process are relatively straightforward, while other changes under consideration, such as the creation of a verification testing requirement, raise more complicated and nuanced issues. Even relatively simple changes, however, can greatly advance the effective enforcement of DOE's conservation standards and regulations. Therefore, today's NOPR focuses on promptly advancing two aspects of the DOE's enforcement regime: Certification requirements and enforcement procedures. In addition, this notice proposes consolidating and standardizing, where possible, all of the certification, compliance, and enforcement requirements for both consumer products and commercial equipment into a new 10 CFR Part 429. In all cases, the Department's goals are to establish a uniform, systematic, and fair approach to certification, compliance, and enforcement that will allow the Department to effectively enforce its standards and ensure a level playing field in the marketplace without unduly burdening regulated entities.

While not addressed here, DOE anticipates addressing the remaining topics outlined in the RFI and additional issues regarding certification, compliance, and enforcement, including verification testing requirements, in a subsequent rulemaking. To that end, today's NOPR seeks comment on a variety of issues, which will be more fully addressed in a second certification, compliance, and enforcement rulemaking, including: Revisions to sampling plans for certification and enforcement testing, consideration of compliance requirements for other features affecting the energy and water efficiency of a product, additional provisions for imports, voluntary industry certification programs (VICP), verification testing requirements, laboratory accreditation, and rounding. DOE continues to seek views from all interested parties on these issues and how they can be best developed to ensure effective enforcement.

II. Summary of the Proposal

In today's notice, DOE proposes to revise its certification and enforcement regulations to encourage compliance, achieve energy savings, and prevent those manufacturers that do not adhere to the rules from having a competitive advantage over those that do. As summarized below, the notice proposes revisions to existing certification, compliance, enforcement, and adjudication procedures applicable to both consumer products and commercial and industrial equipment.

A. Reorganization of DOE's Existing Certification, Compliance, and Enforcement Regulations

With the exception of electric motors, DOE is proposing to move all of the existing certification, compliance, and enforcement regulations currently scattered throughout parts 430 and 431 to a new part 429. DOE has consolidated similar provisions for both consumer products and commercial and industrial equipment into one section. As an example, all of the submission of data requirements that are currently found in 10 CFR 430.62, 431.327, and 431.371 will be found in 10 CFR 429.19 for consumer products and commercial and industrial equipment once DOE's proposals become final. While DOE is not proposing revisions to the requirements for electric motors in today's NOPR, DOE does intend to propose to move and harmonize, where possible, the certification, compliance, and enforcement provisions for electric motors in part 429, as well as add an annual certification requirement, in the second rulemaking.

B. Applying DOE's Existing Certification, Compliance, and Enforcement Regulations to Other Consumer Products and Commercial and Industrial Equipment

DOE intends to apply certification, compliance, and enforcement regulations to all covered products and covered equipment. Thus, the Department also proposes to establish certification and enforcement requirements for the consumer products and commercial and industrial equipment that have been added to DOE's programs by either DOE's completion of energy and water conservation standards rulemakings or the Energy Independence and Security Act of 2007. These products include fluorescent lamp ballasts, general service incandescent lamps, candelabra base incandescent lamps, intermediate base incandescent lamps, certain types of commercial refrigeration equipment, beverage vending machines, and walk-in coolers and freezers.

C. Certification

Existing certification requirements direct manufacturers of covered consumer products and commercial and industrial equipment to certify, by means of a compliance statement and a certification report, that each basic model meets the applicable energy conservation, water conservation, and/or design standard before distributing it in commerce within the United States. *See* 10 CFR 430.62 (consumer products); 10 CFR 431.36, 430.371 (commercial equipment). For consumer products, much of the information required to be reported to DOE must also be reported annually to the FTC. In light of these similarities in reporting, DOE desires to eventually work towards the creation of a single, annual reporting mechanism for DOE and FTC, as appropriate. While today's notice does not yet propose such a shared annual reporting mechanism for DOE and FTC, DOE is proposing to include an annual reporting requirement for all covered products and covered equipment. DOE has aligned its annual reporting schedule with FTC's reporting schedule for consumer products. Such annualized reporting will provide DOE with more accurate and comprehensive information regarding the industries subject to DOE's regulations and a better understanding of the efficiency characteristics of products distributed in commerce.

In harmonizing the certification requirements for consumer products and commercial and industrial equipment, DOE believes it is also appropriate to provide more transparency in the certification report itself. As currently written, the Department's rules for certification reports do not always provide DOE with a complete set of information to verify that a covered product or covered equipment is compliant with DOE's regulations. Thus, DOE is proposing to expand the information submitted by manufacturers, including general requirements applicable to all products and product specific requirements. See section 429.19 of the proposed regulatory text for additional details. DOE is also proposing to make clear that all non-proprietary certification information will be considered public information subject to disclosure. By requiring additional relevant data to be supplied in the certification report, DOE will be able to more effectively enforce compliance with the conservation standards. Additionally, the public would have information to use in evaluating the energy efficiency of a covered product or covered equipment. Overall, the proposed revisions have been crafted to balance any incremental reporting burden on manufacturers against the Department's need for comprehensive, timely, and accurate information about regulated products being sold in the United States.

D. Enforcement Testing and Adjudication

In addition, DOE is proposing regulations to make clear the extent of the Department's enforcement authority under EPCA and the Department's process for exercising that authority. DOE desires to make more transparent the process by which it currently exercises its statutory authority to: (1) Request information, by letter or subpoena, from manufacturers concerning the compliance of a basic model with an applicable conservation standard; (2) test or examine units of a given basic model to determine compliance with an applicable standard; and (3) take appropriate enforcement action as warranted. To that end, DOE proposes to establish a standardized process for seeking injunctive relief, civil penalties, or other remedies for violations of conservation standards and/or certification requirements. This includes developing a standard method for responding to complaints of non-compliance, notifying the allegedly non-compliant manufacturer of the complaint, and collecting any needed data via enforcement testing. Revising the current enforcement and adjudication procedures for consumer products and commercial and industrial equipment will provide certainty and clarity to the regulated industry and will ensure that the Department can initiate investigations promptly, respond to complaints effectively, and enforce its regulations in a fair and timely way.

III. Discussion of Specific Revisions to DOE's Certification, Compliance, and Enforcement Regulations and Comments Received in Response to the RFI

In this section, DOE provides a section by section analysis of its proposed rule. As discussed above, DOE proposes to add a new Part 429 to its regulations to address, in one place, the certification, compliance, and enforcement of conservation standards for both consumer products and commercial and industrial equipment with the exception of electric motors. This new part would set forth the certification, compliance, and enforcement procedures to be followed to determine whether a basic model of a covered product or covered equipment complies with the applicable conservation standard.

DOE received comments from 30 interested parties, including manufacturers, trade associations, and advocacy groups. Specifically, comments were received from: Plumbing Manufacturers Institute, Alsons Corporation, Air-Conditioning, Heating, and Refrigeration Institute, National Resource Defense Council, Appliance Standards Awareness Project, Bosch and Siemens Home Appliances Group, Heat Transfer Products, United CoolAir Corporation, Bob McGarrah, Plumbing Americas, Bose Corporation, Intertek, First Company, National Automatic Merchandising Association, Mestek, Underwriters Laboratories, Trane, Sony Electronics Inc., Earthjustice, Delta Faucet Company, Hansgrohe, Consumers Union, Whirlpool Corporation, Association of Home Appliance Manufacturers, Shane Holt, General Electric, National Electrical Manufacturer's Association, Rheem Manufacturing, Friedrich Air Conditioning Co., and American Standard Brands. These comments are discussed in more detail below. The full set of comments can be found at *http://www.regulations.gov.*

A. Basic Model Provisions

1. Basic Model Certification

Under the DOE's existing energy conservation program, DOE has applied the "basic model" concept to streamline certification and compliance and alleviate burden on manufacturers by reducing the amount of testing they

must do to rate the efficiencies of their products. DOE's intent is that a manufacturer would treat each group of its models that have essentially identical energy consumption or water consumption characteristics as a "basic model," such that the manufacturer would derive the efficiency rating for all models in the group from testing sample units of these models. All of the models in the group would comprise the "basic model," and they would all have the same efficiency rating. For example, a manufacturer can identify as the same basic model black, white, and stainless steel finished dishwasher models with the same features and functions. By contrast, a manufacturer could produce two identical models of air conditioners with essentially the same internal components but which use a different control strategy affecting the energy consumption of the unit as measured by DOE's test procedure. Even though both models have essentially the same physical characteristics, the models have different functional characteristics that affect the energy consumption and efficiency. 10 CFR Part 430.2(11). Thus, these models would be considered by DOE to be two different basic models.

The Department recognizes, however, that additional clarity as to what constitutes "essentially identical" energy or water consumption across different model designs or modifications for purposes of a basic model may be helpful for certain types of products and equipment. To provide additional certainty and improve implementation of the basic model concept, the Department seeks comment on how manufacturers determine that a particular model constitutes a basic model.

Sections 430.62(b) and 431.371(b) presently provide for recertification reporting to DOE if there is a change to a basic model that increases energy consumption or decreases energy efficiency. In the RFI, DOE sought input on implementing a recertification requirement whenever there is a change made to a basic model that increases or decreases energy efficiency or energy consumption. Several commenters in the manufacturing sector were opposed to this proposal. These filers stated that such a requirement would discourage producers from introducing product designs that improve energy efficiency and would increase cost and reporting burdens on manufacturers. Other commenters supported recertification if DOE established a threshold percentage that would trigger recertification, or if the recertification requirement was product specific. DOE has tentatively determined not to impose a separate model modification requirement at this time. However, the Department is retaining its requirement that new basic models—including models that are modified such that they are new basic models—must be certified before distribution in commerce. Accordingly, the Department is seeking comment to clarify what modifications to an existing model make it a new basic model subject to the new model certification requirement.

DOE is interested in information regarding how a manufacturer determines that it has made changes to the features or energy use characteristics of a basic model so as to constitute a new basic model. Specifically, DOE is interested in the types of potential changes manufacturers may make to a given model and the difference in the energy use characteristics a typical change may have on a per product basis. Additionally, DOE seeks comment on whether it should propose a specific regulation that requires a new basic model declaration and filing when a modification to a given basic model impacts the energy characteristics of the product by a given de minimus percentage. If so, should these de minimus percentages be product specific, based on the manufacturing characteristics of the product and the variability experienced in testing? DOE seeks comment on how these de minimus percentages might change for each covered product and covered equipment. In addition, DOE believes characterizing the types of changes that constitute a new basic model will be particularly useful in the context of a verification testing program (addressed in III.C of this NOPR) in order to determine what fraction of basic models will be tested under the program. *See* Issue 1 under "Issues on Which DOE Seeks Comment" in section V of this NOPR.

2. Basic Model Numbers

In conjunction with the certification requirement described above for a basic model, DOE proposes to require that manufacturers change the basic model *number* whenever a new basic model is created. DOE believes this would improve the manner in which basic model numbers are designated so that the number that is provided to DOE for certification is clearly associated with the model number used to identify the unit in the market. This more unified approach to numbering changes would assist the Department and the public in identifying the market-based model number that corresponds with what is certified to DOE.

DOE received comments from three trade associations and three manufacturers in protest of creating a more uniform numbering system. These groups stated that requiring a uniform numbering system across products, manufacturers, and models is not desirable because it would have high implementation costs and create confusion and that DOE should focus on ensuring that test reports match model numbers, rather than requiring companies to change their model numbering systems to meet DOE needs. One advocacy group commented positively on the proposal. To be clear, DOE's proposal does not mandate any particular system or configuration of numbering models. Manufacturers and private labelers remain free to use whatever numbering system they choose. However, DOE continues to believe that requiring that the model numbering system, whatever it is, include a change in model number for each new basic model will allow for more transparency and consumer awareness. Thus, DOE proposes to establish a requirement that a new basic model number must be designated when a new basic model is created.

In the RFI, DOE also sought comment on how a basic model should be identified such that the number provided to DOE for certification is clearly associated with the model number used to identify the unit in the market. Accordingly, DOE is proposing to define manufacturer model number as, essentially, the unique identifier for the product as it is sold. As described above, a basic model can subsume multiple manufacturer model numbers. DOE thus suggests that the manufacturer use one of the manufacturer model numbers as the basic model and identify all the manufacturer model numbers that are covered by that particular basic model. DOE believes this will provide further transparency between the certifications received by DOE and the model numbers a consumer sees in the market.

B. Certification

DOE proposes the following amendments relating to certification requirements. If DOE has obtained OMB clearance for the information collection prior to issuance of the final rule, these amendments would become effective 30 days following publication of the final rule. The compliance date for the annual filing requirements would be the first day of the first month following the effective date.

1. Annual Certification Requirements

Under existing DOE regulations, manufacturers of certain covered products and covered equipment must satisfy a one-time certification requirement for each basic model before the basic model can be distributed in commerce. DOE is proposing an annual certification reporting requirement for each basic model of covered product and covered equipment as discussed in section 429.19 of the proposed regulatory text. In order to reduce the reporting burdens on manufacturers, DOE proposes to consolidate the schedule of reporting requirements with the FTC's schedule for consumer products, where possible. DOE determined the proposed annual filing schedule based generally upon the FTC schedule for similar product types subject to annual reporting under the FTC's Appliance Labeling Rule (see 16 CFR 305.8). For commercial and industrial equipment, DOE is aligning similar equipment types with the FTC schedule for consumer products. For example, a manufacturer of both residential and commercial air-conditioning and heating equipment would be required to submit annually by July 1st under the proposed modifications. DOE believes aligning the reporting schedule for products of similar types will also help reduce the number of times annually a manufacturer has to submit information.

As discussed above, DOE raised the possibility of annual reporting requirements in the RFI, and commenters were fairly equally divided in their responses to this proposal, with approximately half of commenters supporting annual certification and the other half opposed to an annual requirement because it would create additional cost and reporting burdens. DOE finds that the costs for annual filing would be minimal for consumer products, especially since it would be coupled with the manufacturer's FTC submission for the same product. Although DOE acknowledges there could be small incremental costs for additional submissions for certain types of commercial and industrial equipment, these filings are needed to ensure that the Department and the public has accurate and comprehensive efficiency information.

A number of commenters objected to DOE imposing annual testing requirements. For clarification, however, the proposed annual filing requirement is not an annual testing requirement. The proposed revision does not require any new or additional testing to be done. The Department's pre-existing regulations require that basic models be tested to ensure compliance with the applicable standard before the unit is first introduced in commerce. The annual filing does not require retesting, but rather a yearly submission of the results of the testing already done for all models a manufacturer has in distribution in that year. In this way, annual submission of certification information would assure that DOE has the most current and complete picture of efficiency characteristics of covered products and covered equipment currently in the marketplace.

2. Filings Consolidation With FTC

In the RFI, DOE had discussed the possibility of consolidating filings with FTC and other agencies such as EPA. In response to a discussion of certification reporting requirements in the RFI, four commenters supported simplifying the reporting requirements and suggested creating a shared database between DOE and FTC for all products covered by DOE standards and FTC labels. Three commenters objected to the proposal, arguing that such a requirement would add additional burdens to those industries that do not participate in the FTC program.

The Department continues to believe that a single Federal database for efficiency information would be of great value. At this time, however, the Department is consolidating its requirements with FTC's schedule only. DOE will continue to consider consolidating filings with the FTC or other government agencies in a future certification, compliance, and enforcement rulemaking.

3. Revisions to the Reporting Requirements, General

DOE is proposing to expand the information it is collecting for certain covered products and covered equipment to include additional details that will help DOE to better enforce its conservation standards. Specifically, DOE proposes to revise what information must be submitted as a part of a certification filing to ensure that the Department obtains the information it needs to effectively carry out its statutory enforcement obligations without unnecessarily burdening certifying parties. To begin, as a streamlining measure, DOE proposes to include the compliance statement as part of the certification report, rather than a separate filing, to reduce the number of submissions transmitted to DOE. Further, DOE seeks to standardize to the extent possible the basic information required for certification of all covered products and covered equipment, setting out the basic requirements for every certification filing, followed by product-specific information requirements. Along these lines, DOE proposes that the following items be included in certification reports for all basic models of all covered products and covered equipment: the manufacturer name, the private labeler(s)' name (as applicable), the brand name, the basic model number, and the individual model numbers covered by that basic model; the sample size and the total number of tests performed; and the certifying party's U.S. Importer of Record identification numbers assigned by U.S. Customs and Border Protection pursuant to 19 CFR 24.5, if applicable. This information should be readily available to the certifying party and will allow the Department to more effectively monitor compliance, investigate complaints, and take appropriate enforcement action.

Additionally, DOE proposes to require manufacturers to submit information related to waivers, exemptions, and approved alternative rating methodologies along with their certification submissions as appropriate. Manufacturers of covered products and covered equipment that are not covered under an existing test procedure, or that cannot meet a DOE conservation standard, have the option to either seek waivers of the test procedures under existing regulations or seek exception relief from the conservation standard from DOE's Office of Hearings and Appeals (OHA). DOE proposes to require that manufacturers who obtain a waiver of test procedures or a grant of exception-based standards from OHA specify such information on the certification report submitted to the Department. This will serve to eliminate the current lengthy records review process the Department must now undertake to determine what test procedures or conservation standards apply to a certain basic model. It will also allow a manufacturer to tailor the certification to its situation rather than causing a manufacturer to certify that a product was tested in accordance with the DOE test procedure when the product was not, in fact, tested in accordance with the DOE test procedure. Similarly, DOE also proposes to require that any DOE-allowed alternative method of determining energy consumption or efficiency, such as an Alternative Rating Method (ARM) for untested split-system central air conditioners or heat pumps, or other alternative method of rating, such as

alternative efficiency determination methods (AEDMs) for commercial heating, ventilating, air-conditioning and water heating equipment (HVAC and WH) or distribution transformers, be indicated on the certification report to provide a clear picture of the test procedures or exceptions used as a basis for the certification.

4. Product Specific Revisions to the Reporting Requirements

As discussed generally above, DOE is proposing new certification reporting requirements for fluorescent lamp ballasts, general service incandescent lamps, candelabra base incandescent lamps, intermediate base incandescent lamps, certain types of commercial refrigeration equipment, beverage vending machines, and walk-in coolers and freezers. These annual reporting requirements were generally based upon the existing reporting requirements for certain types of consumer products and commercial and industrial equipment, which require the certification of a basic model before it is distributed in commerce.

In addition, DOE proposes additional product-specific information that should be submitted to DOE as a part of the certification filing for a variety of consumer products and commercial equipment. DOE believes the addition of this information on the certification report for these products will provide a more complete set of information on a covered product or covered equipment and assist the Department in verifying that a covered product or covered equipment is compliant with DOE's standards. All of the product specific reporting requirements are presented in 10 CFR 429.19(b)(13).

Lastly, DOE is proposing to revise the certification reporting requirements for existing products, where updates have been made to DOE's conservation standards. For example, DOE is proposing to modify the certification reporting requirements for residential clothes washers to add a water factor reporting requirement starting on January 1, 2011.

5. Certifying Entities

Currently, DOE's certification regulations allow either the manufacturer or private labeler to submit certification reports and compliance statements for each basic model. However, this approach lacks certainty as to who should submit data to DOE for privately labeled products. DOE is interested in removing uncertainty, preventing duplicative filings, and having a more comprehensive set of market data concerning each covered product and covered equipment. Accordingly, it is proposing to require that manufacturers be solely responsible for submitting the certification reports to DOE, which would include data regarding the manufacturer's information, as well as the private labeler's information and/or brand information, where appropriate. By placing the reporting burden on manufacturers, which, by statutory definition, includes importers, DOE would have more certainty that the certification information it receives for a product type is comprehensive. DOE also notes that, as discussed more fully below, a manufacturer would still have the option of electing to have its private labeler act as a third party filer and submit the certification report on the manufacturer's behalf.

6. Third Party Representation

Currently, sections 430.62(e) and 431.371(d) allow a manufacturer or private labeler to elect to use a third party to submit certification reports to DOE. While DOE intends to continue to permit this practice, DOE proposes to make clear in its regulations that it may refuse to accept certification reports from a third party with a poor history of performance (i.e., failure to properly submit reports on behalf of a manufacturer on at least two occasions).

Most commenters were in agreement that third party submission of certification reports should continue to be allowed, with appropriate consequences for poor performance, such as improper certification. In particular, one trade association and one manufacturer asserted that third parties with greater than three failures should be put on probation or completely disallowed to submit reports. Other commenters, including a consumer advocacy group, suggested that manufacturers, and not third parties, should be held accountable for any misfiling by the third party.

The Department agrees there is value in continuing its practice of allowing third party submission of certification reports. However, the Department proposes to make explicit in its regulations that the manufacturer remains ultimately responsible for submission of the certification reports to DOE. And, as mentioned, DOE's proposal reserves the discretion to disallow a third party filing from a filer with a poor history of performance.

7. Submission of Certification Reports

The Department proposes to make electronic submission of certification reports through the Certification Compliance Management System (CCMS) found at *http://www.regulations.doe.gov/ccms* the sole method of submission. The CCMS currently has sample templates for certain covered products and covered equipment available for manufacturers to use when submitting certification data to DOE. DOE plans to have these sample templates for all covered products and covered equipment when it issues the final rule for this rulemaking. DOE believes the availability of electronic filing through the CCMS system should reduce reporting burdens, streamline the process, and provide the Department with needed information in a standardized, more accessible form. This electronic filing system will also ensure that records are recorded in a permanent, systematic way. DOE notes that it is proposing to remove the certified mail and e-mail options for filing certification data that are currently allowed in DOE's regulations.

8. Initial Certification and Notice of Discontinuance

In addition to the annual certification requirement, DOE proposes to retain the requirement in the existing regulations that any new basic model be certified before distribution in commerce. This initial certification requirement applies to newly manufactured and produced basic models as well as models that have been modified in a way that changes the model's energy use characteristics and thus constitutes a new basic model.

In addition, the Department proposes to require that discontinued models be reported to DOE as part of the next annual certification report period from when production of the model has ceased. A discontinued model is a model that is no longer distributed in commerce. EPCA defines "distribute in commerce" as "to sell in commerce, to import, to introduce or deliver for introduction into commerce, or to hold for sale or distribution after introduction into commerce." (42 U.S.C. 6291(16)) Thus, a model has been discontinued when it is no longer being sold, or held out for sale or distribution, by the manufacturer or private labeler.

9. Certification Testing

In-House vs. *Independent Testing*

The regulations currently permit in-house, as well as independent, certification testing for determining compliance with DOE's performance-based conservation standards. In the RFI, the Department requested comments as to whether all covered products and covered equipment should

be required to be independently tested for certification purposes. DOE received comments from ten manufacturers and two trade associations in protest of this suggestion. These commenters urged that independent testing would add no additional benefit to consumers, would increase costs and lower profit margins, cause delays which would stifle innovation and competition, and put small manufacturers out of business. DOE received positive comments from one advocacy group in support of the concept, who noted that such testing would ensure a higher level of confidence in manufacturer certification. In view of the above concerns, DOE recognizes that independent testing for purposes of certification may not be appropriate for all manufacturers and all industries. Therefore, DOE is maintaining the current certification testing procedures of allowing both in-house and independent testing. DOE plans to pursue verification testing in a future rulemaking and continues to seek comment on the attributes DOE should consider as part of its verification testing program. See Issue 2 under "Issues on Which DOE Seeks Comment" in section V of this NOPR. The Department believes that a self-certification approach, coupled with an appropriate verification program and robust enforcement, can facilitate compliance without unduly burdening manufacturers.

Sampling Procedures for Certification Testing

Under existing regulations, the sampling procedures for certain consumer products and certain commercial and industrial equipment to be used for certification testing are set forth in sections 430.24, 431.65, 431.135, 431.174, 431.175, 431.197, 431.205, 431.225, 431.265, 431.295, and 431.328. In the RFI, the Department sought comment regarding any needed changes in the current sampling plan for certification testing and the reasons the changes are warranted for a given product. The majority of comments DOE received on this issue were from manufacturers, who were all in agreement that the current sampling plans for certification is adequate and do not require change. Two trade associations commented similarly. Additionally, one advocacy group stated that the sampling plans for certification and enforcement testing should be similar, but may vary in some details including how the samples are procured, or sample size.

For this rulemaking, DOE is consolidating existing sampling provisions in Part 429 and establishing sampling provisions for the types of consumer products and commercial equipment that do not currently have them. Section 323(b)(3) of EPCA, 42 U.S.C. 6293(b)(3), requires a test procedure be reasonably designed to produce results measuring energy efficiency or energy use and not be unduly burdensome to conduct. DOE is proposing the use of a statistically meaningful sampling procedure for selecting test specimens of consumer products and commercial and industrial equipment to reduce the testing burden on manufacturers, while giving sufficient assurance that the true mean energy efficiency of a basic model meets or exceeds the represented measure of energy efficiency. The represented measure of energy efficiency is determined by the manufacturer based on the application of certification testing and DOE's sampling procedures.

DOE reviewed the existing sampling plans for consumer products and commercial and industrial equipment, which provided guidance on how many and which units to test to determine compliance. After reviewing the existing certification and enforcement sampling plans for consumer products and commercial and industrial equipment, DOE is proposing that the manufacturer select a sample at random from a production line and, after each unit or group of units is tested, either accept the sample or continue sampling and testing additional units until a rating determination can be made. As in the existing regulations, DOE does not propose a specific sample size for each product because the sample size is determined by the validity of the sample and how the mean compares to the standard, factors which cannot be determined in advance. Moreover, DOE believes that testing a randomly selected sample until a determination is reached is a method that arrives at a statistically valid decision on the basis of fewer tests than fixed-number sampling. As with the existing regulations, DOE is continuing to propose that manufacturers randomly select and test a sample of production units of a representative basic model, and then calculate a simple average of the values to determine the actual mean value of the sample. The confidence limits and coefficients are product specific and intended to reasonably reflect variations in materials, the manufacturing process, and testing tolerances. The proposed sampling plans for certification testing can be found in section 10 CFR 429.9 of the regulatory text.

DOE is continuing to consider further changes to the sampling plans for certification testing of all consumer products, including: (1) Changes to the product-specific coefficients and the rationale for such changes; (2) whether DOE should continue using sampling plans for certification testing, which provide manufacturers with the option of using the calculated values resulting from applying the criteria set forth in proposed section 10 CFR 429.9 or another representative value meeting the criteria in proposed section 10 CFR 429.9; (3) whether DOE should continue to have different sampling plans for certification testing and enforcement testing; and (4) whether DOE should expand the submission of data requirements in the certification section to include test data and the details of the sampling procedures used for making representations of and certifying compliance with the energy and water use or efficiency.

In addition, DOE is considering adding sampling plans and tolerances for other features of covered products and covered equipment which impact the water or energy characteristics of a product. For example, DOE could add a sampling provision for the measured storage volume of residential water heaters. The representative value of the measured storage volume could then be used in determining the energy efficiency of the product. DOE is seeking comment on this approach, and the methodologies DOE should consider if it decides to extend the sampling provisions to features other than the regulatory metrics. *See* Issue 3 under "Issues on Which DOE Seeks Comment" in section V of this NOPR.

c. Provisions Specific to Commercial HVAC and WH Equipment, Including the Use of AEDMs and VICPs

Currently, DOE's sampling procedures for certification testing of commercial HVAC and WH are based on provisions allowing the use of an AEDM and whether a manufacturer participates in a VICP. See 10 CFR 431.174–176. DOE is continuing to allow the use of AEDMs for commercial HVAC and WH equipment once the manufacturer has met the criteria in 10 CFR 429.23 of the proposed rule. Currently, DOE has provisions requiring more stringent criteria for testing and the use of AEDMs for those manufacturers opting not to participate in a VICP. Specifically, DOE requires non-VICP manufacturers to conduct independent testing, use DOE-prescribed sampling plans, and obtain DOE approval of its AEDMs (if applicable) before those methods may be used for compliance certification purposes. In addition, DOE requires that non-VICP manufacturers file a

compliance statement and certification report directly to DOE.

In this NOPR, DOE is proposing to simplify the procedures governing sampling plans for certification testing, voluntary programs, and AEDM verification. Specifically, DOE is proposing one set of procedures for all types of commercial HVAC and WH equipment regardless of participation in a VICP. In particular, DOE is proposing that the sampling procedures currently applicable for non-VICP members be used for certification testing of all types of commercial HVAC and WH equipment and verification of the AEDM. DOE is proposing to allow manufacturers to use both in-house testing facilities and independent laboratories at the manufacturer's discretion for certification testing. Lastly, DOE is continuing to allow third-party certification of compliance statements and certification reports regardless of participation in a VICP. DOE believes this approach treats all manufacturers equally and will simplify the provisions applicable to commercial HVAC and WH equipment.

Even though DOE wants to encourage the use of voluntary industry certification programs, DOE is not proposing modifications to DOE's provisions defining VICPs at this time. However, DOE is considering imposing a verification testing requirement for all product and equipment types. Such a requirement may entail changes to the current provisions governing VICPs in the second certification, compliance, and enforcement rulemaking. DOE thus seeks comment regarding the criteria defining VICPs and the use of VICPs in DOE's certification, compliance, and enforcement programs. Specifically, DOE requests comment about the requirements and details for verification testing programs (*e.g.,* the use of an independent testing laboratory, a specific number of samples randomly tested, *etc.*) and the actions taken by the VICP in conjunction with DOE when a unit is found to have failed the verification testing program of the VICP. *See* Issue 4 under "Issues on Which DOE Seeks Comment" in section V of this NOPR.

10. Records

Maintenance of Records

DOE proposes to establish a record retention requirement for certification reports that corresponds to the time period established for retention of test data under sections 430.62(d) and 431.371(d). This would require certification reports, along with the underlying certification test data that is already required to be retained under sections 430.62(d) and 431.371(d), to be retained by the manufacturer as long as the model is being distributed in commerce and, for discontinued models, for two years from the date that production of a basic model has ceased and is no longer being distributed by the manufacturer.

b. Public Records

In response to the RFI, two advocacy groups provided comments in support of making certification data publicly available. To that end, DOE proposes to clarify in its regulations that the following information submitted pursuant to the certification requirements is considered public information: the manufacturer's name, brand name, model number(s), and all of the product-specific information submitted on the certification report.

C. Enforcement Testing and Adjudication

DOE proposes the following amendments relating to its enforcement testing and adjudication requirements.

1. Enforcement Testing

a. Initiation of Enforcement Action

Pursuant to EPCA, DOE has authority to initiate enforcement actions to ensure compliance with its standards. The current regulations provide for enforcement testing upon DOE's receipt of written information that a covered product or covered equipment may be violating a standard. DOE proposes to revise its procedures to make clear that, pursuant to section 6296 of EPCA, the Department retains the discretion to request data, test, or examine the standard compliance of any covered product or covered equipment at any time. DOE may initiate enforcement testing on its own and is not required to rely solely on receipt of written information from another entity.

In response to DOE's questions relating to enforcement testing set forth in the RFI, three commenters asserted that DOE should have broader authority to initiate an enforcement proceeding, while six commenters argued that the standard of proof required to initiate a proceeding should be higher. Four commenters said they would support greater flexibility in enforcement procedures as long as plumbing products are excluded from those changes.

After consideration of these comments, DOE continues to believe that it is essential to align its regulations with its broad statutory authority under EPCA to initiate enforcement investigations and actions to determine if a covered product or covered equipment is compliant. This will ensure that the Department can enforce its regulations in a timely, effective manner as Congress intended. The enforcement program simply cannot be as effective if the Department can only initiate enforcement testing upon the receipt of an external complaint—DOE must be able to monitor compliance and test products at its own discretion. Furthermore, the ability of the Department to request records, test products, or examine design standard compliance, at any time, is crucial to the deterrent effect of the Department's enforcement efforts. Making clear the Department's authority as established by Congress to take these actions—in and of itself—will encourage compliance. Thus, the Department is proposing regulations for all covered products and covered equipment that make plain its authority to monitor compliance by requesting data and testing products, at any time, and to initiate enforcement investigations and actions based on a belief that a covered product or covered equipment is not compliant with an applicable standard.

Test Notice

DOE proposes to change the current requirements relating to the time period by which a manufacturer must ship test units of a basic model to the testing laboratory pursuant to a test notice. DOE proposes to reduce the time period from 5 to 2 days, in order to ensure that the enforcement testing process is not unnecessarily delayed. Because select units are already boxed for shipping in most cases, DOE believes this will not impose additional burden on manufacturers.

Sampling for Enforcement Testing

The sampling procedures to be used for enforcement testing are set forth in Appendix B to Subpart F of Part 430, Appendix B to Subpart K of Part 431, Appendix C to Subpart S of Part 431, and Appendix D to Subpart T of Part 431. Currently, the existing sampling plans for enforcement testing of consumer products require testing an initial sample of four products. Then, depending on the standard deviation of the results of the initial sample, a second sample size of up to 16 additional units may need to be tested to make a determination of compliance or non-compliance. DOE recognizes a sample size of 20 total units may not always be available for basic models that are low-volume and built-to-order. To accommodate these circumstances and reduce burden on manufacturers, DOE proposes to modify the existing

sampling procedures for consumer products to account for low-volume and built-to-order basic models. DOE has modeled these provisions on the existing enforcement sampling provisions for commercial and industrial equipment, where low-volume and built-to-order manufacturing is more common. Further, DOE proposes to retain the discretion to determine whether the basic model qualifies as low-volume or built-to-order. DOE proposes to make such determination by evaluating the number of units of a given basic model available at the manufacturer's site and all distributors.

Test Procedure Guidance and Enforcement Testing

DOE has launched a new online database offering guidance on the Department's test procedures for consumer products and commercial equipment. The new database will provide a publicly accessible forum for anyone with questions about—or needing clarification of—DOE's test procedures. This new online resource will also ensure that all manufacturers and members of the public are equally and immediately aware of the Department's interpretations of its test procedures. The database is available here: *http://www1.eere.energy.gov/guidance/default.aspx?pid=2&spid=1.*

In response to questions submitted, the Department will develop draft interpretive guidance, post it on the public database, and solicit public comment for a period of 30 days. At the end of that comment period, draft guidance documents may be adopted as final, revised, or withdrawn. Guidance marked as final and posted on the database represents the definitive interpretation of the Department on the questions addressed and may be relied upon by industry and members of the public. DOE wishes to make clear that any test procedure guidance that is marked final on DOE's database will be used by DOE when conducting enforcement testing.

e. Test Unit Selection

i. Collection Method

In order to allow for maximum flexibility in obtaining test units for enforcement testing and to discourage units from being chosen that may not be representative of the product that the consumer receives, DOE proposes to revise its test unit selection provisions for enforcement testing to allow DOE to select the units of a basic model to be tested and to provide that, at DOE's discretion, those units could come from the manufacturer, a distributor, or directly from the retailer.

In response to questions in the RFI regarding test unit selection, DOE received several comments from various parties. One advocacy group, one manufacturer, and two trade associations supported test unit selection directly from retail sources. Another trade association and two manufacturers commented that manufacturers should be given the opportunity to determine where the products can be best selected. In the case of low-volume products, commenters suggested that DOE settle for built-to-order products or manufacturer written assurances.

Reliable enforcement testing requires the selection and testing of an unbiased sample that is representative of the units distributed in commerce. DOE believes that providing Departmental flexibility in the test unit selection method will allow for the most reliable testing. Therefore, DOE proposes to provide in its regulations that units of a basic model to be tested for enforcement purposes may come from the distributor or retailer, as well as from the manufacturer. With regard to units that are specifically built-to-order or produced in low volume, the Department will determine the most reliable method of selecting units that are representative of those sold to consumers.

ii. Selection Process

In selecting test units for enforcement testing, existing regulations require a DOE representative to select a batch sample of up to 20 units, and test units from the batch sample. This requirement was intended to ensure that sufficient units were available for testing and to help prevent bias by requiring random sampling and by the quarantine of units at the outset of enforcement testing. DOE has found that this selection process is not always feasible due to varying production volume and distribution mechanisms. The Department proposes to revise this requirement to allow greater flexibility when selecting a sample for testing. Specifically, DOE proposes that DOE need not select a batch sample when it selects units off the retail shelf. In such circumstances, there is less concern about sample bias and no need to quarantine additional units. The proposed approach will minimize the burden on a manufacturer, while still allowing DOE to obtain a valid sample.

DOE also proposes that, for particular products, the size of the sample selected may vary depending on the statistical sampling procedures that apply to the particular product for enforcement purposes. This variability exists for certain commercial equipment in the current regulations and reflects known variations in materials, the manufacturing process, and testing tolerances. To address production environments, such as build-to-order manufacturing or low volume production requirements, DOE is also proposing a new provision that will allow DOE to make a determination of compliance where a statistically valid sample size cannot be obtained.

DOE proposes to increase the maximum sample size to 21 units in order to account for the test sample needed for certain types of consumer lighting products. Additionally, DOE proposes to allow units tested using the applicable DOE test procedure by DOE or another Federal agency, pursuant to other provisions or programs, to count toward units in the test sample, so long as the testing is done in accordance with the DOE test procedures and certification testing provisions. In this way, the Department will not have to duplicate efforts already taken by itself or other agencies to test units for compliance. For example, if a unit was tested under the ENERGY STAR verification program, DOE is proposing to allow these test units and results to count towards the sample for enforcement testing.

iii. Cost Allocation for Unit Selection

In the RFI, the Department solicited comments on whether the cost allocation for test units should be the same regardless of how the units are obtained (e.g. off-the-shelf or manufacturer provided). DOE received two comments on this issue from manufacturers. In particular, one manufacturer asserted that the cost allocation should be the same regardless of how the product is obtained. On the contrary, another manufacturer argued that DOE should pay the cost if units are selected off-the-shelf. Section 6296(b)(3) of EPCA provides DOE with the authority to require a manufacturer to supply at its expense covered products and covered equipment to DOE for testing. Consistent with this statutory directive, DOE proposes to require manufacturers to continue to assume the expense of supplying basic models for enforcement testing, including reimbursing the distributor or retailer for any units DOE has directly acquired from such distributer or retailer, not to exceed twenty-one units.

f. Testing at Manufacturer's Option

In the RFI, DOE requested comments on whether to remove the provision in

section 430.70(a)(6) relating to testing at the manufacturer's option if a basic model is determined to be in noncompliance with the applicable conservation standard at the conclusion of DOE testing. DOE received five comments from manufacturers arguing that manufacturers should be given the opportunity to request a repeat of the tests. The Department wishes to clarify that current regulations do not provide for manufacturers to test the same units that DOE has already tested. On the contrary, sections 430.70(a)(6) and 431.383(f) merely allow manufacturers to increase the testing sample size. Because manufacturers can perform additional testing on their own at any time, the Department proposes to remove existing sections 430.70(a)(6) and 431.383(f). There is no statutory requirement that manufacturers be given additional opportunities to test units found by DOE to be noncompliant, and the Department believes that such additional testing will only serve to delay the enforcement process.

g. Cost Allocation for Testing

In the RFI, DOE solicited comments relating to the distribution of costs for enforcement testing. Currently, enforcement testing is done at the Department's expense. Most commenting manufacturers argued that DOE should be responsible for paying the cost of testing appliances, while one non-profit organization stated that the manufacturers should bear the cost. Three commenters suggested that DOE should pay if the manufacturer was found to be in compliance, and the manufacturer should pay if it was not. Commenters also urged DOE to limit testing where possible and to conduct targeted challenge testing rather than random tests. One commenter suggested that DOE should create an online testing cost calculator.

DOE tentatively concludes that the cost of enforcement testing should remain with the Department and is not proposing a change at this time.

2. Adjudication

a. Improper Certification

DOE proposes to explicitly establish in its rules that a manufacturer's failure to properly certify a covered product or covered equipment and retain records in accordance with DOE regulations may be subject to enforcement action, including the assessment of civil penalties, separate from any determination of whether a covered product or covered equipment does or does not comply with the applicable conservation standard. While existing regulations already provide for enforcement action to be taken for improper certification or upon a determination of noncompliance, to eliminate any uncertainty, the Department proposes to make clear that a failure to certify covered products and covered equipment in accordance with the DOE rules is an independent violation of EPCA and DOE's implementing regulations that may be subject to enforcement action.

b. Failure To Test

The Department proposes to clarify in its regulations that a failure to test any covered product or covered equipment subject to any of the conservation standards would be a violation of the applicable conservation standard.

c. Distribution in Commerce After Notice of Noncompliance Determination

DOE proposes to revise its regulations to make clear that a manufacturer or private labeler's distribution in commerce of a basic model after a notice of noncompliance determination has been issued would constitute a prohibited act subject to enforcement action.

d. Knowing Misrepresentation

DOE proposes to establish enforcement steps to be taken to address those instances where a knowing misrepresentation has occurred. This may arise where a covered product or a covered equipment meets the applicable conservation standard, but not at the efficiency level that has been claimed.

e. Penalties

Existing statutory authority under EPCA allows DOE to assess civil penalties for knowing violations. Under section 6303 of the statute, each unit of a covered product or covered equipment found to be in violation of a prohibited act, such as failure to meet an applicable conservation standard, constitutes a separate violation. For certification requirement violations, per statutory authority and DOE guidance, the Department will calculate penalties based on each day a manufacturer distributes each basic model in commerce in the United States without having submitted a certification report. DOE proposes to revise its regulations to clearly state this penalty procedure. Additionally, DOE proposes to explicitly state in its regulations that, consistent with its guidance, it will consider numerous factors in assessing civil penalties, including: the nature and scope of the violation; the provision violated; the violator's history of compliance or noncompliance; whether the violator is a small business; the violator's ability to pay; the violator's timely self-reporting of the violation; the violator's self-initiated corrected action, if any; and such other matters as justice may require.

f. Imposition of Additional Certification Testing Requirements as Remedy for Non-Compliance

As an additional tool to ensure compliance with the DOE conservation standards and regulations, the Department proposes to revise its regulations to provide that the DOE may require independent, third-party testing for certification of covered products and covered equipment where DOE has determined a manufacturer or private labeler is in noncompliance with the certification requirements or applicable conservation standards.

g. Compromise and Settlement

The Department proposes to outline the steps to be taken by both parties (DOE and respondent) once a compromise or settlement offer has been made.

D. Verification Testing

In the RFI, DOE requested comments relating to a possible new requirement for periodic verification testing by manufacturers that would be applicable to all basic models certified to DOE. This requirement would be used to verify that the units distributed into commerce continue to perform at the certified levels. In particular, DOE solicited comments on whether manufacturers and/or private labelers should be required to perform verification testing according to certain conditions and criteria. DOE received extensive comments and suggestions on this issue, relating to costs, coverage, unit selection, information flow, testing labs and methodology. At this time, DOE has not yet made a determination as to the development of a verification program and instead has focused its initial efforts on revising its certification, enforcement testing and adjudication regulations. An effective verification program must be carefully crafted to balance the benefits of regularized compliance monitoring against the additional testing burdens on manufacturers. Moreover, such a program must be consistent and fair across all regulated product types, while accounting for legitimate differences in the diverse products covered by EPCA. DOE continues to seek comments about how to best balance the competing interests and achieve the Department's overarching objective of ensuring compliance with the Federal

conservation standards. Specifically, DOE requests comment about the requirements and details for verification testing programs (e.g., the use of an independent testing laboratory and a specific number of samples that should be randomly tested for each product).

E. Waivers

DOE also addressed the possibility of establishing a mandatory waiver requirement in the RFI. This would obligate manufacturers to obtain a waiver where the test procedure does not evaluate the energy or water consumption characteristics in a representative manner or where the test procedure yields materially inaccurate comparative data. The majority of comments the Department received in response to this information request agreed that DOE has authority to grant waivers, but were divided on whether the waiver requirement will hold new authority or whether it is just replicating an existing process. One commenter in support of the waiver process pointed out that a waiver can act as a sign that a test procedure is out-of-date. Another commenter urged the DOE to seek advice from relevant trade associations and standards committees before issuing a waiver. A third commenter argued that manufacturers should not be required to obtain a waiver at all if the test procedure does not address a specific product design.

In view of these comments, the Department will continue to monitor the market to ensure that a manufacturer does not receive an unfair advantage due to product characteristics.

F. Additional Product Specific Discussions and Issues for Which DOE Continues To Seek Comment

1. Clarification of Entity Responsible for Compliance for Walk-In Coolers or Freezers

In response to the test procedure notice of proposed rulemaking for walk-in coolers or freezers (WICFs), several interested parties commented on DOE's interpretation of the compliance testing responsibility associated with the role of "manufacturer". 75 FR 186 (January 4, 2010). Consistent with the Department's consolidation of certification and enforcement provisions for all products into one section, we propose to address this issue as a part of today's NOPR.

In the comments on the test procedure notice, Craig cautioned that not holding contractors, end-users, or wholesalers accountable for WICF performance would remove the incentive for these entities to ensure compliance. It suggested that this would put manufacturers, who would be required to demonstrate compliance, at a competitive disadvantage due to testing costs to the manufacturers and cost differences to the end users. (EERE–2008–BT–TP–0014, Craig, No. 1.3.017 at p. 2 and Public Meeting Transcript, No. 1.2.010 at pp. 140 and 179) Kysor suggested that the general contractor at the end-use site could certify the WICF, as general contractors already go through a certification process for other parts of a building. (EERE–2008–BT–TP–0014, Kysor, Public Meeting Transcript, No. 1.2.010 at pp. 66 and 75 – 76) Arctic added that a manufacturer does not have complete control over WICF efficiency because the end-user's behavior can also affect WICF performance. (EERE–2008–BT–TP–0014, Arctic, Public Meeting Transcript, No. 1.2.010 at p. 80)

Others commented on the role of the installer—that is, the entity who places or constructs the WICF in its end use location—in ensuring compliance with the regulation. Craig, Schott Gemtron, and Bally stated that the installer should be considered the manufacturer and thus be held responsible for ensuring compliance. Bally stated that infiltration in particular depends on the ability of the installer and that Bally does not control the installation procedure. (EERE–2008–BT–TP–0014, Bally, Public Meeting Transcript, No. 1.2.010 at p. 132) Schott Gemtron stated that incorrect installation affects WICF performance, which, in its view, should be the responsibility of the installer because WICF manufacturers cannot ensure proper installation. (EERE–2008–BT–TP–0014, Schott Gemtron, Public Meeting Transcript, No. 1.2.010 at pp. 67 and 139)

Craig agreed that the manufacturer cannot control installation in the field, but Craig also mentioned that testing at the point of installation would be infeasible if every application would need to be tested. (EERE–2008–BT–TP–0014, Craig, Public Meeting Transcript, No. 1.2.010 at pp. 70–71) Craig recommended that DOE define the installer as the manufacturer and hold the installer responsible for compliance, or, alternatively, require that the manufacturer assume responsibility and control of all aspects of the process—including installation—so that the manufacturer could verify that the WICF is tested correctly and meets DOE's requirements. (EERE–2008–BT–TP–0014, Craig, No. 1.3.017 at p. 1 and Public Meeting Transcript, No. 1.2.010 at pp. 23, 25 and 52)

American Panel contended that a requirement for a factory representative to oversee installation would be cost prohibitive to the end user. (EERE–2008–BT–TP–0014, American Panel, Public Meeting Transcript, No. 1.2.010 at pp. 74 and 79) Kason urged DOE not to consider the installer the manufacturer because installers have no control over system design and components. (EERE–2008–BT–TP–0014, Kason, No. 1.3.0XX at p. 1) American Panel agreed that the installer should not be part of the testing and certification process set forth by DOE. (EERE–2008–BT–TP–0014, American Panel, No. 1.3.024 at p. 3)

In general, the "manufacturer" is the entity responsible for compliance with any DOE performance standard. EPCA defines the term "manufacture" as "to manufacture, produce, assemble or import." 42 U.S.C. 6291(10) The breadth of this definition leaves open numerous entities that could be held responsible for compliance with a WICF performance standard. To clarify the application of this term in the case of WICFs, DOE proposes that the term be applied to the entity responsible for designing and/or selecting the various components used in a WICF. The term could apply to different entities in different situations. If an entity physically manufactures all components that comprise the WICF, that entity would be considered the manufacturer. Alternatively, if an entity physically manufactures some of the components that comprise the WICF and purchases other components from a supplier, and assembles all components into a complete WICF or supplies all components as a complete kit for assembly at a customer's site, that entity would be considered the manufacturer. In this context, a third party that does not manufacture any components but rather chooses the components that comprise the WICF, would be considered the manufacturer of the WICF for purposes of EPCA. DOE believes this addresses Craig's concern that certain parties involved in the manufacture of a WICF could be put at a competitive disadvantage to others.

While DOE recognizes that incorrect installation or use could affect the performance of the WICF, as stated by Craig, Schott Gemtron, and Bally, DOE believes that testing and compliance responsibility in the case of WICFs should not rest with an entity that simply installs this equipment. This is because an entity who solely installs the equipment, and does not make design decisions about the components that are included in the equipment, would not be in a position to certify compliance with the regulations, as suggested by American Panel and Kason. Therefore, DOE proposes that entities responsible

for physical installation of the system would not be required to certify compliance if they do not otherwise meet criteria for being considered the manufacturer, assuming that the envelope or refrigeration system is physically assembled in accordance with the applicable technical specifications developed by the manufacturer.

The unique nature of WICFs requires DOE to consider carefully the assignment of compliance-related responsibilities. The high level of customization that appears in a significant number of WICF requires DOE to apply its requirements in a manner that recognizes the issues presented by this market. Accordingly, while DOE could opt to require every entity in the manufacturing chain to certify compliance, or even assign that responsibility solely to the installer, the agency believes that the entity who designs the WICF and/or selects components of a WICF, is in the best position to ensure that the WICF, when properly installed, will satisfy the required standard. DOE believes that this approach best balances the equities involved with the manufacture and installation of this type of equipment. Accordingly, DOE proposes the following definition of manufacturer of a WICF:

Manufacturer of a walk-in cooler or walk-in freezer means any person who manufactures, produces, assembles or imports such a walk-in cooler or walk-in freezer, including any person who:

(1) Manufactures, produces, assembles, or imports a walk-in cooler or walk-in freezer in its entirety, including the collection and shipment of all components that affect the energy consumption of a walk-in cooler or walk-in freezer;

(2) Manufactures, produces, assembles or imports a walk-in cooler or walk-in freezer in part, and specifies or approves the walk-in cooler or walk-in freezer's components that affect energy consumption, including refrigeration, doors, lights, or other components produced by others, as for example by specifying such components in a catalogue by make and model number or parts number;

(3) Is any vendor who sells a walk-in cooler or walk-in freezer that consists of a combination of components that affect energy consumption, which are not specified or approved by a person described in paragraph (1) or (2) of this definition; or

(4) Is an individual or a company who arranges for a walk-in cooler or walk-in freezer to be assembled at his own or any other specified premises from components that affect energy consumption, which are specified and approved by him and not by a person described in paragraph (1), (2), or (3) of this definition.

DOE believes the burden on manufacturers of certifying compliance with these prescriptive standards will be minimal because no test is necessary to determine compliance with most of the requirements. The chief burden imposed by this rule is a certification report burden of providing DOE information to show that the product is in compliance with the design standards in EISA 2007. DOE is proposing that manufacturers use the online CCMS templates that DOE develops. DOE notes that the manufacturer, as defined, will be required to certify to DOE that the equipment meets the prescriptive requirements, rather than the general contractor as suggested by Kysor, unless the general contractor meets the criteria for being considered the manufacturer. Furthermore, although the end user's behavior does affect WICF performance as stated by Arctic, DOE will not consider the end user responsible for compliance unless the end user meets the criteria for being considered the manufacturer.

In addition, DOE's regulations for WICF specify a test for one requirement: EPCA contains R-value requirements for insulation and states, "for the purpose of test procedures for WICF: The R-value shall be the 1/K factor multiplied by the thickness of the panel. The K factor shall be based on ASTM test procedure C518–2004." 42 U.S.C. 6314(a)(9)(A)(i)-(ii). This means that ASTM C518–2004 must be used to test foam to determine its R-value. However, for purposes of certifying compliance with the R-value requirements, the manufacturer may elect to use the test procedure to test the foam that they use, or the manufacturer may rely on the results of testing done by a third party on their behalf, for instance, a test lab or the foam supplier. Nevertheless, the manufacturer is still responsible for complying with the standard.

2. Submission of Data Requirements for Fluorescent Lamp Ballast

Under DOE's existing regulations, fluorescent lamp ballast manufacturers currently are not required to submit compliance statements and certification reports. In March 2010, DOE published a test procedure NOPR that proposed submission of data requirements for fluorescent lamp ballasts that would become effective one year following the final rule publication of such requirements. 75 FR 14288 (March 24, 2010).

In response to that proposal, Earthjustice, the Northwest Energy Efficiency Alliance (NEEA), Northwest Power and Conservation Council (NPCC) and several CA utilities supported the addition of submission of data requirements. (EERE–2009–BT–TP–0016; NEEA & NPCC, No. 32 at p. 10; Earthjustice, No. 14 at p. 1; CA Utilities, No. 13 at p. 3) Earthjustice added that as there have been no changes made to the test procedure that would require retesting to determine compliance with existing standards, there is no justification for permitting a full year before manufactures must submit data. It cited a precedent (74 FR 65105 (December 9, 2009)) in which DOE allowed a timeline of 30 days for manufactures to submit required certification reports and compliance statements. Earthjustice also commented that DOE should publish a separate final rule to require written documentation of compliance with energy conservation standards on an accelerated timeframe in advance of the full test procedure final rule. (EERE–2009–BT–TP–0016; Earthjustice, No. 14 at p. 1)

DOE agrees that fluorescent lamp ballasts should be included in the provisions for written documentation of compliance with energy conservation standards on an accelerated timeline. For that reason, DOE is proposing to include provisions for the certification of fluorescent lamp ballasts. The proposed revisions will require that ballast manufacturers follow all existing provisions of subpart F of 10 CFR part 430 and report ballast efficacy factor, power factor, number of lamps operated by the ballast, and type of lamp operated by the ballast.

3. Certification, Compliance, and Enforcement for Electric Motors

As explained throughout the NOPR, DOE has not proposed moving or changing any of the certification, compliance, and enforcement provisions related to electric motors. However, DOE will be considering consolidating the provisions, as applicable, with the proposals from today's NOPR in the second certification, compliance, and enforcement rulemaking. Consequently, DOE is seeking comments on the existing provisions for electric motors, including any previous proposals for small electric motors and any changes DOE should consider in the next rulemaking applicable to these products.

In the next certification, compliance, and enforcement rulemaking, DOE will consider an annual certification requirement for motors similar to what

it is proposing for all other types of covered products and covered equipment in today's proposed rule. In light of the annual requirement for other products, DOE specifically seeks comment on if and how the certification compliance numbers for electric motors could be modified to clearly demonstrate compliance when there is a change in the Federal energy conservation standards for these products. See Issue 5 under "Issues on Which DOE Seeks Comment" in section V of this NOPR.

4. Enforcement for Imports and Exports

As DOE puts an additional emphasis on enforcing its regulatory program, DOE believes that some of the proposals in today's notice will aid in enforcing DOE's regulations relating to products imported and exported from the United States. Specifically, DOE is proposing to modify the label on exported products to read "NOT FOR SALE IN THE UNITED STATES" to make it clear that this product is not for distribution in commerce in the United States. In addition, DOE is interested in seeking comment from interested parties on how DOE could modify its certification, compliance, and enforcement provisions to more effectively enforce at the border. *See* Issue 6 under "Issues on Which DOE Seeks Comment" in section V of this NOPR.

IV. Procedural Issues and Regulatory Review

E. Review Under Executive Order 12866

Today's regulatory action is not a "significant regulatory action" under section 3(f) of Executive Order 12866. Accordingly, this action was not subject to review under that Executive Order by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB).

F. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis (IRFA) for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by E.O. 13272, "Proper Consideration of Small Entities in Agency Rulemaking," 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of General Counsel's Web site, *http://www.gc.doe.gov*.

DOE reviewed the certification, compliance, and enforcement requirements being proposed under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. As discussed in more detail below, DOE found that because a subset of the proposed certification, compliance, and enforcement regulations have not previously been required of manufacturers, all manufacturers, including small manufacturers, could potentially experience a financial burden associated with new certification, compliance, and enforcement requirements. While examining this issue, DOE determined that it could not certify that the proposed rule, if promulgated, would not have a significant effect on a substantial number of small entities. Therefore, DOE has prepared an IRFA for this rulemaking. The IRFA describes potential impacts on small businesses associated with certification, compliance, and enforcement requirements on covered products and covered equipment.

DOE has transmitted a copy of this IRFA to the Chief Counsel for Advocacy of the Small Business Administration (SBA) for review.

1. Reasons for the Proposed Rule

The reasons for this proposed rule are discussed elsewhere in the preamble and not repeated here.

2. Objectives of and Legal Basis for the Proposed Rule

The objectives of and legal basis for the proposed rule are discussed elsewhere in the preamble and not repeated here.

3. Description and Estimated Number of Small Entities Regulated

DOE used the small business size standards published on January 31, 1996, as amended, by the SBA to determine whether any small entities would be required to comply with the rule. 61 FR 3286; *see* also 65 FR 30836, 30850 (May 15, 2000), as amended at 65 FR 53533, 53545 (September 5, 2000). The size standards are codified at 13 CFR Part 121. The standards are listed by North American Industry Classification System (NAICS) code and industry description and are available at *http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf*.

This proposed rule potentially impacts manufacturers of almost all types of covered products and covered equipment subject to DOE's energy conservation, water conservation, and design standards.

TABLE IV—1 SMALL BUSINESS CLASSIFICATIONS FOR COVERED PRODUCTS AND COVERED EQUIPMENT

Covered product or covered equipment type	NAICS code	NAICS definition of small manufacturer (number of employees)	Total number of small manufacturers
Residential refrigerators, residential refrigerator-freezers, and residential freezers	335222	≤1000	1
Room air conditioners	333415	≤750	0
Residential central air conditioners and heat pumps	333415	≤750	13
Small-duct, high velocity	333415	≤750	2
Through-the-wall air conditioners and heat pumps	333415	≤750	1
Residential water heaters	335228	≤500	6
Residential furnaces and boilers	333415	≤750	25
Dishwashers	335228	≤500	0
Residential clothes washers	335224	≤1000	1
Clothes dryers	335224	≤1000	0
Direct heating equipment	333414	≤500	12
Cooking products	335221	≤750	2
Pool heaters	333414	≤500	1
Fluorescent lamp ballasts	335311	≤750	11

TABLE IV—1 SMALL BUSINESS CLASSIFICATIONS FOR COVERED PRODUCTS AND COVERED EQUIPMENT—Continued

Covered product or covered equipment type	NAICS code	NAICS definition of small manufacturer (number of employees)	Total number of small manufacturers
General service fluorescent lamps	335110	≤1000	1
Incandescent reflector lamps	335110	≤1000	0
Ceiling fans	335211	≤750	91
Ceiling fan light kits	335211	≤750	91
Torchieres	335121	≤500	404
Medium base compact fluorescent lamps	335110	≤1000	70
Dehumidifiers	335211	≤750	0
External power supplies	335999	≤500	250
General service incandescent lamps	335110	≤1000	67
Candelabra base incandescent lamps	335110	≤1000	67
Intermediate base incandescent lamps	335110	≤1000	67
Commercial refrigeration equipment	333415	≤750	20
Commercial warm air furnaces	333415	≤750	3
Commercial packaged boilers	333414 or 332410	≤500	13
Commercial package air-conditioning and heating equipment	333415	≤750	1
Packaged terminal air conditioners and heat pumps	333415	≤750	6
Single package vertical units	333415	≤750	5
Commercial water heaters	333319	≤500	7
Automatic commercial ice makers	333415	≤750	2
Commercial clothes washers	333312	≤500	0
Distribution transformers	335311	≤750	45
Illuminated exit signs	335129	≤500	269
Traffic signal modules and pedestrian modules	335129	≤500	269
Refrigerated bottled or canned beverage vending machines	333311	≤500	6
Walk-in coolers and freezers	333415	≤750	45
Metal halide fixtures	335122	≤500	75
Faucets	332913	≤500	62
Showerheads	332913	≤500	42
Water closets	327111	≤750	9
Urinals	327111	≤750	2
Commercial prerinse spray valves	332919	≤ 500	8

4. Description and Estimate of Compliance Requirements

Many of the certification, compliance, and enforcement provisions subject to today's final rule are already codified in existing regulations for consumer products and commercial and industrial equipment. As a result, DOE expects the impact on all manufacturers to be minimal. Many of the changes being proposed in today's final rule surround expanding DOE's existing certification requirements and could slightly increase the recordkeeping burden. DOE does not expect manufacturers of all types to incur any capital expenditures as a result of the proposals, since the rulemaking does not impose any product-specific requirements that would require changes to existing plants, facilities, product-specifications, or test procedures. Rather, this rule clarifies sampling requirements and imposes certain data reporting requirements, which may have a slight impact on labor costs.

With regard to sampling for certification testing, this rule clarifies that the minimum number of units tested for certification compliance must be no less than 2 unless a different minimum number is specified. DOE does not believe this specification increases the testing burden on manufacturers because DOE has always required a minimum of 2 samples, if not more, to achieve a realistic sample mean and to mitigate the risk of a product to be out of compliance. For a small number of products, DOE is proposing statistical sampling procedures that are based on previously established procedures for consumer products and commercial equipment. These procedures are designed to keep the testing burden on manufacturers as low as possible, while still providing confidence that the test results can be applied to all units of the same basic model. In some cases, manufacturers are permitted to use analytical procedures, such as computer simulations, to determine the efficiencies of their products, which will further minimize testing burden.

With regard to certification, the proposal considers requiring manufacturers of covered products and covered equipment to certify annually that their products meet the applicable energy conservation standard, water conservation standard or design standard. It is expected that manufacturers will re-submit the original certification testing information each year for basic models with no modifications affecting energy consumption, water consumption, or design. As DOE currently requires manufacturers to submit certification information at the introduction of a new or modified basic model, DOE does not anticipate that annual certification on products already submitted will add substantial additional burden to manufacturers.

The cost of certification testing will depend on the number of basic models a manufacturer produces. The cost of certifying should be minimal once testing for each basic model has occurred pursuant to the test procedures prescribed by DOE.

DOE estimates that a typical firm would spend approximately 20 hours complying with the additional certification, compliance, and enforcement procedures being considered in today's proposed rule. This estimate does not include any testing burden, which results from DOE's test procedures. DOE has already considered this burden on all

manufacturers in the test procedure rulemakings for individual manufacturers. Instead, this burden represents the time it would take a certification engineer to gather the appropriate data, apply the statistical sampling methods required, and submit the required certification to DOE both for new basic models and on an annual basis. DOE has tried to mitigate the impacts on all manufacturers by aligning the annual certification schedule with the Federal Trade Commission's model submission schedule for consumer products. At most, DOE expects an average manufacturer to allocate 4 of the 20 hours to meeting the annual certification reporting requirement.

DOE notes that these values likely overestimate the manufacturer reporting burden, as the Federal Trade Commission currently requires annual submission of data regarding all basic models distributed into commerce for consumer products, and many voluntary programs also require annual data submission.

In addition, to minimize the impact that annual certification filings may have on manufacturers, DOE has introduced the online CCMS system through which manufacturers would be required to submit their products for certification. In addition, DOE is making available CCMS templates for each product, which clearly lay out the certification requirements for each covered product and covered equipment.

5. Duplication, Overlap, and Conflict With Other Rules and Regulations

DOE is not aware of any rules or regulations that duplicate, overlap, or conflict with the proposed rule being considered today.

6. Significant Alternatives to the Rule

This section considers alternatives to the proposals in today's certification, compliance, and enforcement rulemaking. DOE could mitigate the small potential impacts on small manufacturers by reducing the number of samples used, eliminating the annual certification filing, or by expanding the groupings of models. However, DOE strongly believes the proposals in today's rulemaking are essential to a sustainable and consistent enforcement program for all of the covered products and covered equipment. While these alternatives may mitigate the potential economic impacts on small entities compared to the proposed provisions, the ability for DOE to enforce its energy conservation regulations far exceeds any potential burdens. Thus, DOE rejected these alternatives and is proposing the certification, compliance, and enforcement provisions set forth in this rulemaking for all manufacturers of covered products and covered equipment. DOE continues to seek input from businesses that would be affected by this rulemaking and will consider comments received in the development of any final rule.

C. Review Under the Paperwork Reduction Act

1. Description of the Requirements

DOE is developing regulations to implement reporting requirements for energy conservation, water conservation, and design standards, and to address other matters including compliance certification, prohibited actions, and enforcement procedures for covered consumer products and commercial and industrial equipment covered by EPCA.

DOE is proposing to require manufacturers of covered consumer products and commercial and industrial equipment to maintain records about how they determined the energy efficiency, energy consumption, water consumption or design features of their products. DOE is also proposing to require manufacturers to submit a certification report indicating that all basic models currently produced comply with the applicable standards using DOE's testing procedures, as well as include the necessary product specific certification data. The certification reports are submitted for each basic model, either when the requirements go into effect (for models already in distribution) or when the manufacturer begins distribution of a particular basic model, and annually thereafter. Reports must be updated when a new model is introduced or a change affecting energy efficiency or use is made to an existing model. The collection of information is necessary for monitoring compliance with the conservation standards and testing requirements for the consumer products and commercial and industrial equipment mandated by EPCA.

The information that would be required by these regulations, if finalized, and that is the subject of this proposed collection of information, would be submitted by manufacturers to certify compliance with energy conservation, water conservation, and design standards established by DOE. DOE would also use the information to determine whether an enforcement action is warranted and to better inform DOE during a test procedure and energy conservation standards rulemaking.

The certification and recordkeeping requirements for certain consumer products in 10 CFR part 430 have previously been approved by OMB and assigned OMB control number 1910–1400. DOE is renewing the previously approved certification and recordkeeping requirements, as well as submitting these new proposed certification and recordkeeping requirements for all consumer products and commercial and industrial equipment subject to certification, compliance, and enforcement regulations to OMB for review and approval under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq.

2. Method of Collection

Respondents must submit electronic forms using DOE's on-line CCMS system.

3. Data

The following are DOE estimates of the total annual reporting and recordkeeping burden imposed on manufacturers of all consumer products and commercial and industrial equipment subject to certification, compliance, and enforcement provisions. These estimates take into account the time necessary to develop testing documentation, complete the certification, and submit all required documents to DOE electronically.

OMB Control Number: 1910–1400.

Form Number: None.

Type of Review: Regular submission.

Affected Public: Manufacturers of consumer products and commercial and industrial equipment covered by the rulemakings discussed above.

Estimated Number of Respondents: 2,916.

Estimated Time per Response: Certification reports, 20 hours.

Estimated Total Annual Burden Hours: 58,320.

Estimated Total Annual Cost to the Manufacturers: $4,374,000 in recordkeeping/reporting costs.

4. Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques

or other forms of information technology. Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

D. Review Under the National Environmental Policy Act

DOE has determined that this rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and DOE's implementing regulations at 10 CFR part 1021. Specifically, this rule amends an existing rule without changing its environmental effect and, therefore, is covered by the Categorical Exclusion in 10 CFR part 1021, subpart D, paragraph A5. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review Under Executive Order 13132

DOE reviewed this rule pursuant to Executive Order 13132, "Federalism," 64 FR 43255 (August 4, 1999), which imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. In accordance with DOE's statement of policy describing the intergovernmental consultation process it will follow in the development of regulations that have federalism implications, 65 FR 13735 (March 14, 2000), DOE examined today's proposed rule and determined that the rule 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. *See* 74 FR 61497. Therefore, DOE has taken no further action in today's proposed rule with respect to Executive Order 13132.

F. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform" (61 FR 4729 (February 7, 1996)) imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the proposed regulations meet the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4; 2 U.S.C. 1501 *et seq.*) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish estimates of the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed "significant intergovernmental mandate," and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect such governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820. (The policy is also available at *http://www.gc.doe.gov*). Today's proposed rule contains neither an intergovernmental mandate nor a mandate that may result in an expenditure of $100 million or more in any year, so these requirements do not apply.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. Today's proposed rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 12630

DOE determined under Executive Order 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights," 53 FR 8859 (March 18, 1988), that today's proposed rule would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution. See 74 FR 61497–98.

J. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed today's proposed rule under OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OIRA a Statement of Energy Effects for any proposed significant energy action. A "significant energy action" is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any

adverse effects on energy supply, distribution, or use if the proposal is implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. Today's proposed regulatory action, which proposes amendments to the Department's certification, compliance, enforcement procedures, is not a significant regulatory action under Executive Order 12866 or any successor order; would not have a significant adverse effect on the supply, distribution, or use of energy; and has not been designated by the Administrator of OIRA as a significant energy action. Therefore, it is not a significant energy action, and, accordingly, DOE has not prepared a Statement of Energy Effects.

V. Public Participation

A. Attendance at Public Meeting

The time, date, and location of the public meeting are provided in the **DATES** and **ADDRESSES** sections at the beginning of this document. Anyone who wants to attend the public meeting must notify Ms. Brenda Edwards at (202) 586–2945. Foreign nationals visiting DOE headquarters are subject to advance security screening procedures.

B. Procedure for Submitting Requests To Speak

Any person who has an interest in the topics addressed in this notice, or who is a representative of a group or class of persons that has an interest in these issues, may request an opportunity to make an oral presentation at the public meeting. Such persons may hand-deliver requests to speak to the address shown in the **ADDRESSES** section at the beginning of this notice between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Requests may also be sent by mail or email to: Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121, or *Brenda.Edwards@ee.doe.gov.* Persons who wish to speak should include in their request a computer diskette or CD in WordPerfect, Microsoft Word, PDF, or text (ASCII) file format that briefly describes the nature of their interest in this rulemaking and the topics they wish to discuss. Such persons should also provide a daytime telephone number where they can be reached.

DOE requests that those persons who are scheduled to speak submit a copy of their statements at least one week prior to the public meeting. DOE may permit any person who cannot supply an advance copy of this statement to participate, if that person has made alternative arrangements with the Building Technologies Program in advance. When necessary, the request to give an oral presentation should ask for such alternative arrangements.

C. Conduct of Public Meeting

DOE will designate a DOE official to preside at the public meeting and may also employ a professional facilitator to aid discussion. The public meeting will be conducted in an informal, conference style. The meeting will not be a judicial or evidentiary public hearing, but DOE will conduct it in accordance with section 336 of EPCA (42 U.S.C. 6306). Discussion of proprietary information, costs or prices, market share, or other commercial matters regulated by U.S. anti-trust laws is not permitted.

DOE reserves the right to schedule the order of presentations and to establish the procedures governing the conduct of the public meeting. A court reporter will record the proceedings and prepare a transcript.

At the public meeting, DOE will present summaries of comments received before the public meeting, allow time for presentations by participants, and encourage all interested parties to share their views on issues affecting this rulemaking. Each participant may present a prepared general statement (within time limits determined by DOE) before the discussion of specific topics. Other participants may comment briefly on any general statements. At the end of the prepared statements on each specific topic, participants may clarify their statements briefly and comment on statements made by others. Participants should be prepared to answer questions from DOE and other participants. DOE representatives may also ask questions about other matters relevant to this rulemaking. The official conducting the public meeting will accept additional comments or questions from those attending, as time permits. The presiding official will announce any further procedural rules or modification of procedures needed for the proper conduct of the public meeting.

DOE will make the entire record of this proposed rulemaking, including the transcript from the public meeting, available for inspection at the U.S. Department of Energy, 6th Floor, 950 L'Enfant Plaza, SW., Washington, DC 20024, (202) 586–2945, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Anyone may purchase a copy of the transcript from the transcribing reporter. Additionally, the record for this proposed rulemaking will be made available at *http://www.regulations.gov.*

D. Submission of Comments

DOE will accept comments, data, and information regarding the proposed rule no later than the date provided at the beginning of this notice. Comments, data, and information submitted to DOE's e-mail address for this rulemaking should be provided in WordPerfect, Microsoft Word, PDF, or text (ASCII) file format. Interested parties should avoid the use of special characters or any form of encryption, and wherever possible, comments should include the electronic signature of the author. Absent an electronic signature, comments submitted electronically must be followed and authenticated by submitting a signed original paper document to the address provided at the beginning of this notice. Comments, data, and information submitted to DOE via mail or hand delivery/courier should include one signed original paper copy. No telefacsimiles (faxes) will be accepted.

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: 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 as to the confidential status of the information and treat it according to its determination.

Factors of interest to DOE when evaluating requests to treat submitted information as confidential include (1) a description of the items, (2) whether and why such items are customarily treated as confidential within the industry, (3) whether the information is generally known by or available from other sources, (4) whether the information has previously been made available to others without obligation concerning its confidentiality, (5) an explanation of the competitive injury to the submitting person which would result from public disclosure, (6) a date upon which such information might lose its confidential nature due to the passage of time, and (7) why disclosure of the information would be contrary to the public interest.

E. Issues on Which DOE Seeks Comment

DOE is particularly interested in receiving comments on the following issues:

1. DOE seeks comment on how manufacturers determine that a particular model constitutes a new basic

model, the types of potential changes manufacturers may make to a given model, and the difference in the energy use characteristics a typical change may have on a per product basis. For example, should DOE contemplate proposing a specific regulation that requires a new basic model declaration and filing when a modification to a given basic model impacts the energy characteristics of the product by a given de minimus percentage? DOE seeks comment on how these de minimus percentages might change for each covered product and covered equipment.

2. DOE seeks comment on the attributes DOE should consider as part of its verification testing program.

3. DOE seeks comment regarding the criteria defining VICPs, and the use of VICPs in DOE's certification, compliance, and enforcement programs for both consumer products and commercial and industrial equipment. Specifically, DOE requests comment about the requirements and details for verification testing programs (*e.g.,* the use of an independent testing laboratory, a specific number of samples randomly tested, *etc.*) and the actions taken by the VICP in conjunction with DOE when a unit is found to have failed the verification testing program of the VICP.

4. DOE is considering adding sampling plans and tolerances for other features of covered products and covered equipment which impact the water or energy characteristics of a product. DOE is seeking comment on this approach, and the methodologies DOE should consider if it decides to extend the sampling provisions to features other than the regulatory metrics.

5. DOE is seeking comments on the existing provisions for electric motors, including any previous proposals for small electric motors and any changes DOE should consider in the next rulemaking applicable to these products. In light of the annual requirement for other products, DOE specifically seeks comment on if, and how, the certification compliance numbers for electric motors could be modified to clearly demonstrate compliance when there is a change in the Federal energy conservation standards for these products.

6. DOE is interested in seeking comment from interested parties on how DOE could modify its certification, compliance, and enforcement provisions to more effectively enforce at the border.

7. DOE continues to seek comment from businesses that would be affected by this rulemaking and will consider comments received in the development of any final rule.

VI. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of today's NOPR.

List of Subjects

10 CFR Part 429

Confidential business information, Energy conservation, Household appliances, Imports, Reporting and recordkeeping requirements.

10 CFR Part 430

Confidential business information, Energy conservation, Household appliances, Imports.

10 CFR Part 431

Confidential business information, Energy conservation, Reporting and recordkeeping requirements.

Issued in Washington, DC, on August 31, 2010.

Henry Kelly,

Acting Assistant Secretary, Energy Efficiency and Renewable Energy.

Scott Blake Harris,

General Counsel.

For the reasons stated in the preamble, DOE is proposing to amend chapter II, subchapter D, of title 10 of the Code of Federal Regulations, as set forth below:

1. Add new part 429 to read as follows:

PART 429—CERTIFICATION, COMPLIANCE, AND ENFORCEMENT FOR CONSUMER PRODUCTS AND COMMERCIAL AND INDUSTRIAL EQUIPMENT

Subpart A—General Provisions

Sec.
429.1 Purpose and scope.
429.3 Definitions.

Subpart B—Sampling for Certification Testing

429.9 Units to be tested.

Subpart C—Certification

429.17 Purpose and scope.
429.19 Certification.
429.21 Testing Requirements for Certification.
429.23 Alternative Methods for Determining Efficiency or Energy Use.

Subpart D—General Provisions

429.24 Maintenance of records.
429.25 Imported products.
429.26 Exported products.
429.27 Public record.

Subpart E—Enforcement

429.29 Purpose and scope.
429.31 Prohibited acts subjecting persons to enforcement action.
429.33 Investigation of compliance.
420.34 Review of certification data.
429.35 Subpoena.
429.36 Testing.
429.37 Test notice.
429.39 [Reserved].
429.41 Test unit selection.
429.43 Test unit preparation.
429.45 Sampling for enforcement testing.
429.47 [Reserved]
429.49 Notice of noncompliance determination to cease distribution of a basic model.
429.51 Additional certification testing requirements.
429.53 Injunctions.
429.55 Maximum civil penalty.
429.57 Penalty considerations.
429.59 Notice of proposed civil penalty.
429.61 Election of procedures.
429.63 Administrative law judge hearing and appeal.
429.65 Immediate issuance of order assessing civil penalty.
429.67 Collection of civil penalties.
429.69 Compromise and settlement.
429.71 Confidentiality.
Appendix A to Subpart E of Part 429—Sampling Plan for Enforcement Testing of Covered Products and Certain High-Volume Covered Equipment
Appendix B to Subpart E of Part 429—Sampling Plan for Enforcement Testing of Covered Commercial Equipment and Certain Low-Volume Covered Products
Appendix C to Subpart E of Part 429—Sampling Plan for Enforcement Testing of Distribution Transformers

Authority: 42 U.S.C. 6291–6317.

Subpart A—General Provisions

§ 429.1 Purpose and scope.

This part sets forth the procedures to be followed for certification of compliance and for enforcement for consumer products and commercial and industrial equipment to determine whether covered products and covered equipment comply with the applicable conservation standards set forth in parts 430 and 431 of this subchapter. For the purposes of this subpart, energy conservation standard means any standards meeting the definitions of that term in 42 U.S.C. 6291(6) and 42 U.S.C. 6311(18) as well as any other water conservation standards and design requirements. This part does not cover motors or electric motors as defined in § 431.12, and all references to "covered equipment" in this part exclude such motors.

§ 429.3 Definitions.

(a) The definitions found in §§ 430.2, 431.2, 431.62, 431.72, 431.82, 431.92, 431.102, 431.132, 431.152, 431.172, 431.192, 431.202, 431.222, 431.242, 431.262, 431.292, 431.302, 431.322, and 431.442 apply for purposes of this part.

(b) The following definition applies for the purposes of this part. Any words or terms defined in this section or elsewhere in this part shall be defined as provided in sections 321 and 340 of the Act:

Manufacturer's model number means the identifier used by a manufacturer to uniquely identify the group of identical or essentially identical covered products or covered equipment to which a particular unit belongs. The manufacturer's model number typically appears on the product nameplates, in product catalogs and in other product advertising literature.

Subpart B—Sampling for Certification Testing

§ 429.9 Units to be tested.

(a) When testing of covered products or covered equipment is required to comply with section 323(c) of the Act, or to comply with rules prescribed under sections 324, 325, or 342 of the Act, a sample comprised of production units (or units representative of production units) of the basic model being tested shall be selected at random and tested, and shall meet the following applicable criteria. Components of similar design may be substituted without additional testing if the substitution does not affect energy or water consumption. Any represented values of measures of energy efficiency, water efficiency, energy consumption, or water consumption for basic models not tested shall be the same as for the tested basic model.

(b) For covered products and covered equipment subject to the provisions in this part 429, the minimum number of units tested shall be no less than 2 (except where a different minimum limit is specified in paragraph (c) of this section); and

(c)(1) For each basic model of residential refrigerators, refrigerator-freezers, and freezers, a sample of sufficient size shall be tested to insure that—

(i) Any represented value of estimated annual operating cost, energy consumption, or other measure of energy consumption of a basic model for which consumers would favor lower values shall be no less than the higher of:

(A) The mean of the sample, or

(B) The upper 95 percent confidence limit of the true mean divided by 1.10; and

(ii) Any represented value of the energy factor or other measure of energy consumption of a basic model for which consumer would favor higher values shall be no greater than the lower of:

(A) The mean of the sample, or

(B) The lower 95 percent confidence limit of the true mean divided by 0.90.

(2) For each basic model of room air conditioners, a sample of sufficient size shall be tested to insure that—

(i) Any represented value of estimated annual operating cost, energy consumption or other measure of energy consumption of a basic model for which consumers would favor lower values shall be no less than the higher of:

(A) The mean of the sample, or

(B) The upper 97½ percent confidence limit of the true mean divided by 1.05; and

(ii) Any represented value of the energy efficiency ratio or other measure of energy consumption of a basic model for which consumers would favor higher values shall be no greater than the lower of:

(A) The mean of the sample, or

(B) The lower 97½ percent confidence limit of the true mean divided by 0.95.

(3)(i) For central air conditioners and heat pumps, each single-package system and each condensing unit (outdoor unit) of a split-system, when combined with a selected evaporator coil (indoor unit) or a set of selected indoor units, must have a sample of sufficient size tested in accordance with the applicable provisions of this subpart. The represented values for any model of single-package system, any model of a tested split-system combination, any model of a tested mini-split system combination, or any model of a tested multi-split system combination must be assigned such that—

(A) Any represented value of estimated annual operating cost, energy consumption or other measure of energy consumption of the central air conditioner or heat pump for which consumers would favor lower values shall be no less than the higher of:

(*1*) The mean of the sample, or

(*2*) The upper 90-percent confidence limit of the true mean divided by 1.05;

(B) Any represented value of the energy efficiency or other measure of energy consumption of the central air conditioner or heat pump for which consumers would favor higher values shall be no greater than the lower of:

(*1*) The mean of the sample, or

(*2*) The lower 90-percent confidence limit of the true mean divided by 0.95;

(C) For heat pumps, all units of the sample population must be tested in both the cooling and heating modes and the results used for determining the heat pump's certified SEER and HSPF ratings in accordance with paragraph (c)(3)(i)(B) of this section.

(ii) For split-system air conditioners and heat pumps, the condenser-evaporator coil combination selected for tests pursuant to paragraph (c)(3)(i) of this section shall include the evaporator coil that is likely to have the largest volume of retail sales with the particular model of condensing unit. For mini-split condensing units that are designed to always be installed with more than one indoor unit, a "tested combination" as defined in 10 CFR 430.2 shall be used for tests pursuant to paragraph (c)(3)(i) of this section. For multi-split systems, each model of condensing unit shall be tested with two different sets of indoor units. For one set, a "tested combination" composed entirely of non-ducted indoor units shall be used. For the second set, a "tested combination" composed entirely of ducted indoor units shall be used. However, for any split-system air conditioner having a single-speed compressor, the condenser-evaporator coil combination selected for tests pursuant to paragraph (c)(3)(i) of this section shall include the indoor *coil-only* unit that is likely to have the largest volume of retail sales with the particular model of outdoor unit. This *coil-only* requirement does not apply to split-system air conditioners that are only sold and installed with *blower-coil* indoor units, specifically mini-splits, multi-splits, and through-the-wall units. This coil-only requirement does not apply to any split-system heat pumps. For every other split-system combination that includes the same model of condensing unit but a different model of evaporator coil and for every other mini-split and multi-split system that includes the same model of condensing unit but a different set of evaporator coils, whether the evaporator coil(s) is manufactured by the same manufacturer or by a component manufacturer, either—

(A) A sample of sufficient size, comprised of production units or representing production units, must be tested as complete systems with the resulting ratings for the outdoor unit-indoor unit(s) combination obtained in accordance with paragraphs (c)(3)(i)(A) and (c)(3)(i)(B) of this section; or

(B) The representative values of the measures of energy efficiency must be assigned as follows,

(*1*) Using an alternative rating method (ARM) that has been approved by DOE in accordance with the provisions of § 429.23(e)(1) and (2); or

(*2*) For multi-split systems composed entirely of non-ducted indoor units, set equal to the system tested in accordance with paragraph (c)(3)(i) of this section whose tested combination was entirely non-ducted indoor units;

(*3*) For multi-split systems composed entirely of ducted indoor units, set

equal to the system tested in accordance with paragraph (c)(3)(i) of this section when the tested combination was entirely ducted indoor units; and

(*4*) For multi-split systems having a mix of non-ducted and ducted indoor units, set equal to the mean of the values for the two systems — one having the tested combination of all non-ducted units and the second having the tested combination of all ducted indoor units — tested in accordance with paragraph (c)(3)(i) of this section.

(iii) Whenever the representative values of the measures of energy consumption, as determined by the provisions of paragraph (c)(3)(ii)(B) of this section, do not agree within 5 percent of the representative values of the measures of energy consumption as determined by actual testing, the representative values determined by actual testing must be used to comply with section 323(c) of the Act or to comply with rules under section 324 of the Act.

(4) For each basic model of water heaters, a sample of sufficient size shall be tested to insure that—

(i) Any represented value of estimated annual operating cost, energy consumption or other measure of energy consumption of a basic model for which consumers would favor lower values shall be no less than the higher of:

(A) The mean of the sample, or

(B) The upper 95 percent confidence limit of the true mean divided by 1.10, and

(ii) Any represented value of the energy factor or other measure of energy consumption of a basic model for which consumers would favor higher values shall be no greater than the lower of:

(A) The mean of the sample, or

(B) The lower 95 percent confidence limit of the true mean divided by 0.90.

(5)(i) For each basic model of furnaces, other than basic models of those sectional cast-iron boilers which may be aggregated into groups having identical intermediate sections and combustion chambers, a sample of sufficient size shall be tested to insure that—

(A) Any represented value of estimated annual operating cost, energy consumption or other measure of energy consumption of a basic model for which consumers would favor lower values shall be no less than the higher of:

(*1*) The mean of the sample, or

(*2*) The upper 97½ percent confidence limit of the true mean divided by 1.05, and

(B) Any represented value of the annual fuel utilization efficiency or other measure of energy consumption of a basic model for which consumers would favor higher values shall be no greater than the lower of:

(*1*) The mean of the sample, or

(*2*) The lower 97½ percent confidence limit of the true mean divided by 0.95.

(ii) For the lowest capacity basic model of a group of basic models of those sectional cast-iron boilers having identical intermediate sections and combustion chambers, a sample of sufficient size shall be tested to insure that—

(A) Any represented value of estimated annual operating cost, energy consumption or other measure of energy consumption of a basic model for which consumers would favor lower values shall be no less than the higher of:

(*1*) The mean of the sample, or

(*2*) The upper 97½ percent confidence limit of the true mean divided by 1.05, and

(B) Any represented value of the fuel utilization efficiency or other measure of energy consumption of a basic model for which consumers would favor higher values shall be no greater than the lower of:

(*1*) The mean of the sample, or

(*2*) The lower 97½ percent confidence limit of the true mean divided by 0.95.

(iii) For the highest capacity basic model of a group of basic models of those sectional cast-iron boilers having identical intermediate sections and combustion chambers, a sample of sufficient size shall be tested to insure that—

(A) Any represented value of estimated annual operating cost, energy consumption or other measure of energy consumption of a basic model for which consumers would favor lower values be no less than the higher of:

(*1*) The mean of the sample, or

(*2*) The upper 97½ percent confidence limit of the true mean divided by 1.05, and

(B) Any represented value of the fuel utilization efficiency or other measure of energy consumption of a basic model for which consumers would favor higher values shall be no greater than the lower of:

(*1*) The mean of the sample, or

(*2*) The lower 97½ percent confidence limit of the true mean divided by 0.95.

(iv) For each basic model or capacity other than the highest or lowest of the group of basic models of sectional cast-iron boilers having identical intermediate sections and combustion chambers, represented values of measures of energy consumption shall be determined by either—

(A) A linear interpolation of data obtained for the smallest and largest capacity units of the family, or

(B) Testing a sample of sufficient size to insure that:

(*1*) Any represented value of estimated annual operating cost, energy consumption or other measure of energy consumption of a basic model for which consumers would favor lower values shall be no less than the higher of

(*i*) The mean of the sample, or

(*ii*) The upper 97½ percent confidence limit of the true mean divided by 1.05, and

(*2*) Any represented value of the energy factor or other measure of energy consumption of a basic model for which consumers would favor higher values shall be no greater than the lower of:

(*i*) The mean of the sample, or

(*ii*) The lower 97½ percent confidence limit of the true mean divided by 0.95.

(v) Whenever measures of energy consumption determined by linear interpolation do not agree with measures of energy consumption determined by actual testing, the values determined by testing must be used for certification.

(vi) In calculating the measures of energy consumption for each unit tested, use the design heating requirement corresponding to the mean of the capacities of the units of the sample.

(6) For each basic model of dishwashers, a sample of sufficient size shall be tested to insure that—

(i) Any represented value of estimated annual operating cost, energy or water consumption or other measure of energy or water consumption of a basic model for which consumers would favor lower values shall be no less than the higher of:

(A) The mean of the sample, or

(B) The upper 97½ percent confidence limit of the true mean divided by 1.05, and

(ii) Any represented value of the energy or water factor or other measure of energy or water consumption of a basic model for which consumers would favor higher values shall be no greater than the lower of:

(A) The mean of the sample, or

(B) The lower 97½ percent confidence limit of the true mean divided by 0.95.

(7) For each basic model of residential clothes washers, a sample of sufficient size shall be tested to insure that—

(i) Any represented value of the water factor, the estimated annual operating cost, the energy or water consumption, or other measure of energy or water consumption of a basic model for which consumers would favor lower values shall be no less than the higher of:

(A) The mean of the sample, or

(B) The upper 97½ percent confidence limit of the true mean divided by 1.05, and

(ii) Any represented value of the modified energy factor or other measure of energy or water consumption of a basic model for which consumers would favor higher values shall be no greater than the lower of:

(A) The mean of the sample, or

(B) The lower 97½ percent confidence limit of the true mean divided by 0.95.

(8) For each basic model of clothes dryers a sample of sufficient size shall be tested to insure that—

(i) Any represented value of estimated annual operating cost, energy consumption or other measure of energy consumption of a basic model for which consumers would favor lower values shall be no less than the higher of:

(A) The mean of the sample, or

(B) The upper 97½ percent confidence limit of the true mean divided by 1.05, and

(ii) Any represented value of the energy factor or other measure of energy consumption of a basic model for which consumers would favor higher values shall be no greater than the lower of:

(A) The mean of the sample, or

(B) The lower 97½ percent confidence limit of the true mean divided by 0.95.

(11) For each basic model of pool heater a sample of sufficient size shall be tested to insure that any represented value of the thermal efficiency or other measure of energy consumption of a basic model for which consumers would favor higher values shall be no greater than the lower of:

(i) The mean of the sample, or

(ii) The lower 97½ percent confidence limit of the true mean divided by 0.95.

(12) For each basic model of fluorescent lamp ballasts, a sample of sufficient size, not less than four, shall be tested to insure that—

(i) Any represented value of estimated annual energy operating costs, energy consumption, or other measure of energy consumption of a basic model for which consumers would favor lower values shall be no less than the higher of:

(A) The mean of the sample, or

(B) The upper 99 percent confidence limit of the true mean divided by 1.01, and

(ii) Any represented value of the ballast efficacy factor or other measure of the energy consumption of a basic model for which consumers would favor a higher value shall be no greater than the lower of:

(A) The mean of the sample, or

(B) The lower 99 percent confidence limit of the true mean divided by 0.99.

(13)(i) For each basic model of general service fluorescent lamp, general service incandescent lamp, and incandescent reflector lamp, samples of production lamps shall be tested and the results for all samples shall be averaged for a 12-month period. A minimum sample of 21 lamps shall be tested. The manufacturer shall randomly select a minimum of three lamps from each month of production for a minimum of 7 out of the 12-month period. In the instance where production occurs during fewer than 7 of such 12 months, the manufacturer shall randomly select 3 or more lamps from each month of production, where the number of lamps selected for each month shall be distributed as evenly as practicable among the months of production to attain a minimum sample of 21 lamps. Any represented value of lamp efficacy of a basic model shall be based on the sample and shall be no greater than the lower of the mean of the sample or the lower 95-percent confidence limit of the true mean (X_L) divided by 0.97, *i.e.,*

$$\frac{\bar{X} - t_{0.95}\left(\frac{s}{\sqrt{n}}\right)}{0.97}$$

Where:

$\bar{x}$ = the mean luminous efficacy of the sample

s = the sample standard deviation

$t_{0.95}$ = the t statistic for a 95-percent confidence limit for n-1 degrees of freedom (from statistical tables)

n = sample size

(ii) For each basic model of general service fluorescent lamp, the color rendering index (CRI) shall be measured from the same lamps selected for the lumen output and watts input measurements in paragraph (c)(13)(i) of this section, *i.e.,* the manufacturer shall measure all lamps for lumens, watts input, and CRI. The CRI shall be represented as the average of a minimum sample of 21 lamps and shall be no greater than the lower of the mean of the sample or the lower 95-percent confidence limit of the true mean (X_L) divided by 0.97, *i.e.,*

$$\frac{\bar{X} - t_{0.95}\left(\frac{s}{\sqrt{n}}\right)}{0.97}$$

Where:

$\bar{x}$ = the mean color rendering index of the sample

s = the sample standard deviation

$t_{0.95}$ = the t statistic for a 95-percent confidence limit for n-1 degrees of freedom (from statistical tables)

n = sample size

(14) For each basic model of faucet, a sample of sufficient size shall be tested to ensure that any represented value of water consumption of a basic model for which consumers favor lower values shall be no less than the higher of:

(i) The mean of the sample or

(ii) The upper 95 percent confidence limit of the true mean divided by 1.05.

(15) For each basic model of showerhead, a sample of sufficient size shall be tested to ensure that any represented value of water consumption of a basic model for which consumers favor lower values shall be no less than the higher of:

(i) The mean of the sample or

(ii) The upper 95 percent confidence limit of the true mean divided by 1.05.

(16) For each basic model of water closet, a sample of sufficient size shall be tested to ensure that any represented value of water consumption of a basic model for which consumers favor lower values shall be no less than the higher of:

(i) The mean of the sample or

(ii) The upper 90 percent confidence limit of the true mean divided by 1.1.

(17) For each basic model of urinal, a sample of sufficient size shall be tested to ensure that any represented value of water consumption of a basic model for which consumers favor lower values shall be no less than the higher of:

(1) The mean of the sample or

(2) The upper 90 percent confidence limit of the true mean divided by 1.1.

(18) For each basic model of ceiling fan light kit with sockets for medium screw base lamps or pin-based fluorescent lamps selected for testing, a sample of sufficient size shall be selected at random and tested to ensure that—

(i) Any represented value of estimated energy consumption or other measure of energy consumption of a basic model for which consumers would favor lower values shall be no less than the higher of:

(A) The mean of the sample, or

(B) The upper 95 percent confidence limit of the true mean divided by 1.1; and

(ii) Any represented value of the airflow efficiency or other measure of energy consumption of a basic model for which consumers would favor higher values shall be no greater than the lower of:

(A) The mean of the sample, or

(B) The lower 95 percent confidence limit of the true mean divided by 0.9.

(19) For each basic model of bare or covered (no reflector) medium base compact fluorescent lamp selected for testing, a minimum sample of no less than 5 units per basic model must be used when testing for the efficacy, 1000-hour lumen maintenance, and the lumen maintenance, a minimum sample

of no less than 6 unique units (*i.e.,* units that have not previously been tested) per basic model must be used when testing for the rapid cycle stress, and a minimum sample of no less than 10 units per basic model must be used when testing for the average rated lamp life. With the exception of the rapid cycle stress test, the units tested in the sample should be the same. For the efficacy, the 1000-hour lumen maintenance, and the lumen maintenance, each unit within the sample must be tested in the base up position unless the product is labeled restricted by the manufacturer, in which case the unit should be tested in the manufacturer specified position. For the rapid cycle stress test, each unit within the sample can be tested in the base up or down position as stated by the manufacturer. For the average rated lamp life test, half of the sample should be tested in the base up position and half of the sample should be tested in the base down position, unless specific use or position appears on the packaging of that particular unit. Any representative value of efficacy, 1000-hour lumen maintenance, lumen maintenance, and average rated lamp life, shall be based on the sample selected at random and tested to ensure that the represented value shall be no greater than the lower of:

(i) The mean of the sample, or

(ii) The lower 97.5 percent confidence limit of the true mean divided by 0.95.

(20) For each basic model of dehumidifier selected for testing, a sample of sufficient size shall be selected at random and tested to ensure that—

(i) Any represented value of estimated energy consumption or other measure of energy consumption of a basic model for which consumers would favor lower values shall be no less than the higher of:

(A) The mean of the sample, or

(B) The upper 95 percent confidence limit of the true mean divided by 1.10; and

(ii) Any represented value of the energy factor or other measure of energy consumption of a basic model for which consumers would favor higher values shall be no greater than the lower of:

(A) The mean of the sample, or

(B) The lower 95 percent confidence limit of the true mean divided by 0.90.

(21) For each basic model of external power supply selected for testing, a sample of sufficient size shall be selected at random and tested to ensure that—

(i) Any represented value of the estimated energy consumption of a basic model for which consumers would favor lower values shall be no less than the higher of:

(A) The mean of the sample, or

(B) The upper 97.5 percent confidence limit of the true mean divided by 1.05; and

(ii) Any represented value of the estimated energy consumption of a basic model for which consumers would favor higher values shall be no greater than the lower of:

(A) The mean of the sample, or

(B) The lower 97.5 percent confidence limit of the true mean divided by 0.95.

(22) For each basic model of candelabra base incandescent lamp and intermediate base incandescent lamp, a minimum sample of 21 lamps shall be tested. Any represented value of lamp wattage of a basic model shall be based on the sample and shall be no greater than the lower of the mean of the sample or the lower 95-percent confidence limit of the true mean (X_L) divided by 0.97, *i.e.,*

$$\frac{\bar{X} - t_{0.95}\left(\frac{s}{\sqrt{n}}\right)}{0.97}$$

Where:

$\bar{x}$ = the mean wattage of the sample

s = the sample standard deviation

$t_{0.95}$ = the t statistic for a 95-percent confidence limit for n-1 degrees of freedom (from statistical tables)

n = sample size

(23) For each basic model of commercial refrigerator, freezer, or refrigerator-freezer selected for testing, a sample of sufficient size shall be selected at random and tested to ensure that—

(i) Any represented value of estimated energy consumption or other measure of energy consumption of a basic model for which consumers would favor lower values shall be no less than the higher of:

(A) The mean of the sample, or

(B) The upper 95 percent confidence limit of the true mean divided by 1.10; and

(ii) Any represented value of the energy efficiency or other measure of energy consumption of a basic model for which consumers would favor higher values shall be no greater than the lower of:

(A) The mean of the sample, or

(B) The lower 95 percent confidence limit of the true mean divided by 0.90.

(24) A manufacturer must determine the efficiency of each basic model of commercial heating, ventilating, air conditioning, and water heating (HVAC and WH) equipment either by testing, in accordance with applicable test procedures in §§ 431.76, 431.86, 431.96, or 431.106 and the provisions of this section, or by application of an alternative efficiency determination method (AEDM) that meets the requirements of § 429.23 and the provisions of this section. For each basic model of commercial HVAC and WH equipment, a sample of sufficient size shall be selected and tested to ensure that—

(i) Any represented value of energy efficiency or other measure of energy consumption of a basic model for which consumers would favor higher values shall be no greater than the lower of:

(A) The mean of the sample, or

(B) The lower 95 percent confidence limit of the true mean divided by 0.95, and

(ii) Any represented value of energy consumption or other measure of energy usage of a basic model for which consumers would favor lower values shall be no less than the higher of:

(A) The mean of the sample, or

(B) The upper 95 percent confidence limit of the true mean divided by 1.05.

(25) For each basic model of automatic commercial ice maker selected for testing, a sample of sufficient size shall be selected at random and tested to ensure that—

(i) Any represented value of estimated maximum energy use or other measure of energy consumption of a basic model for which consumers would favor lower values shall be no less than the higher of:

(A) The mean of the sample, or

(B) The upper 95 percent confidence limit of the true mean divided by 1.10; and

(ii) Any represented value of the energy efficiency or other measure of energy consumption of a basic model for which consumers would favor higher values shall be no greater than the lower of:

(A) The mean of the sample, or

(B) The lower 95 percent confidence limit of the true mean divided by 0.90.

(26) For each basic model of commercial clothes washers, a sample of sufficient size shall be tested to insure that—

(i) Any represented value of estimated energy or water consumption or other measure of energy or water consumption of a basic model for which consumers would favor lower values shall be no less than the higher of:

(A) The mean of the sample, or

(B) The upper 97½ percent confidence limit of the true mean divided by 1.05, and

(ii) Any represented value of the modified energy factor, water factor, or other measure of energy or water

consumption of a basic model for which consumers would favor higher values shall be no greater than the lower of:

(A) The mean of the sample, or

(B) The lower 97½ percent confidence limit of the true mean divided by 0.95.

(27) A manufacturer must determine the efficiency of each basic model of distribution transformer either by testing, in accordance with § 431.193 and the provisions of this section, or by application of an AEDM) that meets the requirements of § 429.23 and the provisions of this section.

(i) Selection of units for testing within a basic model. For each basic model a manufacturer selects for testing, it shall select and test units as follows:

(A) If the manufacturer would produce five or fewer units of a basic model over a reasonable period of time (approximately 180 days), then it must test each unit. However, a manufacturer may not use a basic model with a sample size of fewer than five units to substantiate an AEDM pursuant to § 429.23.

(B) If the manufacturer produces more than five units over such period of time, it must either test all such units or select a sample of at least five units and test them.

(ii) Applying results of testing. In a test of compliance with a represented efficiency, the average efficiency of the sample, X, which is defined by

$$\overline{x} = \frac{1}{n}\sum_{i=1}^{n} x_i$$

where X_i is the measured efficiency of unit i and n is the number of units tested, must satisfy the condition:

$$\overline{x} \geq \frac{100}{1+\left(1+\frac{0.08}{\sqrt{n}}\right)\left(\frac{100}{RE}-1\right)}$$

where RE is the represented efficiency.

(28) For each basic model of illuminated exit sign selected for testing, a sample of sufficient size shall be selected at random and tested to ensure that—

(i) Any represented value of estimated input power demand or other measure of energy consumption of a basic model for which consumers would favor lower values shall be no less than the higher of:

(A) The mean of the sample, or

(B) The upper 95 percent confidence limit of the true mean divided by 1.10; and

(ii) Any represented value of the energy efficiency or other measure of energy consumption of a basic model for which consumers would favor higher values shall be no greater than the lower of:

(A) The mean of the sample, or

(B) The lower 95 percent confidence limit of the true mean divided by 0.90.

(29) For each basic model of traffic signal module or pedestrian module selected for testing, a sample of sufficient size shall be selected at random and tested to ensure that—

(i) Any represented value of estimated maximum and nominal wattage or other measure of energy consumption of a basic model for which consumers would favor lower values shall be no less than the higher of:

(A) The mean of the sample, or

(B) The upper 95 percent confidence limit of the true mean divided by 1.10; and

(ii) Any represented value of the energy efficiency or other measure of energy consumption of a basic model for which consumers would favor higher values shall be no greater than the lower of:

(A) The mean of the sample, or

(B) The lower 95 percent confidence limit of the true mean divided by 0.90.

(30) For each basic model of commercial prerinse spray valves selected for testing, a sample of sufficient size shall be selected at random and tested to ensure that—

(i) Any represented value of estimated water consumption or other measure of water consumption of a basic model for which consumers would favor lower values shall be no less than the higher of:

(A) The mean of the sample, or

(B) The upper 95 percent confidence limit of the true mean divided by 1.10; and

(ii) Any represented value of the water efficiency or other measure of water consumption of a basic model for which consumers would favor higher values shall be no greater than the lower of:

(A) The mean of the sample, or

(B) The lower 95 percent confidence limit of the true mean divided by 0.90.

(31) For each basic model of refrigerated bottled or canned beverage vending machine selected for testing, a sample of sufficient size shall be selected at random and tested to ensure that—

(i) Any represented value of estimated energy consumption or other measure of energy consumption of a basic model for which consumers would favor lower values shall be no less than the higher of:

(A) The mean of the sample, or

(B) The upper 95 percent confidence limit of the true mean divided by 1.10; and

(ii) Any represented value of the energy efficiency or other measure of energy consumption of a basic model for which consumers would favor higher values shall be no greater than the lower of:

(A) The mean of the sample, or

(B) The lower 95 percent confidence limit of the true mean divided by 0.90.

(32) For each basic model of metal halide lamp ballast selected for testing, a sample of sufficient size, not less than four, shall be selected at random and tested to ensure that:

(i) Any represented value of estimated energy efficiency calculated as the measured output power to the lamp divided by the measured input power to the ballast (P_{out}/P_{in}), of a basic model is no less than the higher of:

(A) The mean of the sample, or

(B) The upper 99-percent confidence limit of the true mean divided by 1.01.

(ii) Any represented value of the energy efficiency of a basic model is no greater than the lower of:

(A) The mean of the sample, or

(B) The lower 99-percent confidence limit of the true mean divided by 0.99.

Subpart C—Certification

§ 429.17 Purpose and scope.

This subpart sets forth the procedures for manufacturers to certify that their covered products and covered equipment comply with the applicable energy conservation standards.

§ 429.19 Certification.

(a) *Certification.* Each manufacturer, before distributing in commerce any basic model of a covered product or covered equipment subject to an applicable energy conservation standard set forth in parts 430 and 431 of this subchapter, and annually thereafter on or before the dates provided in paragraph (e) of this section, shall certify by means of a certification report that each basic model meets the applicable energy conservation standard(s). The certification report(s) must be submitted to DOE in accordance with the submission procedures of paragraph (i) of this section.

(b) *Certification report.* Manufacturers of covered products or covered equipment must submit a certification report for all basic models to DOE. The certification report shall include a compliance statement (*See* paragraph (c) of this section.) for each basic model:

(1) The product or equipment type;

(2) Product or equipment class (as denoted in the provisions of part 430 or 431 containing the applicable energy conservation standard);

(3) Manufacturer's name and address;

(4) Private labeler's name(s) and address (if applicable);

(5) Brand name;

(6) For each brand, the basic model number and the individual manufacturer's model numbers covered by that basic model; in the case of external power supplies, when the manufacturer is certifying using a design family, the individual manufacturer's model numbers covered by the design family; in the case of distribution transformers, the individual manufacturer's model numbers covered by the kilovolt ampere (kVA) grouping;

(7) Whether the submission is for a new model, a discontinued model, a correction to a previously submitted model, data on a historical model, or a model that has been found in violation of a voluntary industry certification program;

(8) The sample size and the total number of tests performed;

(9) Certifying party's U.S. Customs and Border Protection (CBP) importer identification numbers assigned by CBP pursuant to 19 CFR 24.5, if applicable;

(10) Whether certification is based upon any waiver of test procedure requirements under § 430.27 or § 431.401 and the date of such waivers;

(11) Whether certification is based upon any exception relief from an applicable energy conservation standard and the date such relief was issued by DOE's Office of Hearing and Appeals;

(12) Whether certification is based upon the use of an alternate way of determining measures of energy conservation (*e.g.,* an ARM or AEDM), or other method of testing, for determining measures of energy conservation and the approval date, if applicable, of any such alternate rating, testing, or efficiency determination method; and

(13) For:

(i) Residential refrigerators, residential refrigerator-freezers, and residential freezers, the annual energy use in kilowatt hours per year, total adjusted volume in cubic feet, whether the basic model has variable defrost control (in which case, manufacturers must also report the values, if any, of CT_L and CT_M (For an example *see* section 5.2.1.3 in Appendix A to Subpart B of Part 430) used in the calculation of energy consumption), whether the basic model has variable anti-sweat heater control (in which case, manufacturers must also report the values of Heater Watts at the ten humidity levels 5%, 15%, through 95% used to calculate the variable anti-sweat heater "Correction Factor"), and whether testing has been conducted with modifications to the standard temperature sensor locations specified by the figures referenced in section 5.1 of Appendices A1, B1, A, and B to Subpart B of Part 430.

(ii) Room air conditioners, the energy efficiency ratio and cooling capacity in Btu/h.

(iii) Residential central air conditioners, the seasonal energy efficiency ratio, the cooling capacity in Btu/h, and the manufacturer and individual manufacturer's model numbers of the indoor and outdoor unit. For central air conditioners whose seasonal energy efficiency ratio is based on an installation that includes a particular model of ducted air mover (*e.g.,* furnace, air handler, blower kit, *etc.*), the manufacturer's model number of this ducted air mover must be included among the model numbers listed on the certification report.

(iv) Residential central air conditioning heat pumps, the seasonal energy efficiency ratio, the cooling capacity in Btu/h, the heating seasonal performance factor, and the manufacturer and individual model numbers of the indoor and outdoor unit. For central air conditioning heat pumps whose seasonal energy efficiency ratio and heating seasonal performance factor are based on an installation that includes a particular model of ducted air mover (*e.g.,* furnace, air handler, blower kit, *etc.*), the model number of this ducted air mover must be included among the model numbers listed on the certification report.

(v) Small duct, high velocity air conditioners, the seasonal energy efficiency ratio and the cooling capacity in Btu/h. Small duct, high velocity heat pumps, the seasonal energy efficiency ratio, the heating seasonal performance factor, and the cooling capacity in Btu/h.

(vi) Through-the-wall air conditioners, the seasonal energy efficiency ratio and the cooling capacity in Btu/h. Through-the-wall heat pumps, the seasonal energy efficiency ratio, the coefficient of performance, and the cooling capacity in Btu/h.

(vii) Residential water heaters, the energy factor and rated storage volume in gallons.

(viii) Residential furnaces and boilers, the annual fuel utilization efficiency in percent and the input capacity in Btu/h. For cast-iron sectional boilers, a declaration of whether certification is based on linear interpolation or testing. In addition, the type of ignition system for gas-fired steam and hot water boilers and a declaration that the manufacturer has incorporated the applicable design requirements for units manufactured on or after September 1, 2012.

(ix) Dishwashers, the annual energy use in kilowatt hours per year, the water factor in gallons per cycle, and capacity as described in § 430.32(f).

(x) Residential clothes washers, the modified energy factor in cubic feet per kilowatt hour per cycle and the capacity in cubic feet. For top-loading or front-loading standard-size residential clothes washers, a water factor in gallons per cycle per cubic feet must also be reported on or after January 1, 2011.

(xi) Residential clothes dryers, the energy factor in pounds per kilowatt hours, the capacity in cubic feet, and the voltage in volts.

(xii) Direct heating equipment, the annual fuel utilization efficiency in percent and the mean input capacity in Btu/h. Note, vented hearth heaters as defined in § 430.2 must report on or after April 16, 2013.

(xiii) Gas cooking products, the type of pilot light and a declaration that the manufacturer has incorporated the applicable design requirements.

(xiv) Pool heaters, the thermal efficiency in percent and the input capacity in Btu/h.

(xv) Fluorescent Lamp Ballasts, the ballast efficacy factor, the ballast power factor, the number of lamps operated by the ballast, and the type of lamps operated by the ballast.

(xvi) General service fluorescent lamps, the testing laboratory's National Voluntary Laboratory Accreditation Program (NVLAP) identification number or other NVLAP-approved accreditation identification, production date codes (and accompanying decoding scheme), the 12-month average lamp efficacy in lumens per watt, lamp wattage, correlated color temperature, and the 12-month average Color Rendering Index.

(xvii) Incandescent reflector lamps, the laboratory's NVLAP identification number or other NVLAP-approved accreditation identification, production date codes (and accompanying decoding scheme), the 12-month average lamp efficacy in lumens per watt, and lamp wattage.

(xviii) Faucets, the maximum water use in gallons per minute or, in the case of metering faucets, gallons per cycle for each faucet and the flow water pressure in pounds per square inch.

(xix) Showerheads, the maximum water use in gallons per minute and the maximum flow water pressure in pounds per square inch.

(xx) Water closets, the maximum water use in gallons per flush.

(xxi) Urinals, the maximum water use in gallons per flush and for trough-type

urinals, the length of the trough-type urinal.

(xxii) Ceiling fans, the number of spends within the ceiling fan controls and a declaration that the manufacturer has incorporated the applicable design requirements.

(xxiii) Ceiling fan light kits with sockets for medium screw base lamps or pin-based fluorescent lamps, the efficacy in lumens per watt.

(xxiv) Ceiling fan light kits with sockets for other than medium screw base lamps or pin-based fluorescent lamps, the features that have been incorporated into the ceiling fan light kit to meet the applicable design requirement (*e.g.,* circuit breaker, fuse, ballast).

(xxv) Torchieres, the features that have been incorporated into the torchiere to meet the applicable design requirement (*e.g.,* circuit breaker, fuse, ballast).

(xxvi) Medium base compact fluorescent lamps, the testing laboratory's NVLAP identification number or other NVLAP-approved accreditation identification, production date codes (and accompanying decoding scheme), the minimum initial efficacy in lumens per watt, the lumen maintenance at 1,000 hours in percentage, the lumen maintenance at 40 percent of rated life in lumens, the rapid cycle stress test, and the lamp life in hours.

(xxvii) Dehumidifiers, the energy factor in liters per kilowatt hour and capacity in pints per day.

(xxviii) External power supplies, the average active mode efficiency percentage, no-load mode power consumption in watts, nameplate output power in watts, and, if missing from the nameplate, the output current in amperes of the highest- and lowest-voltage models within the external power supply design family.

(xxix) Switch-selectable single-voltage external power supplies, the average active mode efficiency percentage and no-load mode power consumption in watts at the lowest and highest selectable output voltage, nameplate output power in watts, and, if missing from the nameplate, the output current in amperes.

(xxx) On or after the effective dates specified in § 430.32, general service incandescent lamps, the testing laboratory's National Voluntary Laboratory Accreditation Program (NVLAP) identification number or other NVLAP-approved accreditation identification, production date codes (and accompanying decoding scheme), the 12-month average maximum rate wattage, the 12-month average minimum rate lifetime, and the 12-month average Color Rendering Index.

(xxxi) Candelabra base incandescent lamp, the wattage in watts.

(xxxii) Intermediate base incandescent lamp, the wattage in watts.

(xxxiii) Self-contained commercial refrigerators with solid doors, refrigerators with transparent doors, freezers with solid doors, and commercial freezers with transparent doors, the maximum daily energy consumption in kilowatt hours per day and the volume in cubic feet.

(xxxiv) Self-contained commercial refrigerator/freezers with solids doors, the maximum daily energy consumption in kilowatt hours per day and the adjusted volume in cubic feet.

(xxxv) On or after January 1, 2012, remote condensing commercial refrigerators, freezers, and refrigerator-freezers, self-contained commercial refrigerators, freezers, and refrigerator-freezers without doors, commercial ice-cream freezers, and commercial refrigeration equipment with two or more compartments (*i.e.,* hybrid refrigerators, hybrid freezers, hybrid refrigerator-freezers, and non-hybrid refrigerator-freezers), the maximum daily energy consumption in kilowatt hours per day, the total display area (TDA) in feet squared or the volume in cubic feet as necessary to demonstrate compliance with the standards set forth in § 431.66, the rating temperature in degrees Fahrenheit, the operating temperature range in degrees Fahrenheit (*e.g.,* ≥ 32 °F, < 32 °F, and ≤ -5 °F), the equipment family designation as described in § 431.66, and the condensing unit configuration.

(xxxvi) Commercial warm air furnaces, the thermal efficiency in percent and the maximum rated input capacity in Btu/h.

(xxxvii) Commercial packaged boilers, the combustion efficiency in percent and the maximum rated input capacity in Btu/h for equipment manufactured before March 2, 2012. For equipment manufactured on or after March 2, 2012, either the combustion efficiency or the thermal efficiency as required in § 431.87 and the maximum rated input capacity in Btu/h.

(xxxviii) Commercial package air-conditioning and heating equipment (except small commercial package air conditioning and heating equipment that is air-cooled with a cooling capacity less than 65,000 Btu/h), the energy efficiency ratio, the coefficient of performance as necessary to meet the standards set forth in § 431.97, the cooling capacity in Btu/h, and the type of heating used by the unit.

(xxxix) Small commercial package air conditioning and heating equipment that is air-cooled with a cooling capacity less than 65,000 Btu/h, the seasonal energy efficiency ratio, the heating seasonal performance factor as necessary to meet the standards set forth in § 431.97, and the cooling capacity in Btu/h.

(xl) Packaged terminal air conditioners, the energy efficiency ratio, the cooling capacity in Btu/h, and the wall sleeve dimensions in inches. Packaged terminal heat pumps, the energy efficiency ratio, the coefficient of performance, the cooling capacity in Btu/h, and the wall sleeve dimensions in inches.

(xli) Single package vertical air conditioner, the energy efficiency ratio and the cooling capacity in Btu/h. Single package vertical heat pumps, the energy efficiency ratio, the coefficient of performance, and the cooling capacity in Btu/h.

(xlii) Commercial electric storage water heaters, the maximum standby loss in percent per hour and the measured storage volume in gallons.

(xliii) Commercial gas-fired and oil-fired storage water heaters, the minimum thermal efficiency in percent, the maximum standby loss in Btu/h, the rated storage volume in gallons, and the nameplate input rate in Btu/h.

(xliv) Commercial gas-fired and oil-fired instantaneous water heaters greater than or equal to 10 gallons and gas-fired and oil-fired hot water supply boilers greater than or equal to 10 gallons, the minimum thermal efficiency in percent, the maximum standby loss in Btu/h, the rated storage volume in gallons, and the nameplate input rate in gallons.

(xlv) Commercial gas-fired and oil-fired instantaneous water heaters less than 10 gallons and gas-fired and oil-fired hot water supply boilers less than 10 gallons, the minimum thermal efficiency in percent and the storage volume in gallons.

(xlvi) Commercial unfired hot water storage tanks, the minimum thermal insulation (*i.e.,* R-value) and the storage volume.

(xlvii) Automatic commercial ice makers, the maximum energy use in kilowatt hours per 100 pounds of ice, the maximum condenser water use in gallons per 100 pounds of ice, the harvest rate in pounds of ice per 24 hours, the type of cooling, and the equipment type.

(xlviii) Commercial clothes washers, the modified energy factor in cubic feet per kilowatt hour per cycle and the water factor in gallons per cubic feet per cycle for units manufactured on or after January 8, 2013.

(xlix) For the least efficient basic model of distribution transformer within each "kilovolt ampere (kVA) grouping" for which part 431 prescribes an efficiency standard, the kVA rating, the insulation type (*i.e.,* low-voltage dry-type, medium-voltage dry-type or liquid-immersed), the number of phases (*i.e.,* single-phase or three-phase), and the basic impulse insulation level (BIL) group rating (for medium-voltage dry-types). As used in this section, a "kVA grouping" is a group of basic models which all have the same kVA rating, have the same insulation type (*i.e.,* low-voltage dry-type, medium-voltage dry-type or liquid-immersed), have the same number of phases (*i.e.,* single-phase or three-phase), and, for medium-voltage dry-types, have the same BIL group rating (*i.e.,* 20–45 kV BIL, 46–95 kV BIL or greater than 96 kV BIL).

(l) Illuminated exit signs, the input power demand in watts.

(li) Traffic signal modules and pedestrian modules, the maximum wattage in watts, the nominal wattage in watts, and the signal type.

(lii) Commercial unit heaters, the type of ignition system and a declaration that the manufacturer has incorporated the applicable design requirements.

(liii) Commercial prerinse spray valves, the flow rate in gallons per minute.

(liv) Refrigerated bottled or canned beverage vending machines, the maximum daily energy consumption in kilowatt hours per day, the refrigerated volume (V) in cubic feet used to demonstrate compliance with standards set forth in § 431.296, the ambient temperature in degrees Fahrenheit, and the ambient relative humidity in percent during the test for units manufactured on or after August 31, 2012.

(lv) Walk-in coolers and freezers, the door type, the R-value of the insulation of the wall, ceiling, and doors, the R-value of the floor (for freezers only), the motor type, and the efficacy of the lighting including ballast losses. In addition, for those walk-in coolers and freezers with transparent reach-in doors and windows, the glass type of the doors and windows (*e.g.,* double-pane with heat reflective treatment, triple-pane glass with gas fill, *etc.*), the power draw of the antisweat heater in watts, and a declaration that the manufacturer has incorporated the applicable design requirements.

(lvi) Metal halide lamp fixtures, minimum ballast efficiency in percent, the lamp wattage in watts, and the type of ballast (*e.g.,* pulse-start, magnetic probe-start, and non-pulse start electronic).

(c) The compliance statement required by paragraph (b) of this section shall include the date, the name of the company official signing the statement, and his or her signature, title, address, telephone number, and facsimile number and shall certify that:

(1) The basic model(s) complies with the applicable conservation standard(s);

(2) All required testing has been conducted in conformance with the applicable test requirements prescribed in parts 429, 430 and 431 of this subchapter, as appropriate, or in accordance with the terms of an applicable test procedure waiver;

(3) All information reported in the certification report is true, accurate, and complete; and

(4) The manufacturer is aware of the penalties associated with violations of the Energy Policy and Conservation Act (Pub. L. 94–163), as amended by Public Law 95–619, Public Law 100–12, Public Law 100–357, and Public Law 102–486 (the Act), the regulations there under, and 18 U.S.C. 1001 which prohibits knowingly making false statements to the Federal Government.

(d) Copies of reports to the Federal Trade Commission could serve in lieu of the certification report provided the reports include all required information specified in paragraph (b) of this section.

(e) *Annual filing.* All data required by § 429.19(a) through (c) shall be submitted to DOE annually, on or before the following dates:

Product category	Deadline for data submission
(1) Fluorescent lamp ballasts, Medium base compact fluorescent lamps, Incandescent reflector lamps, General service fluorescent lamps, General service incandescent lamps, Intermediate base incandescent lamps, Candelabra base incandescent lamps, Residential ceiling fans, Residential ceiling fan light kits, Residential showerheads, Residential faucets, Residential water closets, and Residential urinals.	Mar. 1.
(2) Residential water heater, Residential furnaces, Residential boilers, Residential pool heaters, Commercial water heaters, Commercial hot water supply boilers, Commercial unfired hot water storage tanks, Commercial packaged boilers, Commercial warm air furnaces, and Commercial unit heaters.	May 1.
(3) Residential dishwashers, Commercial prerinse spray valves, Illuminated exit signs, Traffic signal modules, Pedestrian modules, and Distribution transformers.	June 1.
(4) Room air conditioners, Residential central air conditioners, Residential central heat pumps, Small duct high velocity system, Space constrained products, Commercial package air-conditioning and heating equipment, Packaged terminal air conditioners, Packaged terminal heat pumps, and Single package vertical units.	July 1.
(5) Residential refrigerators, Residential refrigerators-freezers, Residential freezers, Commercial refrigerator, freezer, and refrigerator-freezer, Automatic commercial automatic ice makers, Refrigerated bottled or canned beverage vending machine, Walk-in coolers, and Walk-in freezers.	Aug. 1.
(6) Torchieres, Residential dehumidifiers, Metal halide lamp fixtures, and External power supplies	Sept. 1.
(7) Residential clothes washers, Residential clothes dryers, Residential direct heating equipment, Residential cooking products, and Commercial clothes washers.	Oct. 1.

(f) *New model filing.* (1) In addition to the annual filing schedule in paragraph (e) of this section, any new basic models must be certified pursuant to paragraph (a) of this section before distribution in commerce. New basic model numbers shall be designated whenever a new basic model is created pursuant to this paragraph (f).

(2) Prior to or concurrent with the distribution of a new model of general service fluorescent lamp or incandescent reflector lamp, each manufacturer shall submit a statement signed by a company official stating how the manufacturer determined that the lamp meets or exceeds the energy conservation standards, including a description of any testing or analysis the manufacturer performed. This statement shall also list the model number, lamp wattage, and date of commencement of manufacture. Manufacturers of general service fluorescent lamps and incandescent reflector lamps shall submit the certification report required by paragraph (b) of this section within

one year after the date manufacture of that new model commences.

(3) For distribution transformers, the manufacturer must submit all information required in paragraphs (b) and (c) of this section for the new basic model, unless the manufacturer has previously submitted to the Department a certification report for a basic model of distribution transformer that is in the same kVA grouping as the new basic model.

(g) *Discontinued model filing.* When production of a basic model has ceased and it is no longer being sold or offered for sale by the manufacturer or private labeler, the manufacturer shall report this discontinued status to DOE as part of the next annual certification report following such cessation. For each basic model, the report shall include: Product or equipment type, product or equipment class, the manufacturer's name, the private labeler name(s), if applicable, the brand, and the manufacturer's model number(s) of the basic model that has been discontinued.

(h) *Third party submitters.* A manufacturer may elect to use a third party to submit the certification report to DOE (for example a trade association, independent test lab, or other authorized representative, including a private labeler acting as a third party submitter on behalf of a manufacturer); however, the manufacturer is responsible for submission of the certification report to DOE. DOE may refuse to accept certification reports from third party submitters who have failed, on at least two occasions, to submit reports in accordance with the rules of this part.

(i) *Method of submission.* Reports required by this section must be submitted to DOE electronically at *http://www.regulations.doe.gov/ccms.* A manufacturer or third party submitter can find product-specific templates for each covered product or covered equipment with certification requirements online at *https://www.regulations.doe.gov/ccms/templates.html.*

§ 429.21 Testing Requirements for Certification.

(a) For purposes of a certification of compliance, the determination that a basic model complies with an applicable energy conservation standard or water conservation standard shall be determined from the calculated values derived pursuant to the applicable requirements set forth in parts 429, 430 and 431 of this subchapter. For purposes of a certification of compliance, the determination that a basic model complies with the applicable design standard shall be based upon the incorporation of specific design requirements in parts 430 and 431 or as specified in section 325 and 342 of the Act.

(b) Pursuant to § 429.51, where DOE has determined a particular entity is in noncompliance with an applicable standard or certification requirement, DOE may impose additional testing requirements for certification as a remedial measure.

§ 429.23 Alternative Methods for Determining Efficiency or Energy Use.

(a) *General.* A manufacturer of residential central air conditioners and heat pumps, distribution transformers, and commercial HVAC and WH equipment may not distribute any basic model of such equipment in commerce unless the manufacturer has determined the efficiency of the basic model either from testing of the basic model or from application of an alternative method to the basic model, in accordance with the requirements of this section. In instances where a manufacturer has tested that basic model to validate the alternative method, the efficiency of that basic model must be determined and rated according to results from actual testing. In addition, a manufacturer may not knowingly use an AEDM to overrate the efficiency of a basic model. For each basic model of distribution transformer that has a configuration of windings which allows for more than one nominal rated voltage, the manufacturer must determine the basic model's efficiency either at the voltage at which the highest losses occur or at each voltage at which the transformer is rated to operate.

(b) *Testing.* Testing for each covered product or covered equipment must be done in accordance with the sampling plans established in § 429.9 and the testing procedures in parts 430 and 431 of this subchapter.

(c) *Alternative efficiency determination method (AEDM) for Commercial HVAC and WH equipment*—(1) *Criteria an AEDM must satisfy.* A manufacturer may not apply an AEDM to a basic model to determine its efficiency pursuant to this section unless:

(i) The AEDM is derived from a mathematical model that represents the energy consumption characteristics of the basic model; and

(ii) The AEDM is based on engineering or statistical analysis, computer simulation or modeling, or other analytic evaluation of performance data.

(2) *Substantiation of an AEDM.* Before using an AEDM, the manufacturer must substantiate and validate the AEDM as follows:

(i) A manufacturer must first apply the AEDM to three or more basic models that have been tested in accordance with §§ 431.173(b) and 431.175(a). The predicted efficiency calculated for each such basic model from application of the AEDM must be within five percent of the efficiency determined from testing that basic model, and the predicted efficiencies calculated for the tested basic models must on average be within one percent of the efficiencies determined from testing such basic models; and

(ii) Using the AEDM, the manufacturer must calculate the efficiency of three or more of its basic models. They must be the manufacturer's highest-selling basic models to which the AEDM could apply.

(iii) The manufacturer must test each of these basic models in accordance with § 431.173(b), and either §§ 431.174(b) or 431.175(a), whichever is applicable.

(iv) The predicted efficiency calculated for each such basic model from application of the AEDM must be within three percent of the efficiency determined from testing that basic model, and the average of the predicted efficiencies calculated for the tested basic models must be within one percent of the average of the efficiencies determined from testing these basic models.

(3) *Subsequent verification of an AEDM.* If a manufacturer has used an AEDM pursuant to this section,

(i) The manufacturer must have available for inspection by the Department records showing:

(A) The method or methods used;

(B) The mathematical model, the engineering or statistical analysis, computer simulation or modeling, and other analytic evaluation of performance data on which the AEDM is based;

(C) Complete test data, product information, and related information that the manufacturer generated or acquired under paragraph (c)(1) through (2) of this section; and

(D) The calculations used to determine the average efficiency and energy consumption of each basic model to which an AEDM was applied.

(ii) If requested by the Department, the manufacturer must perform at least one of the following:

(A) Conduct simulations to predict the performance of particular basic models of the commercial HVAC and WH product;

(B) Provide analyses of previous simulations conducted by the manufacturer;

(C) Conduct sample testing of basic models selected by the Department; or

(D) Conduct a combination of these.

(d) *Alternative efficiency determination method for Distribution Transformers*—A manufacturer may use an AEDM to determine the efficiency of one or more of its untested basic models only if it determines the efficiency of at least five of its other basic models (selected in accordance with paragraph (d)(3) of this section) through actual testing.

(1) *Criteria an AEDM must satisfy.* (i) The AEDM has been derived from a mathematical model that represents the electrical characteristics of that basic model;

(ii) The AEDM is based on engineering and statistical analysis, computer simulation or modeling, or other analytic evaluation of performance data; and

(iii) The manufacturer has substantiated the AEDM, in accordance with paragraph (d)(2) of this section, by applying it to, and testing, at least five other basic models of the same type, *i.e.,* low-voltage dry-type distribution transformers, medium-voltage dry-type distribution transformers, or liquid-immersed distribution transformers.

(2) *Substantiation of an AEDM.* Before using an AEDM, the manufacturer must substantiate the AEDM's accuracy and reliability as follows:

(i) Apply the AEDM to at least five of the manufacturer's basic models that have been selected for testing in accordance with paragraph (d)(3) of this section, and calculate the power loss for each of these basic models;

(ii) Test at least five units of each of these basic models in accordance with the applicable test procedure and § 429.9, and determine the power loss for each of these basic models;

(iii) The predicted total power loss for each of these basic models, calculated by applying the AEDM pursuant to paragraph (c)(2)(i) of this section, must be within plus or minus five percent of the mean total power loss determined from the testing of that basic model pursuant to paragraph (c)(2)(ii) of this section; and

(iv) Calculate for each of these basic models the percentage that its power loss calculated pursuant to paragraph (c)(2)(i) of this section is of its power loss determined from testing pursuant to paragraph (c)(2)(ii) of this section, compute the average of these percentages, and that calculated average power loss, expressed as a percentage of the average power loss determined from testing, must be no less than 97 percent and no greater than 103 percent.

(3) *Additional testing requirements.* (i) A manufacturer must select basic models for testing in accordance with the following criteria:

(A) Two of the basic models must be among the five basic models with the highest unit volumes of production by the manufacturer in the prior year, or during the prior 12-calendar-month period beginning in 2003,[1] whichever is later;

(B) No two basic models should have the same combination of power and voltage ratings; and

(C) At least one basic model should be single-phase and at least one should be three-phase.

(ii) In any instance where it is impossible for a manufacturer to select basic models for testing in accordance with all of these criteria, the criteria shall be given priority in the order in which they are listed. Within the limits imposed by the criteria, basic models shall be selected randomly.

(4) *Subsequent verification of an AEDM.* (i) Each manufacturer that has used an AEDM under this section shall have available for inspection by the Department of Energy records showing:

(A) The method or methods used;

(B) The mathematical model, the engineering or statistical analysis, computer simulation or modeling, and other analytic evaluation of performance data on which the AEDM is based;

(C) Complete test data, product information, and related information that the manufacturer has generated or acquired pursuant to paragraph (d)(4) of this section; and

(D) The calculations used to determine the efficiency and total power losses of each basic model to which the AEDM was applied.

(ii) If requested by the Department, the manufacturer must perform at least one of the following:

(A) Conduct simulations to predict the performance of particular basic models of distribution transformers specified by the Department;

(B) Provide analyses of previous simulations conducted by the manufacturer;

(C) Conduct sample testing of basic models selected by the Department; or

(D) Conduct a combination of these.

(e) *Alternate Rating Method (ARM) for residential split-system central air conditioners and heat pumps—(1) Criteria an ARM must satisfy.* The basis of the ARM referred to in § 429.9(c)(3)(ii) for residential central air conditioners and heat pumps must be a representation of the test data and calculations of a mechanical vapor-compression refrigeration cycle. The major components in the refrigeration cycle must be modeled as "fits" to manufacturer performance data or by graphical or tabular performance data. Heat transfer characteristics of coils may be modeled as a function of face area, number of rows, fins per inch, refrigerant circuitry, air-flow rate and entering-air enthalpy. Additional performance-related characteristics to be considered may include type of expansion device, refrigerant flow rate through the expansion device, power of the indoor fan and cyclic-degradation coefficient. Ratings for untested combinations must be derived from the ratings of a combination tested in accordance with § 429.9(c)(3)(i). The seasonal energy efficiency ratio (SEER) and/or heating seasonal performance factor (HSPF) ratings for an untested combination must be set equal to or less than the lower of the SEER and/or HSPF calculated using the applicable DOE-approved alternative rating method (ARM). If the method includes an ARM/simulation adjustment factor(s), determine the value(s) of the factors(s) that yield the best match between the SEER/HSPF determined using the ARM versus the SEER/HSPF determined from testing in accordance with § 429.9(c)(3)(i). Thereafter, apply the ARM using the derived adjustment factor(s) only when determining the ratings for untested combinations having the same outdoor unit.

(2) *Approval of an ARM.* (i) Manufacturers who elect to use an ARM for determining measures of energy consumption under § 429.9(c)(3)(ii)(B)(*1*) and paragraph (e)(1) of this section must submit a request for DOE to review the ARM. Send the request to the U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program (EE–2J), Attention: Certification and Compliance Reports (ARM), Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Approval must be received from the Department to use the ARM before the ARM may be used for rating split-system central air conditioners and heat pumps. If a manufacturer has a DOE-approved ARM for products also distributed in commerce by a private labeler, the ARM may also be used by the private labeler for rating these products. Once an ARM is approved, DOE may contact a

[1] When identifying these five basic models, any basic model that does not comply with Federal energy conservation standards for distribution transformers that may be in effect shall be excluded from consideration.

manufacturer to learn if their ARM has been modified in any way and to verify that the ARM is being applied as approved. DOE will give follow-up priority to individual combinations having questionably high ratings (*e.g.,* a coil-only system having a rating that exceeds the rating of a coil-only highest sales volume combination by more than 6 percent).

(ii) Each request to DOE for approval of an ARM must include:

(A) The name, mailing address, telephone number, and e-mail address of the official representing the manufacturer.

(B) Complete documentation of the alternative rating method to allow DOE to evaluate its technical adequacy. The documentation must include a description of the methodology, state any underlying assumptions, and explain any correlations. The documentation should address how the method accounts for the cyclic-degradation coefficient, the type of expansion device, and, if applicable, the indoor fan-off delay. The requestor must submit any computer programs—including spreadsheets—having less than 200 executable lines that implement the ARM. Longer computer programs must be identified and sufficiently explained, as specified above, but their inclusion in the initial submittal package is optional. Applicability or limitations of the ARM (*e.g.,* only covers single-speed units when operating in the cooling mode, covers units with rated capacities of 3 tons or less, not applicable to the manufacturer's product line of non-ducted systems, *etc.*) must be stated in the documentation.

(C) Complete test data from laboratory tests on four mixed (*i.e.,* non-highest-sales-volume combination) systems per each ARM.

(*1*) The four mixed systems must include four different indoor units and at least two different outdoor units. A particular model of outdoor unit may be tested with up to two of the four indoor units. The four systems must include two low-capacity mixed systems and two high-capacity mixed systems. The low-capacity mixed systems may have any capacity. The rated capacity of each high-capacity mixed system must be at least a factor of two higher than its counterpart low-capacity mixed system. The four mixed systems must meet the applicable energy conservation standard in § 430.32(c) in effect at the time of the rating.

(*2*) The four indoor units must come from at least two different coil families, with a maximum of two indoor units coming from the same coil family. Data for two indoor units from the same coil family, if submitted, must come from testing with one of the "low-capacity mixed systems" and one of the "high capacity mixed systems." A mixed system indoor coil may come from the same coil family as the highest-sales-volume-combination indoor unit (*i.e.,* the "matched" indoor unit) for the particular outdoor unit. Data on mixed systems where the indoor unit is now obsolete will be accepted towards the ARM-validation submittal requirement if it is from the same coil family as other indoor units still in production.

(*3*) The first two sentences of paragraph (e)(2)(ii)(C)(*2*) of this section do not apply if the manufacturer offers indoor units from only one coil family. In this case only, all four indoor coils must be selected from this one coil family. If approved, the ARM will be specifically limited to applications for this one coil family.

(D) All product information on each mixed system indoor unit, each matched system indoor unit, and each outdoor unit needed to implement the proposed ARM. The calculated ratings for the four mixed systems, as determined using the proposed ARM, must be provided along with any other related information that will aid the verification process.

(E) If request for approval is for an updated ARM, manufacturers must identify modifications made to the ARM since the last submittal, including any ARM/simulation adjustment factor(s) added since the ARM was last approved by DOE.

(3) *Changes to DOE's Regulations Requiring Re-Approval of an ARM.* Manufacturers who elect to use an ARM for determining measures of energy consumption under § 429.9(3)(ii)(B)(*1*) and (d)(1) of this section must resubmit a request for DOE to review the ARM when:

(i) DOE amends the energy conservation standards as specified in § 429.32 for residential central air conditioners and heat pumps. In this case, any testing and evidence required under paragraph (e)(2) of this subsection shall be developed with units that meet the amended energy conservation standards specified in § 429.32.

(ii) DOE amends the test procedure for residential air conditioners and heat pumps as specified in Appendix M to Subpart B of Part 430.

(4) Manufacturers that elect to use an ARM for determining measures of energy consumption under § 429.9(c)(3)(ii)(B)(*1*) and (e)(1) of this section must regularly either subject a sample of their units to independent testing, *e.g.,* through a voluntary certification program, in accordance with the applicable DOE test procedure, or have the representations reviewed by an independent state-registered professional engineer who is not an employee of the manufacturer. The manufacturer may continue to use the ARM only if the testing establishes, or the registered professional engineer certifies, that the results of the ARM accurately represent the energy consumption of the unit(s). The manufacturer is to keep the records of any such testing, and any such certifications, on file for review by DOE for two years following the discontinuance of said combination. Any proposed change to the alternative rating method must be approved by DOE prior to its use for rating.

(5) Manufacturers who choose to use computer simulation or engineering analysis for determining measures of energy consumption under § 429.9(c)(3)(ii)(B)(*1*) and (e)(1) through (e)(4) of this section must permit representatives of the Department of Energy to inspect for verification purposes the simulation method(s) and computer program(s) used. This inspection may include conducting simulations to predict the performance of particular outdoor unit "indoor" unit combinations specified by DOE, analysis of previous simulations conducted by the manufacturer, or both.

Subpart D—General Provisions

§ 429.24 Maintenance of records.

The manufacturer of any covered product or covered equipment shall establish, maintain, and retain the records of certification reports, of the underlying test data for all certification testing, and of any other testing conducted to satisfy the requirements of this part 429, part 430, and part 431 of this subchapter. Such records shall be organized and indexed in a fashion that makes them readily accessible for review by DOE upon request. The records shall be retained by the manufacturer for a period of two years from the date that production of the applicable model has ceased.

§ 429.25 Imported products.

(a) Any person importing any covered product or covered equipment into the United States shall comply with the provisions of this part, and is subject to the remedies of this part.

(b) Any covered product or covered equipment offered for importation in violation of this part shall be refused admission into the customs territory of the United States under rules issued by the Department of Homeland Security

(DHS) and subject to further remedies as provided by law, except that DHS may, by such rules, authorize the importation of such covered product or covered equipment upon such terms and conditions (including the furnishing of a bond) as may appear to DHS appropriate to ensure that such covered product or covered equipment will not violate this part, or will be exported or abandoned to the United States.

§ 429.26 Exported products.

This part shall not apply to any covered product or covered equipment if:

(a) Such covered product or covered equipment is manufactured, sold, or held for sale for export from the United States (or such product was imported for export), unless such product is, in fact, distributed in commerce for use in the United States; and

(b) Such covered product or covered equipment, when distributed in commerce, or any container in which it is enclosed when so distributed, bears a stamp or label stating "NOT FOR SALE IN THE UNITED STATES."

§ 429.27 Public record.

Pursuant to the provisions of § 429.71, product-specific information submitted by manufacturers to DOE pursuant to § 429.19(b)(13), including the manufacturer's name, the brand name, and applicable model number(s), shall be considered public information not exempt from public disclosure.

Subpart E—Enforcement

§ 429.29 Purpose and scope.

This subpart describes the enforcement authority of the Secretary and the General Counsel of DOE to ensure compliance with the conservation standards and regulations.

§ 429.31 Prohibited acts subjecting persons to enforcement action.

(a) Each of the following actions are prohibited:

(1) Failure of a manufacturer to provide, maintain, permit access to, or copying of records required to be supplied under the Act and this part or failure to make reports or provide other information required to be supplied under the Act and this part, including but not limited to failure to properly certify covered products and covered equipment in accordance with § 429.19 of this part;

(2) Failure to test any covered product or covered equipment, subject to an applicable energy conservation standard, in conformance with the applicable test requirements prescribed in 10 CFR parts 430 or 431; or deliberate use of controls or features in a covered product or covered equipment to circumvent the requirements of a test procedure and produce test results that are unrepresentative of a product's energy or water consumption if measured pursuant to DOE's required test procedure;

(3) Failure of a manufacturer to supply at the manufacturer's expense a requested number of covered products or covered equipment to a test laboratory designated by the Secretary;

(4) Failure of a manufacturer to permit a representative designated by the Secretary to observe any testing required by the Act and this part and inspect the results of such testing;

(5) Distribution in commerce by a manufacturer or private labeler of any new covered product or covered equipment that is not in compliance with an applicable energy conservation standard prescribed under the Act, except to the extent that the new covered product or covered equipment is covered by a regional standard that is more stringent than the base national standard;

(6) Distribution in commerce by a manufacturer or private labeler of a basic model of covered product or covered equipment after a notice of noncompliance determination has been issued to the manufacturer or private labeler;

(7) Knowing misrepresentation by a manufacturer or private labeler of the applicable conservation standard of any covered product or covered equipment distributed in commerce; or

(8) For any manufacturer, distributor, retailer, or private labeler to distribute in commerce an adapter that—

(i) Is designed to allow an incandescent lamp that does not have a medium screw base to be installed into a fixture or lamp holder with a medium screw base socket; and

(ii) Is capable of being operated at a voltage range at least partially within 110 and 130 volts.

(9) For any manufacturer or private labeler to knowingly sell a product to a distributor, contractor, or dealer with knowledge that the entity routinely violates any regional standard applicable to the product.

(b) When the Secretary has reason to believe that a person has undertaken a prohibited act listed in paragraph (a) of this section, the Secretary may:

(1) Issue a notice of noncompliance determination;

(2) Impose additional certification testing requirements;

(3) Seek injunctive relief;

(4) Assess a civil penalty for knowing violations; or

(5) Undertake any combination of the above.

§ 429.33 Investigation of compliance.

DOE may initiate an investigation of compliance upon belief that a basic model may not be compliant with an applicable conservation standard, certification requirement or other regulation.

§ 429.34 Review of certification data.

DOE may, at any time, request any information relevant to determining compliance with any requirement under parts 429, 430 and 431 of this subchapter, including the data underlying certification of a basic model. Such data may be used by DOE to make a determination of compliance or noncompliance with an applicable standard.

§ 429.35 Subpoena.

For purposes of carrying out parts 429, 430, and 431 of this subchapter, the Secretary or the General Counsel, may sign and issue subpoenas for the attendance and testimony of witnesses and the production of relevant books, records, papers, and other documents, and administer the oaths. Witnesses summoned under the provisions of this section shall be paid the same fees and mileage as are paid to witnesses in the courts of the United States. In case of contumacy by, or refusal to obey a subpoena served, upon any persons subject to this part, the Secretary may seek an order from the District Court of the United States for any District in which such person is found or resides or transacts business requiring such person to appear and give testimony, or to appear and produce documents. Failure to obey such order is punishable by such court as contempt thereof.

§ 429.36 Testing.

DOE may, at any time, test a basic model to assess whether the basic model is in compliance with the applicable energy conservation standard(s).

§ 429.37 Test notice.

To obtain units for enforcement testing to determine compliance with an applicable standard, DOE may issue a test notice addressed to the manufacturer in accordance with the following requirements:

(a) The test notice will be signed by the Secretary or his designee. The test notice will be sent by DOE to the government relations representative or other responsible official, as designated by the manufacturer.

(b) The test notice will specify the basic model to be selected for testing, the method of selecting the test sample,

the maximum size of the sample and the size of the initial test sample, the time at which testing shall be initiated, the date by which testing is scheduled to be completed and the facility at which testing will be conducted. The test notice may also provide for situations in which the selected basic model is unavailable for testing, and may include alternative basic models.

(c) DOE will state in the test notice that it will select the units of a basic model to be tested from the manufacturer, from one or more distributors, and/or from one or more retailers. If any unit is selected from a distributor or retailer, the manufacturer shall reimburse the distributor or retailer (with a replacement unit or a voucher) for any such units.

(d) DOE may require in the test notice that the manufacturer of a basic model ship or cause to be shipped from a retailer or distributor at its expense a requested number of units of a basic model specified in such test notice to a testing laboratory designated by the Secretary. The number of units of a basic model specified in a test notice shall not exceed twenty one (21).

(e) Within 2 working days of the time units are selected, the manufacturer shall ship the specified test units of a basic model to the testing laboratory.

§ 429.39 [Reserved].

§ 429.41 Test unit selection.

(a) To select units for testing from a:

(1) Manufacturer's warehouse, distributor, or other facility affiliated with the manufacturer. A DOE representative will select a batch sample at random of not more than 21 units in accordance with the provisions in § 429.45 and the conditions specified in the test notice. DOE will randomly select an initial test sample of units from the batch sample for testing in accordance with appendices A through C of this subpart. DOE will make a determination whether an alternative sample size will be used in accordance with the provisions in § 429.45(a)(5).

(2) Retailer. A DOE representative will select an initial test sample of units at random, which satisfies the minimum units necessary for testing in accordance with the provisions in appendices A through C of the subpart and the conditions specified in the test notice. Depending on the results of the testing, DOE may select additional units for testing from a retailer in accordance with appendices A through C of the subpart. If the full sample is not available from a retailer, DOE will make a determination based on the provisions in § 429.45(a)(5).

(b) Units tested in accordance with the applicable test procedure under this part by DOE or another Federal agency, pursuant to other provisions or programs, may count toward units in the test sample.

(c) The resulting test data shall constitute official test data for the basic model. Such test data will be used by DOE to make a determination of compliance or noncompliance if a sufficient number of tests have been conducted to satisfy the requirements of § 429.45 and appendix A through appendix C of this subpart.

§ 429.43 Test unit preparation.

(a) Prior to and during testing, a test unit selected in accordance with § 429.41 of this subpart shall not be prepared, modified, or adjusted in any manner unless such preparation, modification, or adjustment is allowed by the applicable DOE test procedure. One test shall be conducted for each test unit in accordance with the applicable test procedures prescribed in parts 430 and 431 of this subchapter.

(b) No quality control, testing or assembly procedures shall be performed on a test unit, or any parts and subassemblies thereof, that is not performed during the production and assembly of all other units included in the basic model.

(c) A test unit shall be considered defective if such unit is inoperative or is found to be in noncompliance due to failure of the unit to operate according to the manufacturer's design and operating instructions. Defective units, including those damaged due to shipping or handling, shall be reported immediately to DOE. DOE shall authorize testing of an additional unit on a case-by-case basis.

§ 429.45 Sampling for enforcement testing.

(a) The Department will base the determination of whether a basic model complies with the applicable energy conservation or water conservation standards on testing conducted in accordance with the applicable test procedures specified in parts 430 and 431 of this subchapter, and with the following statistical sampling procedures:

(1) For products with applicable energy and water conservation standards in § 430.32, the Department will use a sample size of not more than 21 units and follow the sampling plans in Appendix A to Subpart E of Part 429 (Sampling for Enforcement Testing of Covered Consumer Products and Certain High-Volume Commercial Equipment).

(2) For commercial prerinse spray valves, illuminated exit signs, traffic signal modules and pedestrian modules, commercial clothes washers, and metal halide lamp ballasts, the Department will use a sample size of not more than 21 units and follow the sampling plans in Appendix A to Subpart E of Part 429 (Sampling for Enforcement Testing of Covered Consumer Products and Certain High-Volume Commercial Equipment).

(3) For automatic commercial ice makers, commercial refrigerators, freezers, and refrigerator-freezers, refrigerated bottled or canned vending machines, and commercial HVAC and WH equipment, the Department will use an initial sample size of not more than four units and follow the sampling plans in Appendix B to Subpart E of Part 429 (Sampling Plan for Enforcement Testing of Covered Equipment and Certain Low-Volume Covered Products) with the following exceptions:

(i) Except as required or provided in paragraphs (a)(3)(ii) of this section, initially, the Department will test two units.

(ii) If fewer than two units of the basic model are available for testing when the manufacturer receives the test notice, then:

(A) The Department will test the available unit; or

(B) If one or more other units of the basic model are expected to become available within 30 days, the Department may instead at its discretion, test either:

(*1*) The available unit(s) and one or more of the other units that subsequently become available (up to a maximum of four); or

(*2*) Up to four of the other units that subsequently become available.

(4) For distribution transformers, the Department will use an initial sample size of not more than five units and follow the sampling plans in Appendix C to Subpart E of Part 429 (Sampling Plan for Enforcement Testing of Distribution Transformers). If fewer than five units of a basic model are available for testing when the manufacturer receives the test notice, then:

(i) DOE will test the available unit(s); or

(ii) If one or more other units of the basic model are expected to become available within 30 days, the Department may instead at its discretion, test either:

(*A*) The available unit(s) and one or more of the other units that subsequently become available (up to a maximum of 21); or

(*B*) Up to 21 of the other units that subsequently become available.

(5) Notwithstanding paragraphs (a)(1) through (a)(4) of this section, if testing

of the available or subsequently available units of a basic model would be impractical, as for example when a basic model has unusual testing requirements or has limited production, the Department may in its discretion decide to base the determination of compliance on the testing of fewer than the otherwise required number of units.

(6) When the Department makes a determination in accordance with section (a)(5) to test less than the number of units specified (a)(1) through (a)(4) of this section, the Department will base the compliance determination on the results of such testing in accordance with Appendix B to Subpart E of Part 429 (Sampling Plan for Enforcement Testing of Covered Equipment and Certain Low-Volume Covered Products) using a sample size (n_1) equal to the number of units identified in § 429.41 without the option for additional testing at the manufacturer's option.

(6) For the purposes of paragraphs (a)(1) through (a)(5) of this section, available units are those that are available for commercial distribution within the United States.

§ 429.47 [Reserved]

§ 429.49 Notice of noncompliance determination to cease distribution of a basic model.

(a) In the event that DOE determines a basic model is noncompliant with an applicable energy conservation standard, or if a manufacturer or private labeler determines a basic model to be in noncompliance, DOE may issue a notice of noncompliance determination to the manufacturer or private labeler. This notice of noncompliance determination will notify the manufacturer or private labeler of its obligation to:

(1) Immediately cease distribution in commerce of the basic model.

(2) Give immediate written notification of the determination of noncompliance to all persons to whom the manufacturer has distributed units of the basic model manufactured since the date of the last determination of compliance.

(3) Pursuant to a request made by the Secretary, provide DOE within 30 days of the request, records, reports and other documentation pertaining to the acquisition, ordering, storage, shipment, or sale of a basic model determined to be in noncompliance.

(b) In the event that DOE determines a model is noncompliant with an applicable certification requirement, or if a manufacturer or private labeler determines a model to be in noncompliance with the certification requirements, DOE may issue a notice of noncompliance determination to the manufacturer or private labeler. This notice of noncompliance determination will notify the manufacturer or private labeler of its obligation to:

(1) Immediately cease distribution in commerce of the basic model.

(2) Pursuant to a request made by the Secretary, provide DOE within 30 days of the request, records, reports and other documentation pertaining to the acquisition, ordering, storage, shipment, or sale of a basic model determined to be in noncompliance.

(c) If a manufacturer or private labeler fails to comply with the required actions in the notice of noncompliance determination as set forth in paragraphs (a) or (b) of this section, the Secretary may seek, among other remedies, injunctive action and civil penalties, where appropriate.

(d) The manufacturer may modify a basic model determined to be noncompliant with an applicable energy conservation standard in such manner as to make it comply with the applicable standard. Such modified basic model shall then be treated as a new basic model and must be certified in accordance with the provisions of this part; except that in addition to satisfying all requirements of this part, the manufacturer shall also maintain, and provide upon request made by the Secretary, records that demonstrate that modifications have been made to all units of the new basic model prior to distribution in commerce.

§ 429.51 Additional certification testing requirements.

Pursuant to § 429.31(b)(2), if DOE determines that independent, third-party testing is necessary to ensure a manufacturer's compliance with the rules of this part 429, part 430, or part 431 of this subchapter, a manufacturer must base its certification of a basic model under subpart C of this part on independent, third-party laboratory testing.

§ 429.53 Injunctions.

If the Secretary has reason to seek an injunction under the Act:

(a) DOE will notify the manufacturer, private labeler or any other person as required, of the prohibited act at issue and the Secretary's intent to seek a judicial order enjoining the manufacturer, private labeler or any other person as required from engaging in the prohibited act unless the manufacturer, private labeler or any other person as required, delivers to DOE within 15 calendar days a corrective action and compliance plan, satisfactory to DOE, of the steps it will take to ensure that the prohibited conduct ceases. DOE will monitor the implementation of such plan.

(b) If the manufacturer, private labeler or any other person as required, fails to cease engaging in the prohibited conduct or fails to provide a satisfactory corrective action and compliance plan, the Secretary may seek an injunction.

(c) The Secretary shall determine whether the facts of the case warrant the assessment of civil penalties for knowing violations.

§ 429.55 Maximum civil penalty.

Any person who knowingly violates any provision of § 429.31(a) of this part may be subject to assessment of a civil penalty of no more than $200 for each violation. As to § 429.31(a)(1) with respect to failure to certify, and as to § 429.31(a)(2), (5) through (9), each unit of a covered product or covered equipment distributed in violation of such paragraph shall constitute a separate violation. For violations of § 429.31(a)(1), (3), and (4), each day of noncompliance shall constitute a separate violation for each basic model at issue.

§ 429.57 Penalty considerations.

DOE will assess a civil penalty under this subpart taking the following into account:

(a) The nature and scope of the violation;

(b) The provision violated;

(c) The violator's history of compliance or non-compliance;

(d) Whether the violator is a small business;

(e) The violator's ability to pay;

(f) The violator's timely self-reporting of the violation, if any;

(g) The violator's self-initiated corrected action, if any; and

(h) Such other matters as justice may require.

§ 429.59 Notice of proposed civil penalty.

(a) Before issuing an order assessing a civil penalty against any person under this section, the Secretary shall provide to such person notice of the proposed penalty.

(b) The notice of proposed penalty will:

(1) Include the amount of the proposed penalty;

(2) Include a statement of the material facts constituting the alleged violation; and

(3) Inform the person of the opportunity to elect in writing within 30 calendar days of receipt of the notice to have the procedures of § 429.65 (in lieu

of those of § 429.63) apply with respect to the penalty.

§ 429.61 Election of procedures.

(a) In responding to a notice of proposed civil penalty, the respondent may request:

(1) An administrative hearing before an Administrative Law Judge (ALJ) under § 429.63 of this part; or

(2) Elect to have the procedures of § 429.65 apply.

(b) Any election to have the procedures of § 429.65 apply may not be revoked except with the consent of the Secretary.

(c) If the respondent fails to respond to a notice issued under § 429.59 or otherwise fails to indicate its election of procedures, DOE shall refer the civil penalty action to an ALJ for a hearing under § 429.63.

§ 429.63 Administrative law judge hearing and appeal.

(a) When elected pursuant to § 429.61, DOE shall refer a civil penalty action brought under § 429.59 of this part to an ALJ, who shall afford the respondent an opportunity for an agency hearing on the record.

(b) After consideration of all matters of record in the proceeding, the ALJ will issue a recommended decision, if appropriate, recommending a civil penalty. The decision includes a statement of the findings and conclusions, and the reasons therefore, on all material issues of fact, law, and discretion.

(c)(1) The Secretary shall adopt, modify, or set aside the conclusions of law or discretion contained in the ALJ's recommended decision and shall set forth a final order assessing a civil penalty. The Secretary shall include in its final order the ALJ's findings of fact and the reasons for its actions.

(2) Any person against whom a penalty is assessed under this section may, within 60 calendar days after the date of the final order of the Secretary assessing such penalty, institute an action in the United States Court of Appeals for the appropriate judicial circuit for judicial review of such order in accordance with chapter 7 of title 5, United States Code. The court shall have jurisdiction to enter a judgment affirming, modifying, or setting aside in whole or in part, the order of the Secretary, or the court may remand the proceeding to the Secretary for such further action as the court may direct.

§ 429.65 Immediate issuance of order assessing civil penalty.

(a) If respondent elects to forgo an agency hearing pursuant to § 429.61, DOE shall issue an order assessing the civil penalty proposed in the notice of proposed penalty under § 429.59, 30 days after respondent's receipt of the notice of proposed penalty.

(b) If within 60 days of receiving the assessment order in paragraph (a) of this section the respondent does not pay the civil penalty amount, the Secretary shall institute an action in the appropriate United States District Court for an order affirming the assessment of the civil penalty. The court shall have authority to review de novo the law and the facts involved and shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part, such assessment.

§ 429.67 Collection of civil penalties.

(a) If any person fails to pay an assessment of a civil penalty after it has become a final and unappealable order under § 429.63 or after the appropriate District Court has entered final judgment in favor of the Secretary under § 429.65, the Secretary shall institute an action to recover the amount of such penalty in any appropriate District Court of the United States. In such action, the validity and appropriateness of such final assessment order or judgment shall not be subject to review.

(b)(1) The Secretary will be represented by the General Counsel of DOE (or any attorney or attorneys within DOE designated by the General Counsel) who shall supervise, conduct, and argue any civil litigation to which § 429.65 applies including any related collection action under paragraph (a) of this section in a court of the United States or in any other court, except the Supreme Court of the United States, consulting with the Attorney General concerning such litigation. The Attorney General will provide, on request, such assistance in the conduct of such litigation as may be appropriate.

(2) The Secretary shall be represented by the Attorney General, or the Solicitor General, as appropriate, in actions under this section, except to the extent provided in paragraph (b)(1) of this section.

(3) DOE will provide to a Respondent contact information for the appropriate administrative law judge when a case is referred for hearing pursuant to § 429.63.

§ 429.69 Compromise and settlement.

(a) The Secretary may compromise, modify, or remit, with or without conditions, any civil penalty (with leave of court if necessary).

(b) In exercising its authority under paragraph (a) of this section, the Secretary may consider the nature and seriousness of the violation, the efforts of the respondent to remedy the violation in a timely manner, and other factors as justice may require.

(c) The Secretary's authority to compromise, modify or remit a civil penalty may be exercised at any time prior to a final decision by the United States Court of Appeals if § 429.63 procedures are utilized, or prior to a final decision by the United States District Court, if § 429.65 procedures are utilized.

(d) Notwithstanding paragraph (a) of this section, the Secretary or the respondent may propose to settle the case. If a settlement is agreed to by the parties, the respondent is notified and the case is closed.

§ 429.71 Confidentiality.

Pursuant to the provisions of 10 CFR 1004.11, any person submitting information or data which the person believes to be confidential and exempt by law from public disclosure should submit one complete copy, and one copy from which the information believed to be confidential has been deleted. In accordance with the procedures established in 10 CFR 1004.11, DOE shall make its own determination with regard to any claim that information submitted be exempt from public disclosure; however, the following records and other material of DOE are not exempt from public disclosure:

(a) Reports of compliance filed pursuant to the rules in this part or pursuant to a provision in a DOE order; and

(b) Product-specific information submitted by manufacturers to DOE pursuant to § 429.19(b)(13), including the manufacturer's name, the brand name, and applicable model number(s).

Appendix A to Subpart E of Part 429—Sampling Plan for Enforcement Testing of Covered Consumer Products and Certain High-Volume Commercial Equipment

(a) The first sample size (n_1) must be four or more units, except as provided by § 429.45.

(b) Compute the mean of the measured energy performance (x_1) for all tests as follows:

$$x_1 = \frac{1}{n_1}\left(\sum_{i=1}^{n_1} x_i\right) \qquad \text{[Equation 1]}$$

where x_i is the measured energy or water efficiency or consumption from test i, and n_1 is the total number of tests.

(c) Compute the standard deviation (s_1) of the measured energy performance from the n_1 tests as follows:

$$s_1 = \sqrt{\frac{\sum_{i=1}^{n_1}(x_i - x_1)^2}{n_1 - 1}} \qquad \text{[Equation 2]}$$

(d) Compute the standard error (s_{x1}) of the measured energy performance from the n_1 tests as follows:

$$s_{x_1} = \sqrt{\frac{s_1}{n_1}} \qquad \text{[Equation 3]}$$

(e) Compute the upper control limit (UCL_1) and lower control limit (LCL_1) for the mean of the first sample using the applicable DOE energy or water performance standard (EPS) as the desired mean and a probability level of 95 percent (two-tailed test) as follows:

$$LCL_1 = EPS - ts_{x_1} \qquad \text{[Equation 4]}$$

and

$$UCL_1 = EPS + ts_{x_1} \qquad \text{[Equation 5]}$$

where t is the statistic based on a 95 percent two-tailed probability level and a sample size of n_1.

(f)(1) For an energy efficiency or water efficiency standard, compare the mean of the first sample (x_1) with the upper and lower control limits (UCL_1 and LCL_1) to determine one of the following:

(2) For an energy or water consumption standard, compare the mean of the first sample (x_1) with the upper and lower control limits (UCL_1 and LCL_1) to determine one of the following:

(A) If the mean of the first sample is below the lower control limit, then the basic model is in noncompliance and testing is at an end. (Do not go on to any of the steps below.)

(B) If the mean of the first sample is equal to or greater than the upper control limit, then the basic model is in compliance and testing is at an end. (Do not go on to any of the steps below.)

(C) If the sample mean is equal to or greater than the lower control limit but less than the upper control limit, then no determination of compliance or noncompliance can be made and a second sample size is determined by Step h(1).

(g)(1) For an energy efficiency or water efficiency standard, determine the second sample size (n_2) as follows:

$$n_2 = \left(\frac{ts_1}{0.05\,EPS}\right)^2 - n_1 \qquad \text{[Equation 6a]}$$

where s_1 and t have the values used in Steps 4 and 5, respectively. The term "0.05 EPS" is the difference between the applicable energy efficiency or water efficiency standard and 95 percent of the standard, where 95 percent of the standard is taken as the lower control limit. This procedure yields a sufficient combined sample size (n_1+n_2) to give an estimated 97.5 percent probability of obtaining a determination of compliance when the true mean efficiency is equal to the applicable standard. Given the solution value of n_2, determine one of the following:

(A) If the value of n_2 is less than or equal to zero and if the mean energy or water efficiency of the first sample (x_1) is either equal to or greater than the lower control limit (LCL_1) or equal to or greater than 95 percent of the applicable energy efficiency or water efficiency standard (EES), whichever is greater, i.e., if $n_2 \leq 0$ and $x_1 \geq$ max (LCL_1, 0.95 EES), the basic model is in compliance and testing is at an end.

(B) If the value of n_2 is less than or equal to zero and the mean energy efficiency of the first sample (x_1) is less than the lower control limit (LCL_1) or less than 95 percent of the applicable energy efficiency standard (EES), whichever is greater, i.e., if $n_2 \leq 0$ and $x_1 \geq$ max (LCL_1, 0.95 EES), the basic model is in noncompliance and testing is at an end.

(C) If the value of n_2 is greater than zero, then value of the second sample size is determined to be the smallest integer equal to or greater than the solution value of n_2 for equation (6). If the value of $n_2$so calculated is greater than $21 - n_1$, set n_2 equal to $21 - n_1$.

(2) For an Energy or Water Consumption Standard, determine the second sample size (n_2) as follows:

$$n_2 = \left(\frac{ts_1}{0.05\,EPS}\right)^2 - n_1 \qquad \text{[Equation 6b]}$$

where $s_1$and t have the values used in (d) and (e), respectively. The term "0.05 EPS" is the difference between the applicable energy or water consumption standard and 105 percent of the standard, where 105 percent of the standard is taken as the upper control limit. This procedure yields a sufficient combined sample size ($n_1 + n_2$) to give an estimated 97.5 percent probability of obtaining a determination of compliance when the true mean consumption is equal to the applicable standard. Given the solution value of n_2, determine one of the following:

(A) If the value of n_2 is less than or equal to zero and if the mean energy or water consumption of the first sample (x_1) is either equal to or less than the upper control limit (UCL_1) or equal to or less than 105 percent of the applicable energy or water performance standard (EPS), whichever is less, *i.e.,* if $n_2 \leq 0$ and $x_1 \leq$ min (UCL_1, 1.05 EPS), the basic model is in compliance and testing is at an end.

(B) If the value of n_2 is less than or equal to zero and the mean energy or water consumption of the first sample (x_1) is greater than the upper control limit (UCL_1) or more than 105 percent of the applicable energy or water performance standard (EPS), whichever is less, *i.e.,* if $n_2 \leq 0$ and $x_1 >$ min (UCL_1, 1.05 EPS), the basic model is in noncompliance and testing is at an end.

(C) If the value of n_2 is greater than zero, then the value of the second sample size is determined to be the smallest integer equal to or greater than the solution value of n_2 for equation (6a). If the value of n_2 so calculated is greater than $20 - n_1$, set n_2 equal to $21 - n_1$.

(h) Compute the combined mean (x_2) of the measured energy or water performance of the n_1 and n_2 units of the combined first and second samples as follows:

$$\bar{x}_2 = \frac{1}{n_1 + n_2}\left(\sum_{i=1}^{n_1+n_2} x_i\right) \qquad \text{[Equation 7]}$$

(i) Compute the standard error (S_{x1}) of the measured energy or water performance of then $_1$ and n_2 units in the combined first and second samples as follows:

$$s_{x_2} = \frac{s^1}{\sqrt{n_1 + n_2}} \qquad \text{[Equation 8]}$$

Note: s_1 is the value obtained in (c).

(j)(1). For an Energy Efficiency Standard, compute the lower control limit (LCL_2) for the mean of the combined first and second samples using the DOE energy efficiency standard (EES) as the desired mean and a one-tailed probability level of 97.5 percent (equivalent to the two-tailed probability level of 95 percent used in Step (e)) as follows:

$$LCL_2 = EPS - ts_{x_2} \qquad \text{[Equation 9a]}$$

where the t-statistic has the value obtained in Step (e).

(j)(2). For an Energy or Water Consumption Standard, compute the upper control limit (UCL_2) for the mean of the combined first and second samples using the DOE energy or water performance standard (EPS) as the desired mean and a one-tailed probability level of 102.5 percent (equivalent to the two-tailed probability level of 95 percent used in Step (e)) as follows:

$$UCL_1 = EPS + ts_{x_1} \qquad \text{[Equation 9b]}$$

where the t-statistic has the value obtained in (e).

(k)(1). For an Energy Efficiency Standard, compare the combined sample mean (x_2) to the lower control limit (LCL_2) to find one of the following:

(A) If the mean of the combined sample (x_2) is less than the lower control limit (LCL_2) or 95 percent of the applicable energy efficiency standard (EES), whichever is greater, *i.e.,* if $x_2 <$ max (LCL_2, 0.95 EES), the basic model is in noncompliance and testing is at an end.

(B) If the mean of the combined sample (x_2) is equal to or greater than the lower control limit (LCL_2) or 95 percent of the applicable energy efficiency standard (EES), whichever is greater, *i.e.,* if $x_2 \geq$ max (LCL_2, 0.95 EES), the basic model is in compliance and testing is at an end.

(k)(2). For an Energy or Water Consumption Standard, compare the combined sample mean (x_2) to the upper control limit (UCL_2) to find one of the following:

(A) If the mean of the combined sample (x_2) is greater than the upper control limit (UCL_2) or 105 percent of the applicable energy or water performance standard (EPS), whichever is less, *i.e.,* if $x_2 >$ min (UCL_2, 1.05 EPS), the basic model is in noncompliance and testing is at an end.

(B) If the mean of the combined sample (x_2) is equal to or less than the upper control limit (UCL_2) or 105 percent of the applicable energy or water performance standard (EPS),

whichever is less, *i.e.,* if $x_2 \leq$ min (UCL_2, 1.05 EPS), the basic model is in compliance and testing is at an end.

Appendix B to Subpart E of Part 429—Sampling Plan for Enforcement Testing of Covered Equipment and Certain Low-Volume Covered Products

The Department will determine compliance as follows:

(a) The first sample size (n_1) must be four or more units, except as provided by § 429.45.

(b) Compute the mean of the measured energy performance (x_1) for all tests as follows:

$$x_1 = \frac{1}{n_1}\left(\sum_{i=1}^{n_1} x_i\right) \qquad \text{[Equation 1]}$$

Where x_i is the measured energy efficiency or consumption from test i, and n_1 is the total number of tests.

(c) Compute the standard deviation (s_1) of the measured energy performance from the n_1 tests as follows:

$$s_1 = \sqrt{\frac{\sum_{i=1}^{n_1}(x_i - x_1)^2}{n_1 - 1}} \qquad \text{[Equation 2]}$$

(d) Compute the standard error (s_{x1}) of the measured energy performance from the n_1 tests as follows:

$$s_{x_1} = \sqrt{\frac{s_1}{n_1}} \qquad \text{[Equation 3]}$$

(e)(1) For an energy efficiency standard, compute the lower control limit (LCL_1) according to:

$$LCL_1 = EPS - ts_{x_1} \qquad \text{[Equation 4a]}$$

or

$$LCL_1 = 0.95EPS, \qquad \text{[Equation 4b]}$$

(whichever is greater).

(2) For an energy use standard, compute the upper control limit (UCL_1) according to:

$$UCL_1 = EPS + ts_{x_1} \qquad \text{[Equation 5a]}$$

or

$$UCL_1 = 1.05EPS, \qquad \text{[Equation 5b]}$$

(whichever is less),

Where EPS is the energy performance standard and t is a statistic based on a 97.5 percent, one-sided confidence limit and a sample size of n_1.

(f)(1) Compare the sample mean to the control limit.

(i) The basic model is in compliance and testing is at an end if:

(A) For an energy or water efficiency standard, the sample mean is equal to or greater than the lower control limit, or

(B) For an energy or water consumption standard, the sample mean is equal to or less than the upper control limit.

(ii) Unless the manufacturer requests manufacturer-option testing and provides the additional units for such testing, the basic model is in noncompliance and the testing is at an end because compliance has not been demonstrated if:

(A) For an energy efficiency standard, the sample mean is less than the lower control limit, or

(B) For an energy consumption standard, the sample mean is greater than the upper control limit.

(2) If the manufacturer does request additional testing, and provides the necessary additional units, the Department will test each unit the same number of times it tested previous units. The Department will then compute a combined sample mean, standard deviation, and standard error as described above. (The "combined sample" refers to the units the Department initially tested plus the additional units the Department has tested at the manufacturer's request.) The Department will determine compliance or noncompliance from the mean and the new lower or upper control limit of the combined sample. If, for an energy efficiency standard, the combined sample mean is equal to or greater than the new lower control limit or, for an energy consumption standard, the sample mean is equal to or less than the upper control limit, the basic model is in compliance, and testing is at an end. If the combined sample mean does not satisfy one of these two conditions, the basic model is in noncompliance and the testing is at an end.

Appendix C to Subpart E of Part 429—Sampling Plan for Enforcement Testing of Distribution Transformers

(a) When testing distribution transformers, the number of units in the sample (m_1) shall be in accordance with § 429.45 and DOE shall perform the following number of tests:

(i) If DOE tests four or more units, it will test each unit once;

(ii) If DOE tests two or three units, it will test each unit twice; or

(iii) If DOE tests one unit, it will test that unit four times.

(b) DOE shall determine compliance as follows:

(i) Compute the mean (X_1) of the measured energy performance of the n_1 tests in the first sample as follows:

$$\bar{X}_1 = \frac{1}{n_1}\sum_{i=1}^{n_1} X_i \qquad \text{[Equation 1]}$$

Where X_i is the measured efficiency of test i.

(ii) Compute the sample standard deviation (S_1) of the measured efficiency of the n_1 tests in the first sample as follows:

$$s_1 = \sqrt{\sum_{i=1}^{n_1}\frac{(X_i - \bar{X}_1)^2}{n_1 - 1}} \qquad \text{[Equation 2]}$$

(iii) Compute the standard error ($SE(X_1)$) of the mean efficiency of the first sample as follows:

$$SE(\bar{X}_1) = \frac{S_1}{\sqrt{n_1}} \qquad \text{[Equation 3]}$$

(iv) Computer the sample size discount ($SSD(m_1)$) as follows:

$$SSD(m_1) = \frac{100}{1 + \left(1 + \frac{0.08}{\sqrt{m_1}}\right)\left(\frac{100}{RE} - 1\right)} \qquad \text{[Equation 4]}$$

Where m_1 is the number of units in the sample, and RE is the applicable DOE efficiency when the test is to determine compliance with the applicable energy conservation standard, or is the labeled efficiency when the test is to determine compliance with the labeled efficiency value.

(v) Compute the lower control limit (LCL_1) for the mean of the first sample as follows:

$$LCL_1 = SSD(m_1) - tSE(\bar{X}_1) \qquad \text{[Equation 5]}$$

Where t is the 2.5th percentile of a t-distribution for a sample size of n_1, which yields a 97.5 percent confidence level for a one-tailed t-test.

(vi) Compare the mean of the first sample (X_1) with the lower control limit (LCL_1) to determine one of the following:

(A) If the mean of the first sample is below the lower control limit, then the basic model is in non-compliance and testing is at an end.

(B) If the mean is equal to or greater than the lower control limit, no final determination of compliance or non-compliance can be made; proceed to Step (vii).

(vii) Determine the recommended sample size (n) as follows:

$$n = \left[\frac{tS_1(108 - 0.08RE)}{RE(8 - 0.08RE)} \right]^2 \quad \text{[Equation 6]}$$

Where S_1 and t have the values used in Steps (ii) and (v), respectively. The factor

$$\frac{(108 - 0.08RE)}{(8 - 0.08RE)}$$

is based on an 8-percent tolerance in the total power loss.

Given the value of n, determine one of the following:

(A) If the value of n is less than or equal to n_1 and if the mean energy efficiency of the first sample (X_1) is equal to or greater than the lower control limit (LCL_1), the basic model is in compliance and testing is at an end.

(B) If the value of n is greater than n_1, the basic model is in non-compliance. The size of a second sample n_2 is determined to be the smallest integer equal to or greater than the difference $n - n_1$. If the value of n_2 so calculated is greater than $21 - n_1$, set n_2 equal to $21 - n_1$.

(viii) Compute the combined (X_2) mean of the measured energy performance of the n_1 and n_2 units of the combined first and second samples as follows:

$$\bar{X}_2 = \frac{1}{n_1 + n_2} \left(\sum_{i=1}^{n_1+n_2} X_i \right) \quad \text{[Equation 7]}$$

(ix) Compute the standard error ($SE(X_2)$) of the mean full-load efficiency of the n_1 and $n_2$units in the combined first and second samples as follows:

$$SE\left(\bar{X}_2\right) = \frac{S^1}{\sqrt{n_1 + n_2}} \quad \text{[Equation 8]}$$

(Note that S_1 is the value obtained above in (ii).)

(x) Set the lower control limit (LCL_2) to,

$$LCL_2 = SSD\left(m_1\right) - tSE\left(\bar{X}_2\right) \quad \text{[Equation 9]}$$

Where t has the value obtained in (v), and compare the combined sample mean (X_2) to the lower control limit (LCL_2) to find one of the following:

(A) If the mean of the combined sample (X_2) is less than the lower control limit (LCL_2), the basic model is in non-compliance and testing is at an end.

(B) If the mean of the combined sample (X_2) is equal to or greater than the lower control limit (LCL_2), the basic model is in compliance and testing is at an end.

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

2. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

3. In § 430.2 revise the definition of "Act" and in the definition of "basic model" revise paragraph (24) to read as follows:

§ 430.2 Definitions.

* * * * *

Act means the Energy Policy and Conservation Act of 1975, as amended, 42 U.S.C. 6291–6316.

* * * * *

Basic model * * *

(24) With respect to medium base compact fluorescent lamps, means lamps that have essentially identical light output and electrical characteristics and that do not have any differing physical or functional characteristics that affect energy consumption or efficacy.

* * * * *

§ 430.24 [Removed and Reserved]

4. Remove and reserve § 430.24.

Subpart F—[Removed and Reserved]

5. Remove and reserve Subpart F, consisting of §§ 430.60 through 430.75, and Appendix A and B to subpart F of part 430.

PART 431—ENERGY EFFICIENCY PROGRAM FOR CERTAIN COMMERCIAL AND INDUSTRIAL EQUIPMENT

6. The authority citation for part 431 continues to read as follows:

Authority: 42 U.S.C. 6291–6317.

§ 431.65 [Removed]

7. Section 431.65 is removed.

§ 431.135 [Removed]

8. Section 431.135 is removed.

§§ 431.173 through 431.175 [Removed and Reserved]

9. Sections 431.173 through 431.175 are removed and reserved.

§§ 431.197 and 431.198 [Removed]

10a. Sections 431.197 and 431.198 are removed.

Appendix B to Subpart K of Part 431—[Removed]

10b. Appendix B to subpart K of part 431 is removed.

§ 431.205 [Removed]

11. Section 431.205 is removed.

§ 431.225 [Removed]

12. Section 431.225 is removed.

§ 431.265 [Removed]

13. Section 431.265 is removed.

§ 431.295 [Removed]

14. Section 431.295 is removed.

15. In § 431.302 a new definition of "manufacturer of walk-in cooler or walk-in freezer" is added in alphabetical order to read as follows:

§ 431.302 Definitions concerning walk-in coolers and walk-in freezers.

Manufacturer of a walk-in cooler or walk-in freezer means any person who manufactures, produces, assembles or imports such a walk-in cooler or walk-in freezer, including any person who:

(1) Manufacturers, produces, assembles, or imports a walk-in cooler or walk-in freezer in its entirety, including the collection and shipment of all components that affect the energy consumption of a walk-in cooler or walk-in freezer;

(2) Manufactures, produces, assembles or imports a walk-in cooler or walk-in freezer in part, and specifies or approves the walk-in cooler or walk-in freezer's components that affect energy consumption, including refrigeration, doors, lights, or other components produced by others, as for example by specifying such components in a catalogue by make and model number or parts number;

(3) Is any vendor who sells a walk-in cooler or walk-in freezer that consists of a combination of components that affect energy consumption, which are not specified or approved by a person described in paragraphs (1) or (2) of this definition; or

(4) Is an individual or a company who arranges for a walk-in cooler or walk-in freezer to be assembled at his own or any other specified premises from components that affect energy consumption, which are specified and approved by him and not by a person described in paragraphs (1), (2), or (3) of this definition.

* * * * *

§ 431.325 [Removed]

16. Section 431.325 is removed.

§§ 431.327 through 431.329 [Removed]

17. Remove §§ 431.327 through 431.329.

Appendices A through C to Subpart S of Part 431—[Removed].

18. Remove Appendices A through C to subpart S of part 431.

Subpart T—[Removed]

19. Remove subpart T to part 431, consisting of §§ 431.370 through 431.373 and appendices A through D, is removed.

20a. Revise the heading to Subpart U to read as follows:

Subpart U—Enforcement for Electric Motors

* * * * *

20b. Revise § 431.381 to read as follows

§ 431.381 Purpose and scope for electric motors.

This subpart describes violations of EPCA's energy conservation requirements, specific procedures we will follow in pursuing alleged non-compliance of an electric motor with an applicable energy conservation standard or labeling requirement, and general procedures for enforcement action, largely drawn directly from EPCA, that apply to electric motors.

§§ 431.403 through 431.407 [Removed]

21. Remove §§ 431.403 through 431.407.

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Part IV

Department of Education

Notice of Waivers Granted Under Section 9401 of the Elementary and Secondary Education Act of 1965, as Amended; Notice

DEPARTMENT OF EDUCATION

Notice of Waivers Granted Under Section 9401 of the Elementary and Secondary Education Act of 1965, as Amended

SUMMARY: In this notice, we announce the waivers that the U.S. Department of Education (Department) granted during calendar year 2009 under the waiver authority in section 9401 of the Elementary and Secondary Education Act of 1965, as amended (ESEA). We also announce waivers that the Department granted under the waiver authority in section 9401 for Title I, Part A programs for funding provided through the American Recovery and Reinvestment Act of 2009 (ARRA).

SUPPLEMENTARY INFORMATION: In 2009, the Department granted a total of 351 waivers under the waiver authority in section 9401 of the ESEA. The waivers granted were as follows: (1) Two waivers extending the period in which funds are available for obligation for various programs due to Hurricanes Katrina and Rita, twenty-seven waivers extending the period in which funds are available for obligation for the Reading First program, and three waivers extending the period in which funds are available for obligation for School Improvement activities; (2) four waivers allowing implementation of the "growth model pilot;" (3) three waivers allowing implementation of the "differentiated accountability model pilot;" (4) one waiver allowing a substitute assessment; (5) four waivers allowing delayed release of assessment results; (6) two waivers of the adequate yearly progress (AYP) determinations; (7) two Title I, Part A within-district allocation waivers; (8) one waiver of the Title I carryover limitation; (9) nineteen waivers to local educational agencies (LEAs) identified for improvement to exclude their Title I, Part A allocation when calculating their obligation to spend 10 percent of their Title I funds for professional development; (10) one waiver of the ESEA transferability rules; (11) four waivers allowing recipients of funds under the Indian Education program to charge additional administrative costs to the program; (12) twenty-three waivers of the requirement to provide 14-day notice of public school choice; (13) twenty-eight waivers allowing State educational agencies (SEAs) to approve schools or LEAs in need of improvement to become supplemental educational services (SES) providers; (14) twenty-five new waivers and six continuations of existing waivers allowing LEAs to provide SES to eligible students attending schools that receive funding under Title I, Part A of the ESEA (Title I schools) and are in the first year of school improvement and to count the costs of both toward meeting the LEA's "20 percent obligation"; and (15) one hundred and ninety-six waivers allowing LEAs and/or schools to exclude their Title I, Part A allocation received under ARRA when calculating their obligation to spend their funds for public school choice and professional development and when calculating the per-pupil amount for SES, and to waive the carryover limitation more than once every three years.

Waiver Data:

I. Extensions of the Obligation Period

A. Waivers Related to Hurricanes Katrina and Rita

1. Waiver Applicant: Louisiana Department of Education

- Provision waived: Tydings Amendment, section 421(b) of the General Education Provisions Act (GEPA).
- Date waiver granted: October 19, 2009.
- Description of waiver: Extended until December 31, 2009 the period of availability for fiscal year 2007 funds for various programs authorized under the ESEA, specifically Title I, Part A, Improving Basic Programs Operated by Local Educational Agencies; Title I, Part A, School Improvement under Section 1003(a); Title I, Part A, School Improvement Grants under Section 1003(g); Title I, Part B, Subpart 1, Reading First; Title I, Part D, Neglected and Delinquent State Agency and Local Educational Agency Program; Title II Part A, Improving Teacher Quality State Grants; Title II Part B, Sections 2201–2203, Mathematics and Science Partnerships; Title II, Part D, Enhancing Education Through Technology State Grants; Title III, English Language Acquisition State Grants; and Title IV, Safe and Drug-Free Schools and Communities.

2. Waiver Applicant: Louisiana Department of Education

- Provision waived: Tydings Amendment, section 421(b) of the General Education Provisions Act (GEPA).
- Date waiver granted: October 19, 2009.
- Description of waiver: Extended until September 30, 2010 the period of availability for fiscal year 2007 funds for the 21st Century Community Learning Centers grant authorized under the ESEA.

B. Waivers for the Reading First Program

1. Waiver Applicant: Alabama Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: June 22, 2009.
- Description of waiver: Extended until September 30, 2010 the period of availability for fiscal year 2007 Reading First funds.

2. Waiver Applicant: Alaska Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: August 12, 2009.
- Description of waiver: Extended until September 30, 2010 the period of availability for fiscal year 2007 Reading First funds.

3. Waiver Applicant: Arizona Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: July 30, 2009.
- Description of waiver: Extended until September 30, 2010 the period of availability for fiscal year 2007 Reading First funds.

4. Waiver Applicant: Arkansas Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: June 17, 2009.
- Description of waiver: Extended until September 30, 2010 the period of availability for fiscal year 2007 Reading First funds.

5. Waiver Applicant: Colorado Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: July 30, 2009.
- Description of waiver: Extended until September 30, 2010 the period of availability for fiscal year 2007 Reading First funds.

6. Waiver Applicant: Georgia Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: June 10, 2009.
- Description of waiver: Extended until September 30, 2010 the period of availability for fiscal year 2007 Reading First funds.

7. Waiver Applicant: Illinois State Board of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: June 17, 2009.

• Description of waiver: Extended until September 30, 2010 the period of availability for fiscal year 2007 Reading First funds.

8. Waiver Applicant: Indiana Department of Education

• Provision waived: Tydings Amendment, section 421(b) of GEPA.
• Date waiver granted: September 1, 2009.
• Description of waiver: Extended until September 30, 2010 the period of availability for fiscal year 2007 Reading First funds.

9. Waiver Applicant: Kentucky Department of Education

• Provision waived: Tydings Amendment, section 421(b) of GEPA.
• Date waiver granted: July 27, 2009.
• Description of waiver: Extended until September 30, 2010 the period of availability for fiscal year 2007 Reading First funds.

10. Waiver Applicant: Maine Department of Education

• Provision waived: Tydings Amendment, section 421(b) of GEPA.
• Date waiver granted: June 30, 2009.
• Description of waiver: Extended until September 30, 2010 the period of availability for fiscal year 2007 Reading First funds.

11. Waiver Applicant: Massachusetts Department of Education

• Provision waived: Tydings Amendment, section 421(b) of GEPA.
• Date waiver granted: May 27, 2009.
• Description of waiver: Extended until September 30, 2010 the period of availability for fiscal year 2007 Reading First funds.

12. Waiver Applicant: Mississippi Department of Education

• Provision waived: Tydings Amendment, section 421(b) of GEPA.
• Date waiver granted: June 26, 2009.
• Description of waiver: Extended until September 30, 2010 the period of availability for fiscal year 2007 Reading First funds.

13. Waiver Applicant: New Jersey Department of Education

• Provision waived: Tydings Amendment, section 421(b) of GEPA.
• Date waiver granted: June 30, 2009.
• Description of waiver: Extended until September 30, 2010 the period of availability for fiscal year 2007 Reading First funds.

14. Waiver Applicant: New Mexico Department of Education

• Provision waived: Tydings Amendment, section 421(b) of GEPA.
• Date waiver granted: August 12, 2009.
• Description of waiver: Extended until September 30, 2010 the period of availability for fiscal year 2007 Reading First funds.

15. Waiver Applicant: North Carolina Department of Public Instruction

• Provision waived: Tydings Amendment, section 421(b) of GEPA.
• Date waiver granted: August 13, 2009.
• Description of waiver: Extended until September 30, 2010 the period of availability for fiscal year 2007 Reading First funds.

16. Waiver Applicant: North Dakota Department of Public Instruction

• Provision waived: Tydings Amendment, section 421(b) of GEPA.
• Date waiver granted: July 30, 2009.
• Description of waiver: Extended until September 30, 2010 the period of availability for fiscal year 2007 Reading First funds.

17. Waiver Applicant: Ohio Department of Education

• Provision waived: Tydings Amendment, section 421(b) of GEPA.
• Date waiver granted: October 2, 2009.
• Description of waiver: Extended until September 30, 2010 the period of availability for fiscal year 2007 Reading First funds.

18. Waiver Applicant: Oregon Department of Education

• Provision waived: Tydings Amendment, section 421(b) of GEPA.
• Date waiver granted: August 12, 2009.
• Description of waiver: Extended until September 30, 2010 the period of availability for fiscal year 2007 Reading First funds.

19. Waiver Applicant: Pennsylvania Department of Education

• Provision waived: Tydings Amendment, section 421(b) of GEPA.
• Date waiver granted: August 12, 2009.
• Description of waiver: Extended until September 30, 2010 the period of availability for fiscal year 2007 Reading First funds.

20. Waiver Applicant: Rhode Island Department of Education

• Provision waived: Tydings Amendment, section 421(b) of GEPA.
• Date waiver granted: August 12, 2009.
• Description of waiver: Extended until September 30, 2010 the period of availability for fiscal year 2007 Reading First funds.

21. Waiver Applicant: South Carolina Department of Education

• Provision waived: Tydings Amendment, section 421(b) of GEPA.
• Date waiver granted: September 23, 2009.
• Description of waiver: Extended until September 30, 2010 the period of availability for fiscal year 2007 Reading First funds.

22. Waiver Applicant: South Dakota Department of Education

• Provision waived: Tydings Amendment, section 421(b) of GEPA.
• Date waiver granted: July 31, 2009.
• Description of waiver: Extended until September 30, 2010 the period of availability for fiscal year 2007 Reading First funds.

23. Waiver Applicant: Texas Education Agency

• Provision waived: Tydings Amendment, section 421(b) of GEPA.
• Date waiver granted: August 13, 2009.
• Description of waiver: Extended until September 30, 2010 the period of availability for fiscal year 2007 Reading First funds.

24. Waiver Applicant: Vermont Department of Education

• Provision waived: Tydings Amendment, section 421(b) of GEPA.
• Date waiver granted: June 10, 2009.
• Description of waiver: Extended until September 30, 2010 the period of availability for fiscal year 2007 Reading First funds.

25. Waiver Applicant: Washington Department of Education

• Provision waived: Tydings Amendment, section 421(b) of GEPA.
• Date waiver granted: August 12, 2009.
• Description of waiver: Extended until September 30, 2010 the period of availability for fiscal year 2007 Reading First funds.

26. Waiver Applicant: West Virginia Department of Education

• Provision waived: Tydings Amendment, section 421(b) of GEPA.
• Date waiver granted: June 22, 2009.
• Description of waiver: Extended until September 30, 2010 the period of availability for fiscal year 2007 Reading First funds.

27. Waiver Applicant: Wyoming Department of Education

• Provision waived: Tydings Amendment, section 421(b) of GEPA.

• Date waiver granted: July 31, 2009.
• Description of waiver: Extended until September 30, 2010 the period of availability for fiscal year 2007 Reading First funds.

C. Waivers for the School Improvement Program

1. Waiver Applicant: California Department of Education

• Provision waived: Tydings Amendment, section 421(b) of GEPA.
• Date waiver granted: May 4, 2009.
• Description of waiver: Extended until March 31, 2010 the period of availability for fiscal year 2006 Title I, Part A funds reserved for school improvement activities under section 1003(a) of the ESEA.

2. Waiver Applicant: California Department of Education

• Provision waived: Tydings Amendment, section 421(b) of GEPA.
• Date waiver granted: October 30, 2009.
• Description of waiver: Extended until September 30, 2010 the period of availability for fiscal year 2007 Title I, Part A funds reserved for school improvement activities under section 1003(g) of the ESEA.

3. Waiver Applicant: New York Department of Education

• Provision waived: Tydings Amendment, section 421(b) of GEPA.
• Date waiver granted: September 30, 2009.
• Description of waiver: Extended until March 31, 2010 the period of availability for fiscal year 2007 Title I, Part A funds reserved for school improvement activities under section 1003(g) of the ESEA.

II. "Growth Model Pilots"

1. Waiver Applicant: Colorado Department of Education

• Provision waived: Section 1111(b)(2) of the ESEA.
• Date waiver granted: January 8, 2009.
• Description of waiver: Provided Colorado the flexibility to implement a growth-based accountability model as part of determining adequate yearly progress (AYP) for the 2009–2010 school year, based on assessments administered in the 2008–2009 school year.

2. Waiver Applicant: Minnesota Department of Education

• Provision waived: Section 1111(b)(2) of the ESEA.
• Date waiver granted: January 8, 2009.
• Description of waiver: Provided Minnesota the flexibility to implement a growth-based accountability model as part of determining AYP beginning in the 2009–2010 school year through the 2012–2013 school year based on assessments administered in the 2008–2009 school year through the 2011–2012 school year.

3. Waiver Applicant: Pennsylvania Department of Education

• Provision waived: Section 1111(b)(2) of the ESEA.
• Date waiver granted: January 8, 2009.
• Description of waiver: Provided Pennsylvania the flexibility to implement a growth-based accountability model as part of determining AYP beginning in the 2009–2010 school year through the 2012–2013 school year based on assessments administered in the 2008–2009 school year through the 2011–2012 school year.

4. Waiver Applicant: Texas Education Agency

• Provision waived: Section 1111(b)(2) of the ESEA.
• Date waiver granted: January 8, 2009.
• Description of waiver: Provided Texas the flexibility to implement a growth-based accountability model as part of determining AYP beginning in the 2009–2010 school year through the 2012–2013 school year based on assessments administered in the 2008–2009 school year through the 2011–2012 school year.

III. "Differentiated Accountability Model Pilots"

1. Waiver Applicant: Arkansas Department of Education

• Provision waived: Section 1116 of the ESEA.
• Date waiver granted: January 8, 2009.
• Description of waiver: Provided Arkansas the flexibility to include its differentiated accountability model as a part of its system of school improvement interventions beginning in the 2009–2010 school year through the 2012–2013 school year.

2. Waiver Applicant: Louisiana Department of Education

• Provision waived: Section 1116 of the ESEA.
• Date waiver granted: January 8, 2009.
• Description of waiver: Provided Louisiana the flexibility to include its differentiated accountability model as a part of its system of school improvement interventions beginning in the 2009–2010 school year through the 2012–2013 school year.

3. Waiver Applicant: New York Department of Education

• Provision waived: Section 1116 of the ESEA.
• Date waiver granted: January 8, 2009.
• Description of waiver: Provided New York the flexibility to include its differentiated accountability model as a part of its system of school improvement interventions beginning in the 2009–2010 school year through the 2012–2013 school year.

IV. Substitute Assessments

1. Waiver Applicant: Maryland Department of Education

• Provisions waived: Section 1111(b)(3)(C)(i) of the ESEA and 34 CFR 200.3(a)(1)(i).
• Date waiver granted: January 15, 2009.
• Description of waiver: Permits Maryland to use Advanced Placement or the International Baccalaureate Biology assessments, from the 2008–2009 school year through the 2011–2012 school year, in place of the high school science end-of-course assessment even though the same assessment will not be used by all students and some students may take an assessment that does not cover the full breadth and depth of the State's academic content standards.

V. Delayed Release of Assessment Results and/or Public School Choice Notice

1. Waiver Applicant: California Department of Education

• Provision waived: Sections 1116(a)(2) and 1116(b)(1)(E)(i) of the ESEA.
• Date waiver granted: November 6, 2009.
• Description of waiver: Allows California to postpone the release of results of the State academic assessment administered in the 2008–2009 school year because new assessments had been implemented in that year, and to postpone notice of public school choice for the start of the 2009–2010 school year until assessment results are available.

2. Waiver Applicant: Kentucky Department of Education

• Provision waived: Section 1116(b)(1)(E)(i) of the ESEA.
• Date waiver granted: September 4, 2009.
• Description of waiver: Allows Kentucky to postpone notice of public

school choice for the 2009–2010 school year until assessment results are available. Due to severe weather Kentucky experienced during the 2008–2009 school year, Kentucky delayed administering its statewide assessments.

3. Waiver Applicant: Puerto Rico Department of Education

- Provision waived: Section 1116(b)(1)(E)(i) of the ESEA.
- Date waiver granted: December 11, 2009.
- Description of waiver: Allows Puerto Rico to postpone the release of results of the State academic assessment administered in the 2008–2009 school year because new assessments had been implemented in that year, and to postpone notice of public school choice for the start of the 2009–2010 school year until assessment results are available.

4. Waiver Applicant: South Carolina Department of Education

- Provisions waived: Sections 1116(a)(2) and 1116(b)(1)(E)(i) of the ESEA.
- Date waiver granted: September 9, 2009.
- Description of waiver: Allows South Carolina to postpone the release of results of the State academic assessment administered in the 2008–2009 school year because new assessments had been implemented in that year, and to postpone notice of public school choice for the start of the 2009–2010 school year until assessment results are available.

VI. AYP Determinations

1. Waiver Applicant: Kentucky Department of Education

- Provisions waived: Sections 1111(b)(3)(A), 1111(b)(3)(C)(vii), and 1116(a)(1)(A) of the ESEA.
- Date waiver granted: September 4, 2009.
- Description of waiver: Allows Belfry Middle School to exclude assessments administered in the 2008–2009 school year when making AYP determinations because flooding that occurred during testing on May 8, 2009, damaged test materials.

2. Waiver Applicant: West Virginia Department of Education

- Provisions waived: Sections 1111(b)(3)(A), 1111(b)(3)(C)(vii), and 1116(a)(1)(A) of the ESEA.
- Date waiver granted: May 22, 2009.
- Description of waiver: Allows some schools in Mingo County to exclude assessments administered in the 2008–2009 school year when making AYP determinations because flooding occurred during the testing period, which made schools inoperable and unable to administer the State assessments.

VII. Title I Within-District Allocation Waiver

1. Waiver Applicant: McHenry Community High School District 156, IL

- Provisions waived: Sections 1113(a)(2) and 1113(c)(2)(A) of the ESEA.
- Date waiver granted: October 15, 2009.
- Description of waiver: Enables the District to allocate Title I funds to its second high school, which is just below the district-wide poverty rate and, therefore, not eligible for Title I funds, and would further enable the District to allocate an amount per poor child to both its high schools that is less than 125 percent of the per-pupil amount for the District as a whole.

2. Waiver Applicant: Milwaukee Public Schools, WI

- Provisions waived: Sections 1113(a)(2) and 1113(c)(2)(A) of the ESEA.
- Date waiver granted: November 6, 2009.
- Description of waiver: Enables Milwaukee Public Schools to allocate Title I funds to five schools that are below the district-wide poverty rate of 35 percent and, therefore, not eligible for Title I funds, and would further enable Milwaukee to allocate an amount per poor child to all its Title I schools that is less than 125 percent of the per-pupil amount for Milwaukee as a whole.

VIII. Allowing an LEA To Carry Over Title I Funds From One Fiscal Year to the Next

1. Waiver Applicant: Michigan Department of Education

- Provision waived: Section 1127(b) of the ESEA.
- Date waiver granted: June 17, 2009.
- Description of waiver: Allows Michigan to grant a carryover exemption more frequently than once every three years to Detroit Public Schools, specifically for FY 2007 Title I funds allocated to the LEA for school year 2007–2008 and for FY 2008 Title I funds allocated to the LEA for school year 2008–2009.

IX. Allowing LEAs Identified for Improvement To Exclude Their Title I Allocation When Calculating an LEA's Obligation To Spend 10 Percent of the Funds for Professional Development

1. On July 6, 2009, the Department granted the following LEAs in Massachusetts waivers of sections 1116(b)(3)(A)(iii) and 1116(c)(7)(A)(iii) of the ESEA. These sections preclude the 19 districts from using funds other than Title I, Part A funds for the 2008–2009 school year to meet the 10 percent professional development spending requirement. These waivers exempt an LEA identified for improvement, or an LEA for a school identified for improvement in the LEA from reserving 10 percent of its Title I allocation for professional development.

For schools identified for improvement:

- Adams Cheshire (for Plunkett Elementary School)
- Amherst-Pelham Regional (for Crocker Farm Elementary School in Amherst)
- Atlantis Charter School (single-school district)
- Attleborough (for Studley Elementary School)
- Greater New Bedford Voc-Tech (single-school district)
- Hawlemont (for Hawlemont Regional High School)
- Lowell (for Moody Elementary and McAuliffe Elementary Schools)
- Marblehead (for the Village School)
- Mohawk Trail Regional (for Buckland-Shelburne Elementary School)
- Monson (for Quarry Hill Community School)
- Norton (for Henry Yelle Elementary School)
- Orange (for Butterfield Elementary and Dexter Park Intermediate Schools)
- Randolph (for Lyons Elementary School)
- Triton Regional (for Salisbury Elementary School)
- Tyngsborough (for Tyngsborough Elementary School)
- Waltham (for Whittemore Elementary and Plympton Elementary Schools)

For LEAs identified for improvement:

- Agawam
- Ashburhan-Westminster Regional
- Plymouth

X. Transferability Waiver

1. Waiver Applicant: New York State Department of Education

- Provision waived: Section 6123(a) of the ESEA.
- Date waiver granted: November 23, 2009.
- Description of waiver: Permits the State to transfer certain Title IV, Part B funds for State-level activities to its Title I, Part A Administrative Reserve funds.

XI. Waivers of the Administrative Cost Limitation That Applies to Indian Education Funds

On June 17, 2009, the Department granted the following LEAs waivers of section 7115(d) of the ESEA, which establishes a five percent administrative cost limitation on funds awarded under the Indian Education formula grant program:

- Whiteriver Unified School District, AZ
- Ventura Unified School District, CA
- Muskogee Public Schools, OK
- Tulsa Public Schools, OK

XII. Notification of Public School Choice

1. Waiver Applicant: Alabama Department of Education

- Provision waived: 34 CFR 200.37(b)(4)(iv).
- Date waiver granted: August 14, 2009.
- Description of waiver: Permitted Alabama's LEAs to postpone notice of public school choice options beyond 14 days before the start of the school year to parents of eligible children attending schools that are newly identified for improvement for the 2009–2010 school year or that made AYP in the previous year but did not exit improvement status.

2. Waiver Applicant: Arizona Department of Education

- Provision waived: 34 CFR 200.37(b)(4)(iv).
- Date waiver granted: August 24, 2009.
- Description of waiver: Permitted Arizona's LEAs to postpone notice of public school choice options beyond 14 days before the start of the school year to parents of eligible children attending schools that are newly identified for improvement for the 2009–2010 school year or that made AYP in the previous year but did not exit improvement status.

3. Waiver Applicant: California Department of Education

- Provision waived: 34 CFR 200.37(b)(4)(iv).
- Date waiver granted: November 6, 2009.
- Description of waiver: Permitted California's LEAs to postpone notice of public school choice options beyond 14 days before the start of the school year to parents of eligible children attending schools that are newly identified for improvement for the 2009–2010 school year or that made AYP in the previous year but did not exit improvement status.

4. Waiver Applicant: Colorado Department of Education

- Provision waived: 34 CFR 200.37(b)(4)(iv).
- Date waiver granted: August 11, 2009.
- Description of waiver: Permitted Colorado's LEAs to postpone notice of public school choice options beyond 14 days before the start of the school year to parents of eligible children attending schools that are newly identified for improvement for the 2009–2010 school year or that made AYP in the previous year but did not exit improvement status.

5. Waiver Applicant: Idaho Department of Education

- Provision waived: 34 CFR 200.37(b)(4)(iv).
- Date waiver granted: October 15, 2009.
- Description of waiver: Permitted Idaho's LEAs to postpone notice of public school choice options beyond 14 days before the start of the school year to parents of eligible children attending schools that are newly identified for improvement for the 2009–2010 school year or that made AYP in the previous year but did not exit improvement status.

6. Waiver Applicant: Illinois State Board of Education

- Provision waived: 34 CFR 200.37(b)(4)(iv).
- Date waiver granted: September 16, 2009.
- Description of waiver: Permitted Illinois' LEAs to postpone notice of public school choice options beyond 14 days before the start of the school year to parents of eligible children attending schools that are newly identified for improvement for the 2009–2010 school year or that made AYP in the previous year but did not exit improvement status.

7. Waiver Applicant: Kentucky Department of Education

- Provision waived: 34 CFR 200.37(b)(4)(iv).
- Date waiver granted: September 4, 2009.
- Description of waiver: Permitted Kentucky's LEAs to postpone notice of public school choice options beyond 14 days before the start of the school year to parents of eligible children attending schools that are newly identified for improvement for the 2009–2010 school year or that made AYP in the previous year but did not exit improvement status.

8. Waiver Applicant: Louisiana Department of Education

- Provision waived: 34 CFR 200.37(b)(4)(iv).
- Date waiver granted: August 27, 2009.
- Description of waiver: Permitted Louisiana's LEAs to postpone notice of public school choice options beyond 14 days before the start of the school year to parents of eligible children attending schools that are newly identified for improvement for the 2009–2010 school year or that made AYP in the previous year but did not exit improvement status.

9. Waiver Applicant: Maine Department of Education

- Provision waived: 34 CFR 200.37(b)(4)(iv).
- Date waiver granted: September 23, 2009.
- Description of waiver: Permitted Maine's LEAs to postpone notice of public school choice options beyond 14 days before the start of the school year to parents of eligible children attending schools that are newly identified for improvement for the 2009–2010 school year or that made AYP in the previous year but did not exit improvement status.

10. Waiver Applicant: Massachusetts Department of Education

- Provision waived: 34 CFR 200.37(b)(4)(iv).
- Date waiver granted: August 24, 2009.
- Description of waiver: Permitted Massachusetts' LEAs to postpone notice of public school choice options beyond 14 days before the start of the school year to parents of eligible children attending schools that are newly identified for improvement for the 2009–2010 school year or that made AYP in the previous year but did not exit improvement status.

11. Waiver Applicant: Missouri Department of Education

- Provision waived: 34 CFR 200.37(b)(4)(iv).
- Date waiver granted: August 7, 2009.
- Description of waiver: Permitted Missouri's LEAs to postpone notice of public school choice options beyond 14 days before the start of the school year to parents of eligible children attending schools that are newly identified for improvement for the 2009–2010 school year or that made AYP in the previous year but did not exit improvement status.

12. Waiver Applicant: New Jersey Department of Education

- Provision waived: 34 CFR 200.37(b)(4)(iv).
- Date waiver granted: October 2, 2009.
- Description of waiver: Permitted New Jersey's LEAs to postpone notice of public school choice options beyond 14 days before the start of the school year to parents of eligible children attending schools that are newly identified for improvement for the 2009–2010 school year or that made AYP in the previous year but did not exit improvement status.

13. Waiver Applicant: New Mexico Department of Education

- Provision waived: 34 CFR 200.37(b)(4)(iv).
- Date waiver granted: August 31, 2009.
- Description of waiver: Permitted New Mexico's LEAs to postpone notice of public school choice options beyond 14 days before the start of the school year to parents of eligible children attending schools that are newly identified for improvement for the 2009–2010 school year or that made AYP in the previous year but did not exit improvement status.

14. Waiver Applicant: Oklahoma Department of Education

- Provision waived: 34 CFR 200.37(b)(4)(iv).
- Date waiver granted: October 15, 2009.
- Description of waiver: Permitted Oklahoma's LEAs to postpone notice of public school choice options beyond 14 days before the start of the school year to parents of eligible children attending schools that are newly identified for improvement for the 2009–2010 school year or that made AYP in the previous year but did not exit improvement status.

15. Waiver Applicant: Pennsylvania Department of Education

- Provision waived: 34 CFR 200.37(b)(4)(iv).
- Date waiver granted: August 27, 2009.
- Description of waiver: Permitted Pennsylvania's LEAs to postpone notice of public school choice options beyond 14 days before the start of the school year to parents of eligible children attending schools that are newly identified for improvement for the 2009–2010 school year or that made AYP in the previous year but did not exit improvement status.

16. Waiver Applicant: Puerto Rico Department of Education

- Provision waived: 34 CFR 200.37(b)(4)(iv).
- Date waiver granted: December 11, 2009.
- Description of waiver: Permitted Puerto Rico to postpone notice of public school choice options for some schools beyond 14 days before the start of the school year to parents of eligible children attending schools that are newly identified for improvement for the 2009–2010 school year or that made AYP in the previous year but did not exit improvement status.

17. Waiver Applicant: South Carolina Department of Education

- Provision waived: 34 CFR 200.37(b)(4)(iv).
- Date waiver granted: September 9, 2009.
- Description of waiver: Permitted South Carolina's LEAs to postpone notice of public school choice options beyond 14 days before the start of the school year to parents of eligible children attending schools that are newly identified for improvement for the 2009–2010 school year or that made AYP in the previous year but did not exit improvement status.

18. Waiver Applicant: Tennessee Department of Education

- Provision waived: 34 CFR 200.37(b)(4)(iv).
- Date waiver granted: August 27, 2009.
- Description of waiver: Permitted Tennessee's LEAs to postpone notice of public school choice options beyond 14 days before the start of the school year to parents of eligible children attending schools that are newly identified for improvement for the 2009–2010 school year or that made AYP in the previous year but did not exit improvement status.

19. Waiver Applicant: Utah State Office of Education

- Provision waived: 34 CFR 200.37(b)(4)(iv).
- Date waiver granted: October 15, 2009.
- Description of waiver: Permitted Utah's LEAs to postpone notice of public school choice options beyond 14 days before the start of the school year to parents of eligible children attending schools that are newly identified for improvement for the 2009–2010 school year or that made AYP in the previous year but did not exit improvement status.

20. Waiver Applicant: Virginia Department of Education

- Provision waived: 34 CFR 200.37(b)(4)(iv).
- Date waiver granted: September 4, 2009.
- Description of waiver: Permitted Virginia's LEAs to postpone notice of public school choice options beyond 14 days before the start of the school year to parents of eligible children attending schools that are newly identified for improvement for the 2009–2010 school year or that made AYP in the previous year but did not exit improvement status.

21. Waiver Applicant: Washington Department of Education

- Provision waived: 34 CFR 200.37(b)(4)(iv).
- Date waiver granted: August 13, 2009.
- Description of waiver: Permitted Washington's LEAs to postpone notice of public school choice options beyond 14 days before the start of the school year to parents of eligible children attending schools that are newly identified for improvement for the 2009–2010 school year or that made AYP in the previous year but did not exit improvement status.

22. Waiver Applicant: West Virginia Department of Education

- Provision waived: 34 CFR 200.37(b)(4)(iv).
- Date waiver granted: September 23, 2009.
- Description of waiver: Permitted West Virginia's LEAs to postpone notice of public school choice options beyond 14 days before the start of the school year to parents of eligible children attending schools that are newly identified for improvement for the 2009–2010 school year or that made AYP in the previous year but did not exit improvement status.

23. Waiver Applicant: Wyoming Department of Education

- Provision waived: 34 CFR 200.37(b)(4)(iv).
- Date waiver granted: September 16, 2009.
- Description of waiver: Permitted Wyoming's LEAs to postpone notice of public school choice options beyond 14 days before the start of the school year to parents of eligible children attending schools that are newly identified for improvement for the 2009–2010 school year or that made AYP in the previous year but did not exit improvement status.

XIII. Allowing SEAs To Approve Schools or LEAs in Need of Improvement To Become SES Providers

1. Waiver Applicant: Alaska Department of Education

- Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).
- Date waiver granted: August 13, 2009.
- Description of waiver: Permitted Alaska to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2009–2010 school year.

2. Waiver Applicant: Arizona Department of Education

- Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).
- Date waiver granted: September 16, 2009.
- Description of waiver: Permitted Arizona to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2009–2010 school year.

3. Waiver Applicant: California Department of Education

- Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).
- Date waiver granted: October 23, 2009.
- Description of waiver: Permitted California to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2009–2010 school year.

4. Waiver Applicant: Colorado Department of Education

- Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).
- Date waiver granted: August 11, 2009.
- Description of waiver: Permitted Colorado to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2009–2010 school year.

5. Waiver Applicant: Connecticut Department of Education

- Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).
- Date waiver granted: September 11, 2009.
- Description of waiver: Permitted Connecticut to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2009–2010 school year.

6. Waiver Applicant: Florida Department of Education

- Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).
- Date waiver granted: September 23, 2009.
- Description of waiver: Permitted Florida to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2009–2010 school year.

7. Waiver Applicant: Georgia Department of Education

- Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).
- Date waiver granted: August 13, 2009.
- Description of waiver: Permitted Georgia to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2009–2010 school year.

8. Waiver Applicant: Idaho Department of Education

- Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).
- Date waiver granted: October 15, 2009.
- Description of waiver: Permitted Idaho to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2009–2010 school year.

9. Waiver Applicant: Illinois State Board of Education

- Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).
- Date waiver granted: September 16, 2009.
- Description of waiver: Permitted Illinois to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2009–2010 school year.

10. Waiver Applicant: Indiana Department of Education

- Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).
- Date waiver granted: September 23, 2009.
- Description of waiver: Permitted Indiana to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2009–2010 school year.

11. Waiver Applicant: Kentucky Department of Education

- Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).
- Date waiver granted: September 4, 2009.
- Description of waiver: Permitted Kentucky to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2009–2010 school year.

12. Waiver Applicant: Massachusetts Department of Education

- Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).
- Date waiver granted: August 24, 2009.
- Description of waiver: Permitted Massachusetts to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2009–2010 school year.

13. Waiver Applicant: Michigan Department of Education

- Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).
- Date waiver granted: September 23, 2009.
- Description of waiver: Permitted Michigan to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2009–2010 school year.

14. Waiver Applicant: Missouri Department of Education

- Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).
- Date waiver granted: August 7, 2009.
- Description of waiver: Permitted Missouri to approve a school or LEA identified for improvement to serve as a provider of SES during the 2009–2010 school year.

15. Waiver Applicant: North Carolina Department of Public Instruction

- Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).
- Date waiver granted: September 4, 2009.
- Description of waiver: Permitted North Carolina to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2009–2010 school year.

16. Waiver Applicant: Nebraska Department of Education

- Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).
- Date waiver granted: August 26, 2009.
- Description of waiver: Permitted Nebraska to approve a school or LEA identified for improvement, corrective

action, or restructuring to serve as a provider of SES during the 2009–2010 school year.

17. Waiver Applicant: New Mexico Department of Education

- Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).
- Date waiver granted: August 31, 2009.
- Description of waiver: Permitted New Mexico to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2009–2010 school year.

18. Waiver Applicant: Ohio Department of Education

- Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).
- Date waiver granted: August 14, 2009.
- Description of waiver: Permitted Ohio to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2009–2010 school year.

19. Waiver Applicant: Oklahoma Department of Education

- Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).
- Date waiver granted: October 15, 2009.
- Description of waiver: Permitted Oklahoma to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2009–2010 school year.

20. Waiver Applicant: Oregon Department of Education

- Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).
- Date waiver granted: October 23, 2009.
- Description of waiver: Permitted Oregon to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2009–2010 school year.

21. Waiver Applicant: Pennsylvania Department of Education

- Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).
- Date waiver granted: August 27, 2009.
- Description of waiver: Permitted Pennsylvania to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2009–2010 school year.

22. Waiver Applicant: Rhode Island Department of Education

- Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).
- Date waiver granted: August 24, 2009.
- Description of waiver: Permitted Rhode Island to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2009–2010 school year.

23. Waiver Applicant: South Carolina Department of Education

- Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).
- Date waiver granted: September 9, 2009.
- Description of waiver: Permitted South Carolina to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2009–2010 school year.

24. Waiver Applicant: South Dakota Department of Education

- Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).
- Date waiver granted: August 14, 2009.
- Description of waiver: Permitted South Dakota to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2009–2010 school year.

25. Waiver Applicant: Tennessee Department of Education

- Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).
- Date waiver granted: August 27, 2009.
- Description of waiver: Permitted Tennessee to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2009–2010 school year.

26. Waiver Applicant: Washington Department of Education

- Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).
- Date waiver granted: August 13, 2009.
- Description of waiver: Permitted Washington to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2009–2010 school year.

27. Waiver Applicant: Wisconsin Department of Public Instruction

- Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).
- Date waiver granted: August 13, 2009.
- Description of waiver: Permitted Wisconsin to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2009–2010 school year.

28. Waiver Applicant: Wyoming Department of Education

- Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).
- Date waiver granted: September 16, 2009.
- Description of waiver: Permitted Wyoming to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2009–2010 school year.

XIV. Allowing LEAs to Provide SES, in Addition to Public School Choice, to Eligible Students in Title I Schools in the First Year of School Improvement and Counting the Costs of Both Toward Meeting the LEA's "20 Percent Obligation"

New Applicants

1. Waiver Applicant: Arizona Department of Education

- Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.
- Date waiver granted: September 16, 2009.
- Description of waiver: For the 2009–2010 school year, permitted LEAs in Arizona to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of both toward meeting the LEA's "20 percent obligation."

2. Waiver Applicant: California Department of Education

- Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.
- Date waiver granted: December 11, 2009.
- Description of waiver: For the 2009–2010 school year, permitted LEAs in California to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of both toward meeting the LEA's "20 percent obligation."

3. Waiver Applicant: Connecticut Department of Education

- Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.
- Date waiver granted: September 11, 2009.

• Description of waiver: For the 2009–2010 school year, permitted LEAs in Connecticut to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of both toward meeting the LEA's "20 percent obligation."

4. Waiver Applicant: DC Office of the State Superintendent of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.
• Date waiver granted: October 15, 2009.
• Description of waiver: For the 2009–2010 school year, permitted the District of Columbia LEAs to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of both toward meeting the LEA's "20 percent obligation."

5. Waiver Applicant: Idaho Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.
• Date waiver granted: October 15, 2009.
• Description of waiver: For the 2009–2010 school year, permitted LEAs in Idaho to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of both toward meeting the LEA's "20 percent obligation."

6. Waiver Applicant: Iowa Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.
• Date waiver granted: August 31, 2009.
• Description of waiver: For the 2009–2010 school year, permitted LEAs in Iowa to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of both toward meeting the LEA's "20 percent obligation."

7. Waiver Applicant: Kentucky Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.
• Date waiver granted: September 4, 2009.
• Description of waiver: For the 2009–2010 school year, permitted LEAs in Kentucky to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of both toward meeting the LEA's "20 percent obligation."

8. Waiver Applicant: Maryland Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.
• Date waiver granted: November 2, 2009.
• Description of waiver: For the 2009–2010 school year, permitted LEAs in Maryland to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of both toward meeting the LEA's "20 percent obligation."

9. Waiver Applicant: Massachusetts Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.
• Date waiver granted: August 24, 2009.
• Description of waiver: For the 2009–2010 school year, permitted LEAs in Massachusetts to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of both toward meeting the LEA's "20 percent obligation."

10. Waiver Applicant: Michigan Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.
• Date waiver granted: September 23, 2009.
• Description of waiver: For the 2009–2010 school year, permitted LEAs in Michigan to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of both toward meeting the LEA's "20 percent obligation."

11. Waiver Applicant: Missouri Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.
• Date waiver granted: August 7, 2009.
• Description of waiver: For the 2009–2010 school year, permitted LEAs in Missouri to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of both toward meeting the LEA's "20 percent obligation."

12. Waiver Applicant: Nebraska Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.
• Date waiver granted: August 26, 2009.
• Description of waiver: For the 2009–2010 school year, permitted LEAs in Nebraska to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of both toward meeting the LEA's "20 percent obligation."

13. Waiver Applicant: Nevada Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.
• Date waiver granted: October 8, 2009.
• Description of waiver: For the 2009–2010 school year, permitted LEAs in Nevada to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of both toward meeting the LEA's "20 percent obligation."

14. Waiver Applicant: New Hampshire Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.
• Date waiver granted: September 23, 2009.
• Description of waiver: For the 2009–2010 school year, permitted LEAs in New Hampshire to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of both toward meeting the LEA's "20 percent obligation."

15. Waiver Applicant: New Jersey Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.
• Date waiver granted: October 2, 2009.
• Description of waiver: For the 2009–2010 school year, permitted LEAs in New Jersey to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of both toward meeting the LEA's "20 percent obligation."

16. Waiver Applicant: New Mexico Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.

• Date waiver granted: August 31, 2009.

• Description of waiver: For the 2009–2010 school year, permitted LEAs in New Mexico to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of both toward meeting the LEA's "20 percent obligation."

17. Waiver Applicant: Ohio Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.

• Date waiver granted: August 14, 2009.

• Description of waiver: For the 2009–2010 school year, permitted LEAs in Ohio to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of both toward meeting the LEA's "20 percent obligation."

18. Waiver Applicant: Oklahoma Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.

• Date waiver granted: October 15, 2009.

• Description of waiver: For the 2009–2010 school year, permitted LEAs in Oklahoma to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of both toward meeting the LEA's "20 percent obligation."

19. Waiver Applicant: Oregon Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.

• Date waiver granted: October 23, 2009.

• Description of waiver: For the 2009–2010 school year, permitted LEAs in Oregon to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of both toward meeting the LEA's "20 percent obligation."

20. Waiver Applicant: Rhode Island Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.

• Date waiver granted: August 24, 2009.

• Description of waiver: For the 2009–2010 school year, permitted LEAs in Rhode Island to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of both toward meeting the LEA's "20 percent obligation."

21. Waiver Applicant: South Carolina Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.

• Date waiver granted: September 9, 2009.

• Description of waiver: For the 2009–2010 school year, permitted LEAs in South Carolina to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of both toward meeting the LEA's "20 percent obligation."

22. Waiver Applicant: Washington Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.

• Date waiver granted: August 31, 2009.

• Description of waiver: For the 2009–2010 school year, permitted LEAs in Washington to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of both toward meeting the LEA's "20 percent obligation."

23. Waiver Applicant: West Virginia Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.

• Date waiver granted: August 24, 2009.

• Description of waiver: For the 2009–2010 school year, permitted LEAs in West Virginia to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of both toward meeting the LEA's "20 percent obligation."

24. Waiver Applicant: Wisconsin Department of Public Instruction

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.

• Date waiver granted: August 13, 2009.

• Description of waiver: For the 2009–2010 school year, permitted LEAs in Wisconsin to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of both toward meeting the LEA's "20 percent obligation."

25. Waiver Applicant: Wyoming Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.

• Date waiver granted: September 16, 2009.

• Description of waiver: For the 2009–2010 school year, permitted LEAs in Wyoming to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of both toward meeting the LEA's "20 percent obligation."

Continuation Applicants

1. Waiver Applicant: Alabama Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.

• Date waiver granted: September 16, 2009.

• Description of waiver: For the 2009–2010 school year, permitted LEAS in Alabama to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of both toward meeting the LEA's "20 percent obligation."

2. Waiver Applicant: Alaska Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.

• Date waiver granted: September 16, 2009.

• Description of waiver: For the 2009–2010 school year, permitted LEAs in Alaska to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of both toward meeting the LEA's "20 percent obligation."

3. Waiver Applicant: North Carolina Department of Public Instruction

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.

• Date waiver granted: September 16, 2009.

• Description of waiver: For the 2009–2010 school year, permitted LEAs in North Carolina to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of both toward meeting the LEA's "20 percent obligation."

4. Waiver Applicant: Tennessee Department of Education

- Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.
- Date waiver granted: September 16, 2009.
- Description of waiver: For the 2009–2010 school year, permitted LEAs in Tennessee to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of both toward meeting the LEA's "20 percent obligation."

5. Waiver Applicant: Utah Department of Public Instruction

- Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.
- Date waiver granted: September 16, 2009.
- Description of waiver: For the 2009–2010 school year, permitted LEAs in Utah to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of both toward meeting the LEA's "20 percent obligation."

6. Waiver Applicant: Virginia Department of Education

- Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.
- Date waiver granted: September 16, 2009.
- Description of waiver: For the 2009–2010 school year, permitted LEAs in Virginia to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of both toward meeting the LEA's "20 percent obligation."

XV. Waivers Related to Title I, Part A Funding Provided Under ARRA

A. Allowing an LEA To Exclude Its Title I, Part A Allocation Received Under ARRA When Calculating Its Obligation to Spend the Equivalent of 20 Percent of Title I, Part A Funds for Public School Choice-Related Transportation and SES

1. Waiver Applicant: Alabama Department of Education

- Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).
- Date waiver granted: August 14, 2009.
- Description of waiver: Allows LEAs in Alabama to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

2. Waiver Applicant: Alaska Department of Education

- Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).
- Date waiver granted: August 13, 2009.
- Description of waiver: Allows LEAs in Alaska to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

3. Waiver Applicant: Arizona Department of Education

- Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).
- Date waiver granted: September 16, 2009.
- Description of waiver: Allows LEAs in Arizona to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

4. Waiver Applicant: Arkansas Department of Education

- Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).
- Date waiver granted: October 23, 2009.
- Description of waiver: Allows LEAs in Arkansas to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

5. Waiver Applicant: California Department of Education

- Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).
- Date waiver granted: December 11, 2009.
- Description of waiver: Allows LEAs in California to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

6. Waiver Applicant: Colorado Department of Education

- Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).
- Date waiver granted: August 13, 2009.
- Description of waiver: Allows LEAs in Colorado to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

7. Waiver Applicant: Connecticut Department of Education

- Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).
- Date waiver granted: September 11, 2009.
- Description of waiver: Allows LEAs in Connecticut to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

8. Waiver Applicant: DC Office of the State Superintendent of Education

- Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).
- Date waiver granted: October 15, 2009.
- Description of waiver: Allows the District of Columbia LEA to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of its fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

9. Waiver Applicant: Florida Department of Education

- Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).
- Date waiver granted: September 23, 2009.
- Description of waiver: Allows LEAs in Florida to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

10. Waiver Applicant: Georgia Department of Education

- Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).

• Date waiver granted: August 13, 2009.

• Description of waiver: Allows LEAs in Georgia to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

11. Waiver Applicant: Hawaii Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).

• Date waiver granted: November 2, 2009.

• Description of waiver: Allows the LEA in Hawaii to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of its fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

12. Waiver Applicant: Idaho Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).

• Date waiver granted: October 15, 2009.

• Description of waiver: Allows LEAs in Idaho to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

13. Waiver Applicant: Illinois State Board of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).

• Date waiver granted: September 16, 2009.

• Description of waiver: Allows LEAs in Illinois to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

14. Waiver Applicant: Indiana Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).

• Date waiver granted: September 23, 2009.

• Description of waiver: Allows LEAs in Indiana to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

15. Waiver Applicant: Iowa Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).

• Date waiver granted: August 31, 2009.

• Description of waiver: Allows LEAs in Iowa to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

16. Waiver Applicant: Kentucky Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).

• Date waiver granted: September 4, 2009.

• Description of waiver: Allows LEAs in Kentucky to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

17. Waiver Applicant: Louisiana Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).

• Date waiver granted: August 27, 2009.

• Description of waiver: Allows LEAs in Louisiana to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

18. Waiver Applicant: Maine Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).

• Date waiver granted: September 23, 2009.

• Description of waiver: Allows LEAs in Maine to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

19. Waiver Applicant: Maryland Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).

• Date waiver granted: November 2, 2009.

• Description of waiver: Allows LEAs in Maryland to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

20. Waiver Applicant: Massachusetts Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).

• Date waiver granted: August 24, 2009.

• Description of waiver: Allows LEAs in Massachusetts to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

21. Waiver Applicant: Michigan Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).

• Date waiver granted: September 23, 2009.

• Description of waiver: Allows LEAs in Michigan to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

22. Waiver Applicant: Missouri Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).

• Date waiver granted: August 7, 2009.

• Description of waiver: Allows LEAs in Missouri to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

23. Waiver Applicant: Nebraska Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).

• Date waiver granted: August 26, 2009.

• Description of waiver: Allows LEAs in Nebraska to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

24. Waiver Applicant: Nevada Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).

• Date waiver granted: October 8, 2009.

• Description of waiver: Allows LEAs in Nevada to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

25. Waiver Applicant: New Hampshire Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).

• Date waiver granted: September 23, 2009.

• Description of waiver: Allows LEAs in New Hampshire to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

26. Waiver Applicant: New Jersey Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).

• Date waiver granted: October 2, 2009.

• Description of waiver: Allows LEAs in New Jersey to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

27. Waiver Applicant: New Mexico Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).

• Date waiver granted: August 31, 2009.

• Description of waiver: Allows LEAs in New Mexico to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

28. Waiver Applicant: North Carolina Department of Public Instruction

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).

• Date waiver granted: September 4, 2009.

• Description of waiver: Allows LEAs in North Carolina to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

29. Waiver Applicant: North Dakota Department of Public Instruction

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).

• Date waiver granted: October 2, 2009.

• Description of waiver: Allows LEAs in North Dakota to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

30. Waiver Applicant: Ohio Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).

• Date waiver granted: August 14, 2009.

• Description of waiver: Allows LEAs in Ohio to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

31. Waiver Applicant: Oklahoma Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).

• Date waiver granted: October 15, 2009.

• Description of waiver: Allows LEAs in Oklahoma to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

32. Waiver Applicant: Oregon Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).

• Date waiver granted: October 23, 2009.

• Description of waiver: Allows LEAs in Oregon to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

33. Waiver Applicant: Pennsylvania Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).

• Date waiver granted: August 27, 2009.

• Description of waiver: Allows LEAs in Pennsylvania to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

34. Waiver Applicant: Rhode Island Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).

• Date waiver granted: August 24, 2009.

• Description of waiver: Allows LEAs in Rhode Island to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

35. Waiver Applicant: South Carolina Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).

• Date waiver granted: September 9, 2009.

• Description of waiver: Allows LEAs in South Carolina to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

36. Waiver Applicant: South Dakota Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).

• Date waiver granted: August 14, 2009.

• Description of waiver: Allows LEAs in South Dakota to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

37. Waiver Applicant: Tennessee Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).

• Date waiver granted: August 27, 2009.

• Description of waiver: Allows LEAs in Tennessee to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

38. Waiver Applicant: Virginia Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).

• Date waiver granted: October 8, 2009.

• Description of waiver: Allows LEAs in Virginia to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

39. Waiver Applicant: Washington Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).

• Date waiver granted: August 13, 2009.

• Description of waiver: Allows LEAs in Washington to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

40. Waiver Applicant: West Virginia Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).

• Date waiver granted: August 24, 2009.

• Description of waiver: Allows LEAs in West Virginia to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

41. Waiver Applicant: Wisconsin Department of Public Instruction

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).

• Date waiver granted: August 13, 2009.

• Description of waiver: Allows LEAs in Wisconsin to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

42. Waiver Applicant: Wyoming Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).

• Date waiver granted: September 16, 2009.

• Description of waiver: Allows LEAs in Wyoming to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

B. Allowing an LEA and/or a School to Exclude its Title I, Part A Allocation Received Under ARRA When Calculating Its Obligation to Spend 10 Percent of Title I, Part A Funds for Professional Development

1. Waiver Applicant: Alabama Department of Education

• Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).

• Date waiver granted: August 14, 2009.

• Description of waiver: Allows LEAs and schools in Alabama that are in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

2. Waiver Applicant: Alaska Department of Education

• Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).

• Date waiver granted: August 13, 2009.

• Description of waiver: Allows LEAs and schools in Alaska that are in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

3. Waiver Applicant: Arizona Department of Education

• Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).

• Date waiver granted: September 16, 2009.

• Description of waiver: Allows LEAs and schools in Arizona that are in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

4. Waiver Applicant: Arkansas Department of Education

• Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).

• Date waiver granted: October 23, 2009.

• Description of waiver: Allows LEAs and schools in Arkansas that are in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

5. Waiver Applicant: California Department of Education

• Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).

• Date waiver granted: December 11, 2009.

• Description of waiver: Allows LEAs and schools in California that are in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year

2009 Title I, Part A funds for professional development.

6. Waiver Applicant: Colorado Department of Education

- Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).
- Date waiver granted: August 11, 2009.
- Description of waiver: Allows LEAs and schools in Colorado that are in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

7. Waiver Applicant: Connecticut Department of Education

- Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).
- Date waiver granted: September 11, 2009.
- Description of waiver: Allows LEAs and schools in Connecticut that are in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

8. Waiver Applicant: DC Office of the State Superintendent of Education

- Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).
- Date waiver granted: October 15, 2009.
- Description of waiver: Allows the LEA and schools in the District of Columbia that are in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

9. Waiver Applicant: Florida Department of Education

- Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).
- Date waiver granted: September 23, 2009.
- Description of waiver: Allows LEAs and schools in Florida that are in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

10. Waiver Applicant: Georgia Department of Education

- Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).
- Date waiver granted: August 13, 2009.
- Description of waiver: Allows LEAs and schools in Georgia that are in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

11. Waiver Applicant: Idaho Department of Education

- Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).
- Date waiver granted: October 15, 2009.
- Description of waiver: Allows LEAs and schools in Idaho that are in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

12. Waiver Applicant: Illinois State Board of Education

- Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).
- Date waiver granted: September 16, 2009.
- Description of waiver: Allows LEAs and schools in Illinois that are in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

13. Waiver Applicant: Indiana Department of Education

- Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).
- Date waiver granted: September 23, 2009.
- Description of waiver: Allows LEAs and schools in Indiana that are in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

14. Waiver Applicant: Iowa Department of Education

- Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).
- Date waiver granted: August 31, 2009.
- Description of waiver: Allows LEAs and schools in Iowa that are in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

15. Waiver Applicant: Kentucky Department of Education

- Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).
- Date waiver granted: September 4, 2009.
- Description of waiver: Allows LEAs and schools in Kentucky that are in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

16. Waiver Applicant: Louisiana Department of Education

- Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).
- Date waiver granted: August 27, 2009.
- Description of waiver: Allows LEAs and schools in Louisiana that are in improvement, corrective action, or

restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

17. Waiver Applicant: Maine Department of Education

- Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).
- Date waiver granted: September 23, 2009.
- Description of waiver: Allows LEAs and schools in Maine that are in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

18. Waiver Applicant: Maryland Department of Education

- Provisions waived: Sections 1116(c)(7)(A)(iii) of the ESEA and 34 CFR 200.52(a)(3)(iii).
- Date waiver granted: November 2, 2009.
- Description of waiver: Allows LEAs in Maryland that are in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

19. Waiver Applicant: Massachusetts Department of Education

- Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).
- Date waiver granted: August 24, 2009.
- Description of waiver: Allows LEAs and schools in Massachusetts that are in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

20. Waiver Applicant: Michigan Department of Education

- Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).
- Date waiver granted: October 23, 2009.
- Description of waiver: Allows LEAs and schools in Michigan that are in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

21. Waiver Applicant: Missouri Department of Education

- Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).
- Date waiver granted: August 7, 2009.
- Description of waiver: Allows LEAs and schools in Missouri that are in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

22. Waiver Applicant: Nebraska Department of Education

- Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).
- Date waiver granted: August 26, 2009.
- Description of waiver: Allows LEAs and schools in Nebraska that are in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

23. Waiver Applicant: Nevada Department of Education

- Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).
- Date waiver granted: October 8, 2009.
- Description of waiver: Allows LEAs and schools in Nevada that are in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

24. Waiver Applicant: New Hampshire Department of Education

- Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).
- Date waiver granted: September 23, 2009.
- Description of waiver: Allows LEAs and schools in New Hampshire that are in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

25. Waiver Applicant: New Jersey Department of Education

- Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).
- Date waiver granted: October 2, 2009.
- Description of waiver: Allows LEAs and schools in New Jersey that are in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

26. Waiver Applicant: New Mexico Department of Education

- Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).
- Date waiver granted: August 31, 2009.
- Description of waiver: Allows LEAs and schools in New Mexico that are in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

27. Waiver Applicant: North Carolina Department of Public Instruction

- Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).
- Date waiver granted: September 4, 2009.
- Description of waiver: Allows LEAs and schools in North Carolina that are in improvement, corrective action, or

restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

28. Waiver Applicant: North Dakota Department of Public Instruction

- Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).
- Date waiver granted: October 2, 2009.
- Description of waiver: Allows LEAs and schools in North Dakota that are in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

29. Waiver Applicant: Ohio Department of Education

- Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).
- Date waiver granted: August 14, 2009.
- Description of waiver: Allows LEAs and schools in Ohio that are in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

30. Waiver Applicant: Oklahoma Department of Education

- Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).
- Date waiver granted: October 15, 2009.
- Description of waiver: Allows LEAs and schools in Oklahoma that are in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

31. Waiver Applicant: Oregon Department of Education

- Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).
- Date waiver granted: October 23, 2009.
- Description of waiver: Allows LEAs and schools in Oregon that are in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

32. Waiver Applicant: Pennsylvania Department of Education

- Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).
- Date waiver granted: August 27, 2009.
- Description of waiver: Allows LEAs and schools in Pennsylvania that are in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

33. Waiver Applicant: Rhode Island Department of Education

- Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).
- Date waiver granted: August 24, 2009.
- Description of waiver: Allows LEAs and schools in Rhode Island that are in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

34. Waiver Applicant: South Carolina Department of Education

- Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).
- Date waiver granted: September 9, 2009.
- Description of waiver: Allows LEAs and schools in South Carolina that are in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

35. Waiver applicant: South Dakota Department of Education

- Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).
- Date waiver granted: August 14, 2009.
- Description of waiver: Allows LEAs and schools in South Dakota that are in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

36. Waiver Applicant: Tennessee Department of Education

- Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).
- Date waiver granted: August 27, 2009.
- Description of waiver: Allows LEAs and schools in Tennessee that are in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

37. Waiver Applicant: Virginia Department of Education

- Provisions waived: Sections 1116(c)(7)(A)(iii) of the ESEA and 34 CFR 200.52(a)(3)(iii).
- Date waiver granted: October 8, 2009.
- Description of waiver: Allows LEAs in Virginia that are in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

38. Waiver Applicant: Washington Department of Education

- Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).
- Date waiver granted: August 31, 2009.
- Description of waiver: Allows LEAs and schools in Washington that are in improvement, corrective action, or

restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

39. Waiver Applicant: Wisconsin Department of Public Instruction

- Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).
- Date waiver granted: August 13, 2009.
- Description of waiver: Allows LEAs and schools in Wisconsin that are in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

40. Waiver Applicant: Wyoming Department of Education

- Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).
- Date waiver granted: September 16, 2009.
- Description of waiver: Allows LEAs and schools in Wyoming that are in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

C. Allowing an LEA To Exclude Title I, Part A Funds Received Under ARRA When Calculating the Per-Pupil Amount for SES

1. Waiver Applicant: Alabama Department of Education

- Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
- Date waiver granted: August 14, 2009.
- Description of waiver: Allows LEAs in Alabama to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

2. Waiver Applicant: Alaska Department of Education

- Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
- Date waiver granted: August 13, 2009.
- Description of waiver: Allows LEAs in Alaska to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

3. Waiver Applicant: Arizona Department of Education

- Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
- Date waiver granted: September 16, 2009.
- Description of waiver: Allows LEAs in Arizona to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

4. Waiver Applicant: Arkansas Department of Education

- Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
- Date waiver granted: October 23, 2009.
- Description of waiver: Allows LEAs in Arkansas to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

5. Waiver Applicant: California Department of Education

- Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
- Date waiver granted: December 11, 2009.
- Description of waiver: Allows LEAs in California to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

6. Waiver Applicant: Colorado Department of Education

- Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
- Date waiver granted: August 11, 2009.
- Description of waiver: Allows LEAs in Colorado to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

7. Waiver Applicant: Connecticut Department of Education

- Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
- Date waiver granted: September 11, 2009.
- Description of waiver: Allows LEAs in Connecticut to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

8. Waiver Applicant: DC Office of the State Superintendent of Education

- Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
- Date waiver granted: October 15, 2009.
- Description of waiver: Allows the District of Columbia LEA to exclude all or part of its Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

9. Waiver Applicant: Florida Department of Education

- Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
- Date waiver granted: September 23, 2009.
- Description of waiver: Allows LEAs in Florida to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

10. Waiver Applicant: Georgia Department of Education

- Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
- Date waiver granted: August 13, 2009.
- Description of waiver: Allows LEAs in Georgia to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

11. Waiver Applicant: Idaho Department of Education

- Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
- Date waiver granted: October 15, 2009.
- Description of waiver: Allows LEAs in Idaho to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

12. Waiver Applicant: Illinois State Board of Education

- Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
- Date waiver granted: September 16, 2009.
- Description of waiver: Allows LEAs in Illinois to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

13. Waiver Applicant: Indiana Department of Education

- Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).

• Date waiver granted: September 23, 2009.
• Description of waiver: Allows LEAs in Indiana to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

14. Waiver Applicant: Iowa Department of Education

• Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
• Date waiver granted: August 31, 2009.
• Description of waiver: Allows LEAs in Iowa to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

15. Waiver Applicant: Kentucky Department of Education

• Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
• Date waiver granted: September 4, 2009.
• Description of waiver: Allows LEAs in Kentucky to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

16. Waiver Applicant: Louisiana Department of Education

• Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
• Date waiver granted: August 27, 2009.
• Description of waiver: Allows LEAs in Louisiana to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

17. Waiver Applicant: Maine Department of Education

• Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
• Date waiver granted: September 23, 2009.
• Description of waiver: Allows LEAs in Maine to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

18. Waiver Applicant: Maryland Department of Education

• Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
• Date waiver granted: December 4, 2009.
• Description of waiver: Allows LEAs in Maryland to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

19. Waiver Applicant: Massachusetts Department of Education

• Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
• Date waiver granted: August 24, 2009.
• Description of waiver: Allows LEAs in Massachusetts to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

20. Waiver Applicant: Michigan Department of Education

• Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
• Date waiver granted: September 23, 2009.
• Description of waiver: Allows LEAs in Michigan to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

21. Waiver Applicant: Missouri Department of Education

• Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
• Date waiver granted: August 7, 2009.
• Description of waiver: Allows LEAs in Missouri to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

22. Waiver Applicant: Nebraska Department of Education

• Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
• Date waiver granted: August 26, 2009.
• Description of waiver: Allows LEAs in Nebraska to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

23. Waiver Applicant: Nevada Department of Education

• Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
• Date waiver granted: October 8, 2009.
• Description of waiver: Allows LEAs in Nevada to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

24. Waiver Applicant: New Hampshire Department of Education

• Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
• Date waiver granted: September 23, 2009.
• Description of waiver: Allows LEAs in New Hampshire to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

25. Waiver Applicant: New Jersey Department of Education

• Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
• Date waiver granted: October 2, 2009.
• Description of waiver: Allows LEAs in New Jersey to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

26. Waiver Applicant: New Mexico Department of Education

• Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
• Date waiver granted: August 31, 2009.
• Description of waiver: Allows LEAs in New Mexico to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

27. Waiver Applicant: North Carolina Department of Public Instruction

• Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
• Date waiver granted: September 4, 2009.
• Description of waiver: Allows LEAs in North Carolina to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

28. Waiver Applicant: North Dakota Department of Public Instruction

• Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
• Date waiver granted: October 2, 2009.
• Description of waiver: Allows LEAs in North Dakota to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

29. Waiver Applicant: Ohio Department of Education

• Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).

• Date waiver granted: August 14, 2009.
• Description of waiver: Allows LEAs in Ohio to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

30. Waiver Applicant: Oklahoma Department of Education

• Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
• Date waiver granted: October 15, 2009.
• Description of waiver: Allows LEAs in Oklahoma to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

31. Waiver Applicant: Oregon Department of Education

• Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
• Date waiver granted: October 23, 2009.
• Description of waiver: Allows LEAs in Oregon to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

32. Waiver Applicant: Pennsylvania Department of Education

• Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
• Date waiver granted: August 27, 2009.
• Description of waiver: Allows LEAs in Pennsylvania to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

33. Waiver Applicant: Rhode Island Department of Education

• Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
• Date waiver granted: August 24, 2009.
• Description of waiver: Allows LEAs in Rhode Island to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

34. Waiver Applicant: South Carolina Department of Education

• Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
• Date waiver granted: September 9, 2009.
• Description of waiver: Allows LEAs in South Carolina to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

35. Waiver Applicant: South Dakota Department of Education

• Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
• Date waiver granted: August 14, 2009.
• Description of waiver: Allows LEAs in South Dakota to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

36. Waiver Applicant: Tennessee Department of Education

• Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
• Date waiver granted: August 27, 2009.
• Description of waiver: Allows LEAs in Tennessee to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

37. Waiver Applicant: Virginia Department of Education

• Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
• Date waiver granted: October 8, 2009.
• Description of waiver: Allows LEAs in Virginia to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

38. Waiver Applicant: Washington Department of Education

• Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
• Date waiver granted: August 31, 2009.
• Description of waiver: Allows LEAs in Washington to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

39. Waiver Applicant: Wisconsin Department of Public Instruction

• Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
• Date waiver granted: August 13, 2009.
• Description of waiver: Allows LEAs in Wisconsin to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

40. Waiver Applicant: Wyoming Department of Education

• Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
• Date waiver granted: September 16, 2009.
• Description of waiver: Allows LEAs in Wyoming to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

D. Authorizing an SEA To Waive the Carryover Limitation for an LEA That Needs an Additional Waiver Because of its Receipt of Title I, Part A ARRA Funds

1. Waiver Applicant: Alabama Department of Education

• Provisions waived: Section 1127(a) of the ESEA.
• Date waiver granted: August 14, 2009.
• Description of waiver: Authorizes Alabama to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

2. Waiver Applicant: Alaska Department of Education

• Provisions waived: Section 1127(a) of the ESEA.
• Date waiver granted: August 13, 2009.
• Description of waiver: Authorizes Alaska to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

3. Waiver Applicant: Arizona Department of Education

• Provisions waived: Section 1127(a) of the ESEA.
• Date waiver granted: September 16, 2009.
• Description of waiver: Authorizes Arizona to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

4. Waiver Applicant: Arkansas Department of Education

• Provisions waived: Section 1127(a) of the ESEA.
• Date waiver granted: October 23, 2009.
• Description of waiver: Authorizes Arkansas to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

5. Waiver Applicant: California Department of Education

- Provisions waived: Section 1127(a) of the ESEA.
- Date waiver granted: October 23, 2009.
- Description of waiver: Authorizes California to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

6. Waiver Applicant: Connecticut Department of Education

- Provisions waived: Section 1127(a) of the ESEA.
- Date waiver granted: September 11, 2009.
- Description of waiver: Authorizes Connecticut to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

7. Waiver Applicant: DC Office of the State Superintendent of Education

- Provisions waived: Section 1127(a) of the ESEA.
- Date waiver granted: October 15, 2009.
- Description of waiver: Authorizes the District of Columbia to waive the carryover limitation more than once within three years for its LEA if it needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

8. Waiver Applicant: Florida Department of Education

- Provisions waived: Section 1127(a) of the ESEA.
- Date waiver granted: September 23, 2009.
- Description of waiver: Authorizes Florida to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

9. Waiver Applicant: Georgia Department of Education

- Provisions waived: Section 1127(a) of the ESEA.
- Date waiver granted: August 13, 2009.
- Description of waiver: Authorizes Georgia to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

10. Waiver Applicant: Idaho Department of Education

- Provisions waived: Section 1127(a) of the ESEA.
- Date waiver granted: October 15, 2009.
- Description of waiver: Authorizes Idaho to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

11. Waiver Applicant: Illinois State Board of Education

- Provisions waived: Section 1127(a) of the ESEA.
- Date waiver granted: October 23, 2009.
- Description of waiver: Authorizes Illinois to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

12. Waiver Applicant: Indiana Department of Education

- Provisions waived: Section 1127(a) of the ESEA.
- Date waiver granted: October 23, 2009.
- Description of waiver: Authorizes Indiana to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

13. Waiver Applicant: Iowa Department of Education

- Provisions waived: Section 1127(a) of the ESEA.
- Date waiver granted: August 31, 2009.
- Description of waiver: Authorizes Iowa to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

14. Waiver Applicant: Kentucky Department of Education

- Provisions waived: Section 1127(a) of the ESEA.
- Date waiver granted: September 4, 2009.
- Description of waiver: Authorizes Kentucky to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

15. Waiver Applicant: Louisiana Department of Education

- Provisions waived: Section 1127(a) of the ESEA.
- Date waiver granted: August 27, 2009.
- Description of waiver: Authorizes Louisiana to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

16. Waiver Applicant: Maine Department of Education

- Provisions waived: Section 1127(a) of the ESEA.
- Date waiver granted: September 23, 2009.
- Description of waiver: Authorizes Maine to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

17. Waiver Applicant: Maryland Department of Education

- Provisions waived: Section 1127(a) of the ESEA.
- Date waiver granted: November 20, 2009.
- Description of waiver: Authorizes Maryland to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

18. Waiver Applicant: Michigan Department of Education

- Provisions waived: Section 1127(a) of the ESEA.
- Date waiver granted: September 23, 2009.
- Description of waiver: Authorizes Michigan to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

19. Waiver Applicant: Missouri Department of Education

- Provisions waived: Section 1127(a) of the ESEA.
- Date waiver granted: August 7, 2009.
- Description of waiver: Authorizes Missouri to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

20. Waiver Applicant: Nebraska Department of Education

- Provisions waived: Section 1127(a) of the ESEA.
- Date waiver granted: August 26, 2009.
- Description of waiver: Authorizes Nebraska to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

21. Waiver Applicant: Nevada Department of Education

- Provisions waived: Section 1127(a) of the ESEA.
- Date waiver granted: October 8, 2009.
- Description of waiver: Authorizes Nevada to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

22. Waiver Applicant: New Hampshire Department of Education

- Provisions waived: Section 1127(a) of the ESEA.
- Date waiver granted: September 23, 2009.
- Description of waiver: Authorizes New Hampshire to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

23. Waiver Applicant: New Jersey Department of Education

- Provisions waived: Section 1127(a) of the ESEA.
- Date waiver granted: October 2, 2009.
- Description of waiver: Authorizes New Jersey to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

24. Waiver Applicant: New Mexico Department of Education

- Provisions waived: Section 1127(a) of the ESEA.
- Date waiver granted: August 31, 2009.
- Description of waiver: Authorizes New Mexico to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

25. Waiver Applicant: North Dakota Department of Public Instruction

- Provisions waived: Section 1127(a) of the ESEA.
- Date waiver granted: October 2, 2009.
- Description of waiver: Authorizes North Dakota to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

26. Waiver Applicant: Ohio Department of Education

- Provisions waived: Section 1127(a) of the ESEA.
- Date waiver granted: August 14, 2009.
- Description of waiver: Authorizes Ohio to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

27. Waiver Applicant: Oklahoma Department of Education

- Provisions waived: Section 1127(a) of the ESEA.
- Date waiver granted: October 15, 2009.
- Description of waiver: Authorizes Oklahoma to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

28. Waiver Applicant: Rhode Island Department of Education

- Provisions waived: Section 1127(a) of the ESEA.
- Date waiver granted: August 24, 2009.
- Description of waiver: Authorizes Rhode Island to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

29. Waiver Applicant: South Carolina Department of Education

- Provisions waived: Section 1127(a) of the ESEA.
- Date waiver granted: September 9, 2009.
- Description of waiver: Authorizes South Carolina to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

30. Waiver Applicant: South Dakota Department of Education

- Provisions waived: Section 1127(a) of the ESEA.
- Date waiver granted: August 14, 2009.
- Description of waiver: Authorizes South Dakota to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

31. Waiver Applicant: Tennessee Department of Education

- Provisions waived: Section 1127(a) of the ESEA.
- Date waiver granted: August 27, 2009.
- Description of waiver: Authorizes Tennessee to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

32. Waiver Applicant: Virginia Department of Education

- Provisions waived: Section 1127(a) of the ESEA.
- Date waiver granted: October 8, 2009.
- Description of waiver: Authorizes Virginia to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

33. Waiver Applicant: Washington Department of Education

- Provisions waived: Section 1127(a) of the ESEA.
- Date waiver granted: August 31, 2009.
- Description of waiver: Authorizes Washington to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

34. Waiver Applicant: West Virginia Department of Education

- Provisions waived: Section 1127(a) of the ESEA.
- Date waiver granted: August 24, 2009.
- Description of waiver: Authorizes West Virginia to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

35. Waiver Applicant: Wisconsin Department of Public Instruction

- Provisions waived: Section 1127(a) of the ESEA.
- Date waiver granted: August 13, 2009.
- Description of waiver: Authorizes Wisconsin to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

36. Waiver Applicant: Wyoming Department of Education

- Provisions waived: Section 1127(a) of the ESEA.
- Date waiver granted: September 16, 2009.
- Description of waiver: Authorizes Wyoming to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

FOR FURTHER INFORMATION CONTACT: Luz Curet, U.S. Department of Education, 400 Maryland Avenue, SW., room 3W344, Washington, DC 20202. *Telephone:* (202) 205–3728 or by *e-mail: luz.curet@ed.gov.*

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Dated: September 10, 2010.

Thelma Meléndez de Santa Ana,

Assistant Secretary for Elementary and Secondary Education.

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H.R. 511/P.L. 111–231
To authorize the Secretary of Agriculture to terminate certain easements held by the Secretary on land owned by the Village of Caseyville, Illinois, and to terminate associated contractual arrangements with the Village. (Aug. 16, 2010; 124 Stat. 2489)

H.R. 2097/P.L. 111–232
Star-Spangled Banner Commemorative Coin Act (Aug. 16, 2010; 124 Stat. 2490)

H.R. 3509/P.L. 111–233
Agricultural Credit Act of 2010 (Aug. 16, 2010; 124 Stat. 2493)

H.R. 4275/P.L. 111–234
To designate the annex building under construction for the Elbert P. Tuttle United States Court of Appeals Building in Atlanta, Georgia, as the ''John C. Godbold Federal Building''. (Aug. 16, 2010; 124 Stat. 2494)

H.R. 5278/P.L. 111–235
To designate the facility of the United States Postal Service located at 405 West Second Street in Dixon, Illinois, as the ''President Ronald W. Reagan Post Office Building''. (Aug. 16, 2010; 124 Stat. 2495)

H.R. 5395/P.L. 111–236
To designate the facility of the United States Postal Service located at 151 North Maitland Avenue in Maitland, Florida, as the ''Paula Hawkins Post Office Building''. (Aug. 16, 2010; 124 Stat. 2496)

H.R. 5552/P.L. 111–237
Firearms Excise Tax Improvement Act of 2010 (Aug. 16, 2010; 124 Stat. 2497)

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